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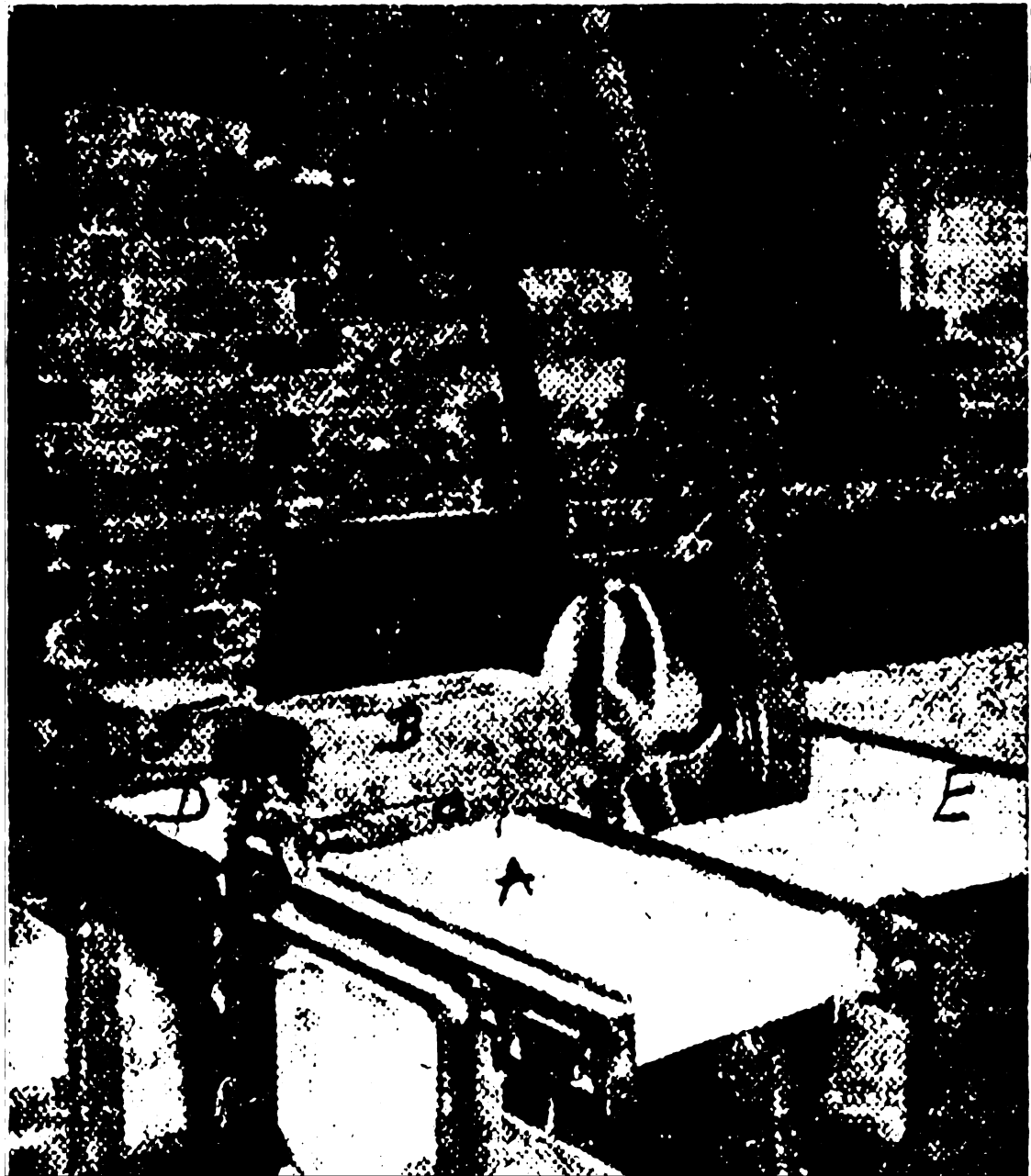
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THE
FEDERAL REPORTER

VOLUME 160.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

JUNE—JULY, 1908.

WITH TABLE OF CASES IN WHICH REHEARINGS HAVE
BEEN GRANTED OR DENIED.

ST. PAUL:
WEST PUBLISHING CO.
1908.

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100 F.	(xii)†

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ARGUED AND DETERMINED
IN THE
UNITED STATES CIRCUIT COURTS OF APPEALS AND THE
CIRCUIT AND DISTRICT COURTS.

FOWLER v. PALMER et al.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1908.)

No. 695.

EQUITY—PLEADING—MULTIFARIOUSNESS—CREDITORS' BILL.

A bill by a judgment creditor against the debtor and others to set aside various conveyances by which it is alleged the debtor fraudulently transferred his property to different corporations organized for the purpose and of which he owned the stock, the purpose being to cover it up and place it beyond the reach of execution through which transfers the other defendants have acquired or claim some interest in different portions of the property, has but a single object, which is to reach and subject the property, is based on a series of transactions forming one course of dealing, and is not demurrable for multifariousness, although the interests of the other parties defendant are separate and distinct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 356.]

Appeal from the Circuit Court of the United States for the Western District of Virginia, at Abingdon.

Daniel Trigg, for appellant.

George E. Penn and J. T. Coleman (J. I. Hurt, James L. White, and R. M. Page, on the brief), for appellees.

Before PRITCHARD, Circuit Judge, and BRAWLEY and BOYD, District Judges.

BOYD, District Judge. On the 16th of December, 1905, A. P. Fowler, receiver of the American Exchange National Bank, of Syracuse, N. Y., filed in the Circuit Court of the United States for the Western District of Virginia, his bill in chancery, as follows:

"To the Honorable Judge of the Circuit Court of the United States for the Western District of Virginia:

"1. The bill of complaint of A. P. Fowler, receiver of the American Exchange National Bank of Syracuse, in the state of New York, who is a citizen of the state of New York, and who holds his position as receiver of the said bank by appointment of the Comptroller of the Currency, and as successor by substitution, as hereinafter stated, to the rights, duties, obligations, and responsibilities of J. W. Schofield, the former receiver of the said American Exchange National Bank of Syracuse, in the management and control of the uncollected assets of the said bank, all of which came into his hands upon his appointment

as such receiver, complainant, against Charles F. Palmer in his own right; C. F. Palmer, administrator of the estate of George W. Palmer, deceased; the Palmer Land & Cattle Company, incorporated; the Palmer-Thomas Lumber Company, incorporated; the L. A. Palmer Company, incorporated; the Holston Mercantile Company, incorporated; the Holston Salt & Plaster Company, incorporated—which said named companies are corporations created by and existing under the laws of the state of Virginia, and doing business in the said state, and in the Western District of Virginia; and Charles F. Palmer and Leon A. Palmer, late partners under the firm name and style of L. A. Palmer & Co.; James W. Bell, trustee, under a deed of trust executed to him by the Palmer Land & Cattle Company; Mrs. Susan M. Palmer, the wife of Charles F. Palmer; Walter S. Preston, executor of A. C. Cummings, deceased; the Lynchburg National Bank; the Bank of Chilhowie, a corporation created and existing under the laws of the state of Virginia; the First National Bank of Lynchburg, Lynchburg, Va.; the Chatham National Bank of New York City; the Marlon National Bank of Marion, Va.; the Bank of Marlon, a corporation created by and existing under the laws of the state of Virginia; the American National Bank of Orange, Va.; the Citizens' Bank of Lebanon, Va., a corporation created by and existing under the laws of the state of Virginia; the Radford Trust Company, of Radford, Va., a corporation created by and existing under the laws of the state of Virginia; the Drovers' & Mechanics' National Bank of Baltimore, Md.; the American Bank of Orange, Va., a corporation created by and existing under the laws of the state of Virginia; the Saltville Bank of Saltville, Va., a corporation created by and existing under the laws of the state of Virginia; the Bank of Wytheville, Wytheville, Va., a corporation created by and existing under the laws of the state of Virginia; the Bank of Glade Spring, of Glade Spring, Va., a corporation created by and existing under the laws of the state of Virginia; the People's National Bank of Lynchburg, Va.; the First National Bank of Abingdon, Va.; V. H. Thomas and W. F. Smyth and H. L. Morgan, S. F. Akers, trustee, in a deed of trust executed to him as trustee by the Holston Mercantile Company; Lynchburg Grocery Company, a corporation under the laws of the state of Virginia; S. Frank & Sons; the Cox Hat Company; the Chilhowie Milling Company; the Mathieson Alkali Works—the last three named being corporations under the laws of the state of Virginia; F. A. Davis & Sons; the George DeWitt Shoe Company; the Baker Grocery Company—corporations created by and existing under the laws of the state of Virginia; Harris, Woodson & Co.; C. M. McClung & Company; Huntsman Brothers & Co.; Pulaski Grocery Company; Cowan, McClung & Co.; Robert Harris & Bros.; the Abingdon Grocery Company; Frank Shantz; the Seinschiner Paper Company; Carlin & Fulton; E. W. King & Co.; E. C. De Witt & Co.; the Art Bedstead Company; George B. Thomas, Jr.; John E. Hurst & Co.; Lockett, Reeves & Co.; D. M. Ferry & Co.; the W. H. Miles Shoe Company; Wyndham B. Robertson and George E. Worden, directors in the Holston Mercantile Company, defendants.

"Complainant alleges that the said American Exchange National Bank of Syracuse was organized on the 12th day of April, 1900, with a capital stock of \$200,000, and from the 12th day of April, 1900, continued to do business as a national banking corporation, with its principal office and place of business in the city of Syracuse, Onondago county, N. Y., down to and including the 10th day of February, 1904. On February 10, 1904, and at the close of business hours, the said bank being insolvent, closed its doors and suspended business.

"On the 11th day of February, 1904, the Comptroller of the Currency of the United States, William B. Ridgely, having become satisfied of the insolvency of said bank, appointed Josiah Van Vranken, Esq., as receiver of the same, under and in accordance with the statutes and laws of the United States, his commission bearing date the 11th day of February, 1904; that on said date said Van Vranken having duly qualified as such receiver, entered upon his duties as such, took possession of the books, records, and assets of the said bank, and continued to act as such receiver until the 11th day of April, 1904, he having resigned as such receiver and his resignation having been accepted, to take effect on such date. On the 6th day of April, 1904, the Comptroller

of the Currency, in accordance with the statutes and laws aforesaid, issued a commission to John W. Schofield, thereby appointing him receiver of said bank, his appointment to take effect on the 11th day of April, 1904; that on said date the said Schofield duly qualified, entered upon his duties, and took possession of the books, records, and assets of said bank, and continued to act as receiver until the 31st day of March, 1905, he having resigned as such receiver, and his resignation having been accepted by the Comptroller of the Currency to take effect on said date. By commission issued by the Comptroller of the Currency under the statutes and laws above mentioned, bearing date the 22d day of March, 1905, your complainant was appointed receiver of said bank, such appointment to take effect, by the terms of such commission, on the 31st day of March, 1905. On said date complainant duly qualified and entered upon his duties and took possession of the books, records, and assets of said bank, and ever since has been and now is acting as such receiver.

"2. Your complainant alleges that his predecessor, J. W. Schofield, as such receiver of the American Exchange National Bank of Syracuse, N. Y., recovered in the Circuit Court of the United States for the Western District of Virginia, at Abingdon, Va., the following named judgments. Some of said judgments were obtained at the October term of said court, 1904, and others of them at the May term, 1905:

"No. 565. Against Charles F. Palmer, administrator of the estate of George W. Palmer, deceased, for \$9,250, with interest at 5% from January 18, 1904, till paid, and costs amounting to \$18.65. Date of judgment, December 22, 1904, docketed in Washington county, Va., January 10, 1905.

"No. 566. Against Charles F. Palmer, for \$4,500, with interest at 6% from May 9, 1904, till paid, and costs amounting to \$29.25. Date of judgment, December 22, 1904, docketed January 10, 1905, in Washington county, Va.

"No. 567. Against Charles F. Palmer in his own right and Charles F. Palmer, administrator of the estate of Geo. W. Palmer, deceased, for \$19,500, with interest at 6% on \$4,000 from May 30, 1904; on \$2,500 from March 8, 1904; on \$2,500 from March 23, 1904; on \$5,000 from March 30, 1904; on \$1,500 from May 4, 1904; on \$4,000 from March 30, 1904, until paid, and costs, \$24.85. Date of judgment, December 22, 1904. Docketed in Washington county, Va., January 10, 1905.

"No. 568. Against the Holston Salt & Plaster Company and Charles F. Palmer, administrator of Geo. W. Palmer, deceased, and Charles F. Palmer, in his own right for \$9,250, with interest at 5% from November 18, 1903, till paid, and costs, \$22.20.

"No. 569. Against the Holston Salt & Plaster Company and C. F. Palmer for \$4,750, with interest from May 31, 1904, and costs, \$14.75. Obtained May 5, 1905.

"No. 570. Against Charles F. Palmer, administrator of the estate of Geo. W. Palmer, deceased, and Charles F. Palmer in his own right, for \$9,250, with interest at 5% from March 21, 1904, until paid, and \$22.75 costs. Date of judgment, December 22, 1904. Docketed January 10, 1905, in Washington county, Va.

"No. 571. Against L. A. Palmer and Charles F. Palmer composing the firm of L. A. Palmer & Co., for \$9,250, with interest at 5% from January 18, 1904, until paid, and \$20.80 costs. Date of judgment, December 22, 1904. Docketed in Washington county, Va., January 10, 1905.

"No. 572. C. F. Palmer, and C. F. Palmer, administrator of Geo. W. Palmer, deceased, for \$11,500, with interest from March 1, 1903, and costs, \$24. Judgment obtained May 5, 1905.

"No. 573. Against W. F. Smyth and Charles F. Palmer for the sum of \$675, with interest thereon at 6% from April 28, 1904, until paid, and \$20.35 costs. Date of judgment, December 22, 1904. Docketed January 10, 1905.

"No. 574. Against the Holston Mercantile Company and Charles F. Palmer for \$1,145, with interest at 6% from May 9, 1904, until paid, and \$20.35 costs.

"No. 575. Against L. A. Palmer and Charles F. Palmer, partners under the firm name and style of 'L. A. Palmer & Co.,' and Charles F. Palmer for \$500, with interest at 6% from June 1, 1904, till paid, and \$17.75 costs. Obtained May 5, 1905.

"And at the May term, 1905, he recovered the following judgments:

"No. 566. Against H. M. Wiley and Charles F. Palmer for \$2,800, with interest at 6% from May 28, 1904, till paid, and \$14.75 costs. Judgment dated May 5, 1905.

"No. 571. Against Charles F. Palmer, administrator of Geo. W. Palmer, deceased, for \$9,250, with interest from January 18, 1904, till paid, and costs \$17.75. Judgment obtained May 5, 1905.

"No. 565. Against Charles F. Palmer for \$9,250, with interest from January 18, 1904, and \$17.75 costs.

"All of the said judgments are due and unpaid, except the said judgment No. 574 against the Holston Mercantile Company—judgment May 5, 1905. Executions have issued from time to time upon the said named judgments, and are now alive in the hands of the marshal of the Western District of Virginia, but he refuses to levy the same upon the property held by the hereinafter named incorporated companies or either of them without a bond of indemnity, under the statutes of Virginia, which said bond complainant and his predecessor as receiver are unable to give or secure, the said American Exchange National Bank of Syracuse, N. Y., having been declared insolvent under the national banking laws. Copies of said judgments are filed as part of this bill marked 'J. W. S.'

"3. Complainant alleges that the said judgments Nos. 571 and 575, respectively, are based and were obtained upon two negotiable notes due respectively the 18th day of January, 1904, and the 1st day of June, 1904, which were executed by the said firm of L. A. Palmer & Co. as makers, and indorsed by the said Charles F. Palmer and George W. Palmer; that before the maturity of the said notes the said firm of L. A. Palmer & Co., or the individual partners thereof, or Charles F. Palmer, procured a charter of incorporation under the laws of the state of Virginia, under the name of the L. A. Palmer Company. The said firm of L. A. Palmer & Co. was a mercantile and manufacturing concern, engaged at Abingdon, Va., in the manufacture and sale of clothing, pants, overalls, and such commodities; employing for that purpose a number of hands, and being possessed of machinery and stock of considerable value, to the amount perhaps of \$15,000. No evidence of the sale or transfer of any property or assets from the firm of L. A. Palmer & Co. to the said corporation appears of record; yet the business is carried on in the same way to the same end, at the same place without any apparent change of the methods pursued by the partnership. It is conducted by the said Leon A. Palmer, who was a nominal partner in L. A. Palmer & Co., and a director and incorporator in the L. A. Palmer Company. The said Charles F. Palmer was the sole owner of the firm of L. A. Palmer & Co., and he is the owner of the entire capital stock of the L. A. Palmer Company. The other directors in the concern are mere figureheads and dummies. They are L. A. Palmer and W. F. Smyth, to whom one or more shares of stock were issued to nominally qualify them for directors, and for which neither of them paid anything; and they and their names have been used in the furtherance of an end of deception and fraud upon and against the creditors of L. A. Palmer and of Charles F. Palmer, and of L. A. Palmer & Co. The said L. A. Palmer Company was capitalized at \$10,000, and your complainant believes that the assets of the firm of L. A. Palmer & Co., were worth fully that sum or more.

"4. Your complainant alleges that the said Holston Mercantile Company is a corporation created by the laws of the state of Virginia, and that the entire ownership was in the said Charles F. Palmer. The said company was incorporated on the ——— day of March, 1899. Its incorporators were the said Charles F. Palmer, president; W. F. Smyth, secretary; George W. Palmer, treasurer and director; and W. B. Robertson, a director; and George E. Worden, a director. The officers of the said company last appointed were Charles F. Palmer, president; George M. Akers, secretary; and W. B. Robertson and George E. Worden, directors. The said company was capitalized at \$10,000, of which \$8,000 of the stock was issued.

"Your complainant charges that the assets of the said corporation are in law and equity liable to the liens of his judgments and executions hereinbefore mentioned, the same being the property of the said Charles F. Palmer, though nominally held by the said corporation, up to the 18th day of Septem-

ber, 1905, when the said Holston Mercantile Company, by deed of that date, executed to S. F. Akers, as trustee, its entire assets, consisting of its entire personal and mixed property, including its stocks of merchandise in the storehouse occupied by it at Buena Vista, in Washington county, Va., and in the Western District of Virginia, together with its good will, bills receivable, and open accounts, in trust to secure certain creditors of the said firm, all of whom will be hereinafter named as defendants, and process against them prayed for if necessary, it not being deemed essential to do so at this time, viz.: The People's National Bank of Lynchburg, Va., the Bank of Wytheville, the Bank of Glade Spring, the Bank of Marion, the Chatham National Bank of New York, the Lynchburg Grocery Company, S. Frank & Sons, the Cox Hat Company, the Chilhowie Milling Company, the Mathieson Alkali Works, F. A. Davis & Sons, George DeWitt Shoe Company, Becker Grocery Company, Harris, Woodson & Co., C. M. McClung & Co., Huntsman Bros. & Co., Pulaski Grocery Company, Cowan, McClung & Co., Robert Harris & Bros., the Abingdon Grocery Company, Frank Shantz, the Seinschiner Paper Company, Carlin & Fulton, E. W. King & Co., E. C. DeWitt & Co., the Art Bedstead Co., George B. Thomas, Jr., John E. Hurst & Co., Lockett, Reeves & Co., D. M. Ferry & Co., the W. H. Miles Shoe Company, and providing that the said Akers as trustee should immediately take possession and control of all the property, personal and mixed, of the said corporation, and proceed to make sale of the same, either privately or by public auction, as a whole or in parcels or parts, as he may deem best for the creditors, and authorizing him, at his discretion, to run and operate the merchandise business of the said company for the period of one year from the date of said deed, and in doing so, authorizing him out of the proceeds of sales by him, to purchase from time to time, for cash, such additional stock of merchandise as will aid in keeping up the business and disposing of the other stock to a better and more profitable advantage; but providing that any number of creditors secured by the said deed whose claims aggregate \$5,000 might require the said trustee at any time to sell the said stock at public auction, to the highest bidder, at private sale, after giving reasonable notice of the time and place of sale, and further providing that at the end of said twelve months, if the said stock is not in the meantime disposed of, the said trustee shall at once proceed to sell the same at public auction, to the highest bidder, after giving a reasonable notice of time and place; that the said trustee shall at once collect all the bills receivable, open accounts or other indebtedness due the said corporation.

"The said trustee is required to keep accurate accounts, and at the end of every three months render to every creditor an accurate statement of his transactions, and append to such statement an account, showing the amount of money on hand, the share to which each creditor secured by this deed is entitled, which he is required to pay over within ten days to such creditors. In case of sale at public auction, upon the demand of creditors or at the end of twelve months, as above provided for, the fund arising from the said sale, after paying expenses, etc., attending the execution of the trust shall be applied to the debts thereby secured.

"The trustee is allowed \$75 per month as a compensation for his services, to be retained monthly out of the proceeds of sale. If a public sale is had within three months after the date of the deed, the trustee is to have a commission of one and a half per cent. on the proceeds of sale in addition to his monthly salary. He is empowered to employ an assistant in running the said business and in disposing of the said stock, at a salary not exceeding \$30 per month, to be paid in the same manner as his own compensation. He is authorized to employ an attorney for advice in the management of his trust, and to pay him a reasonable sum for his services. After payment of the debts so secured, the trustee is required to return to the corporation or its assigns any goods remaining on hand, together with all bills receivable and open accounts uncollected, and to pay over to the said company or its assigns any money in his hands arising under the said deed; and there are certain other provisions as to the powers of the trustee for the accommodation of the house in which the business of the said company has been heretofore conducted, or for the rental of another house under the conditions named in the said deed.

"Your complainant insists and alleges that the property named in this deed of trust is subject to the lien of his judgments and executions hereinbefore set forth in this bill; that it is in reality the property of Charles F. Palmer, who is the owner of the Holston Mercantile Company, and that the transfer of the same and that the attempted appropriation of it to certain creditors is a fraud committed under the cover of the corporate name of the Holston Mercantile Company for the purpose of shielding it from the operation of complainant's judgments and executions named; that, moreover, it purporting to be a general assignment of the property and assets of a mercantile concern, it is contrary to the provisions of Code Va. § 2460a, to prevent merchants engaged in buying and selling merchandise, while indebted, from selling their entire stock of merchandise in public, or selling the major portion thereof, otherwise than in the ordinary course of trade, the section of the Code to which it is so repugnant being 2460a, which provides that it shall be unlawful for any merchant engaged in buying and selling of merchandise, while he is indebted to any person, to sell his entire stock of merchandise in public, or to sell the major portion thereof, otherwise than in the course of trade in the regular and usual prosecution of the seller's business, and with the intent of ceasing to conduct said business, in the same manner and at the same place as he has heretofore conducted the same, without first making a full and complete inventory of the merchandise so proposed to be sold, in which inventory the values shall be extended at the ruling wholesale price thereof; and without making a full, true, and accurate schedule of all persons to whom he is indebted, stating therein the post office address of each of said creditors, and the amount owing to each of them; to which inventory and schedule to the proposed purchaser, and shall retain exact copies same is true and accurate; or, if the seller shall assert that he is not indebted to any person, requiring that he shall make an affidavit to that effect, and deliver the same to the purchaser with the inventory provided for in the said section, and which further provides that the seller shall deliver said inventory and schedule to the proposed purchaser, and shall retain exact copies thereof in his own possession, and that the purchaser and seller shall each preserve such inventory, schedule, and affidavit for the period of six months after the sale and purchase, and that the same shall be open to the inspection of the creditors of the seller, and further providing that 10 days before such sale shall be consummated, and before the purchaser takes possession of the merchandise so proposed to be sold, the seller and proposed purchaser shall join in giving written or printed notice of the proposed sale and purchase of such merchandise to each of the creditors named in said schedule, and further providing that if the seller fail to make such inventory of such merchandise, or if such inventory shall fail to state the true value of the said goods as required, or if the seller fail to make such schedule of creditors and the purchaser shall have knowledge of the fact, and if the purchaser shall fail to require the affidavit above provided, or if the purchaser fail to give the creditors named in said schedule notice as above stated, in the manner provided, or if such creditors shall not correctly state the amount of such merchandise proposed to be sold and the consideration to be paid therefor, and the time and manner of making the same, then in either of such events said sale shall be prima facie presumed to be fraudulent and void as against the creditors of such seller, and the merchandise in the hands of the purchaser, or any part thereof, if it be found in his hands, shall be liable to such creditors. The purchaser in this case is S. F. Akers, the trustee. Your complainant alleges that there was no attempt whatsoever to comply with the terms of the law in this behalf, and that the said trustee in the said deed of trust knew that there was no compliance or attempted compliance with the same.

"Your orator alleges that said Akers was one of the employees of the said Holston Mercantile Company and was conversant with its affairs, and that he knew, or had the full means of knowledge, that the said corporation was owned in full and controlled by Charles F. Palmer, and that he had actual knowledge of the fact that the purpose of the said deed of trust was to commit a fraud upon the other creditors of the said Charles F. Palmer, and among them your complainant, in order to defeat, hinder, and delay your complainant in the collection of his judgments hereinbefore set forth. It is submitted that,

in view of the facts stated, that said deed of trust is fraudulent and void, and that the same is in any event subordinate to the lien of your complainant's judgments and executions hereinbefore set forth. A copy of the said deed of trust, with the schedule of creditors, is filed as part of this bill marked 'S. F. A.,' and prayed to be considered as part of this bill.

"5. Your complainant alleges that the entire scheme of incorporating the L. A. Palmer Company was conceived and consummated in fraud and with the intent to hinder, delay, defraud, and defeat the creditors of L. A. Palmer & Co. and Charles F. Palmer in the collection of debts against them and against the said estate of George W. Palmer. This would appear from the fact that the debts upon which the said first-named judgment, viz., No. 571, was obtained, became due on the 18th day of January, 1904, and the charter of incorporation was granted on the 23d day of February, 1904. At the date of granting said charter the said Charles F. Palmer was the sole owner of the said partnership, and of the assets held by it, and was apparently possessed of considerable property, real and personal, and was reputed to be a man of considerable wealth. He was, in fact, indebted beyond the conception of any of his creditors, and was, in fact, insolvent. He continued, however, to lull the said bank and its officers and the said J. W. Schofield, former receiver, and the plaintiff into a sense of security, by repeated and reiterated assurances and promises of payment of this and a number of other debts, upon which he was liable in one or another capacity, as principal or indorser, in the said bank in a sum in the aggregate of more than \$80,000, upon all of which your complainant has obtained judgment, and executions thereon have been returned nulla bona. Copies of the said judgments are herewith filed as part of this bill marked respectively Exhibits Nos. 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575. The said Holston Salt & Plaster Company, at the time its paper was negotiated and when the judgment was obtained thereon, was a defunct corporation and insolvent—any assets it may be possessed of are subject to the lien of complainant's said judgments and executions.

"6. None, nor any part, of the said judgments have been paid except that numbered 574, against the Holston Mercantile Company, which was paid upon execution on said judgment. The reason of this was that the said Charles F. Palmer had failed to consummate his scheme of fraud, as to that concern, doubtless by inadvertence; a part of which was to obtain charters and convey his entire properties to different corporations so as to defeat the liens of judgments and executions thereon as the same might be obtained, upon his paper which was running to maturity in the said American Exchange National Bank of Syracuse, N. Y., as appears from the said judgments. Accordingly, and to that end, he obtained a charter and had incorporated under the laws of Virginia, the Palmer Land & Cattle Company. The date of this charter was March 1, 1904. The authorized capital of this company was \$25,000, all of which was issued.

"7. By deed made the 1st day of March, 1904, Charles F. Palmer and Sue M., his wife, of the first part, conveyed to the Palmer Land & Cattle Company, incorporated, of the second part, in consideration of 248 shares of the stock of the Palmer Land & Cattle Company, incorporated, of the par value of \$24,800, and in further consideration of \$65,000 of the first mortgage 6 per cent. interest bearing coupon bonds of said company of date March 1st, 1904, maturing on the 1st day of March, 1934, to be secured by deed of trust upon real estate in said deed set forth, with covenants of general warranty, in the counties of Smyth and Washington, Va., viz.:

"No. 1. That tract or certain parcel of land lying and being in the county of Washington, state of Virginia, near Abingdon, containing 9 acres more or less, being the same property conveyed to Charles F. Palmer by F. S. Findlay and wife, by deed of date March 20, 1890.

"No. 2. Those three tracts of land known as the Scott, the Pile, and the Sturgeon lands, lying and being in the county of Washington, state of Virginia, and in the Saltville neighborhood, containing 38 acres, 152 acres, and 7 acres and 55 rods, being the same lands conveyed by George W. Palmer to Harriet A. Palmer by deed of date March 5, 1894, which the said C. F. Palmer derived by inheritance from his mother, Harriet A. Palmer.

"No. 3. That tract or parcel of land lying in Washington county, Va., on

both sides of Fowler's Miller creek, containing 800 acres, being the same land conveyed by Thomas E. Gardner and wife to Harriet A. Palmer by deed of date November 15, 1894, and which the said C. F. Palmer derived by inheritance from his mother, Harriet A. Palmer.

"No. 4. That tract of land lying in Washington county, Va., on the south slope of Lee's Knob, near Saltville, Va., containing 49 acres more or less, being the land conveyed by Ben K. Buchanan and wife to Harriet A. Palmer, by deed of date December 18, 1896, and derived by the said C. F. Palmer by descent from Harriet A. Palmer, his mother.

"No. 5. That tract of land containing 9 acres lying on the south side of Walker's Mountain in Washington county, Va., and being the same land conveyed to C. F. Palmer by Joseph M. Thomas and wife, by deed dated September 11, 1900.

"No. 6. That tract of land lying in Washington county, Va., containing 5 acres and 74 rods adjoining the land of Thomas P. Buchanan and others, and being the same land conveyed to C. F. Palmer by E. E. Gardner, by deed of date November 1, 1900.

"No. 7. That tract of land lying in Washington county containing 5 acres, being the same land conveyed by James H. Moore to C. F. Palmer, by deed of date December 16, 1901.

"No. 8. That tract of land in the counties of Smyth and Washington formerly owned by V. H. and S. M. Thomas, containing 1,059 acres, on the waters of North Fork of Holston River in Rich Valley, which was conveyed to the said C. F. Palmer by B. F. Buchanan, commissioner, by deed of date March 5, 1902.

"No. 9. That tract of land lying on the north side of Walker's Mountain in Washington county, Va., containing 361 acres, and being the same land conveyed to C. F. Palmer by William P. Douglas and others, by deed of date November 24, 1902.

"And the first parties for the consideration aforesaid did sell, transfer, and convey to the second party all the cattle, horses, mules, hogs, sheep, upon the lands aforesaid belonging to the said C. F. Palmer together with all the grain and provender, or any farming instruments, tools, and machinery and all implements pertaining to any of the said lands. The said deed was made on the 1st day of March, 1904, and admitted to record on the 7th day of March, 1904. And on the 1st day of March, 1904, the day of the date of the foregoing deed, the Palmer Land & Cattle Company, incorporated, executed a deed to James W. Bell, trustee, reciting that whereas C. F. Palmer and wife, by deed of an even date therewith, had conveyed to the Palmer Company various tracts of land situate in the counties of Washington and Smyth, state of Virginia, with the appurtenances thereto belonging, together with all the cattle, horses, mules, hogs, sheep, grain, provender, farming implements, tools, and machinery on the said lands, belonging to C. F. Palmer; and whereas the said Palmer Company as part consideration of said conveyance had agreed to execute and deliver to the said C. F. Palmer its coupon bonds to the number of 65, of \$1,000 each, payable to bearer on the 1st day of March, 1934, with interest at the rate of 6% per annum, payable semiannually, on the 1st days of March and September, which bonds were to be secured by deed of trust upon the property, rights, and franchises of the Palmer Company; and whereas, by unanimous resolution of the stockholders of the said Palmer Company, as also by unanimous resolution of the board of directors in other meetings duly and legally assembled on the 20th day of February, 1904, at which said meetings all of which said stockholders and directors were present in person, and said bonds were authorized and directed to be issued and delivered to the said C. F. Palmer for the consideration aforesaid; and whereas, by resolutions as aforesaid of the stockholders and board of directors of the said Palmer Company, this deed of trust was approved by the same and ordered to be executed and delivered for equal security of said bonds without priority or preference of one over another, that for and in consideration of the premises and the sum of \$1 in hand paid by the trustee, the receipt of which was acknowledged, and for the purpose of securing equally the said bonds as aforesaid that day executed and delivered to the said C. F. Palmer—the said Palmer Land & Cattle Company, party of the first part, did grant, bargain, sell, assign,

transfer, convey, and confirm, with covenants of general warranty unto the said James W. Bell, of the second part, all and singular its franchises, and all and singular those certain tracts of land aggregating about 2,000 acres, in the counties of Smyth and Washington, Va., conveyed by the Palmer Land & Cattle Company by deed as aforesaid, in trust nevertheless, for the equal and proportional benefit and security of all and every, the present and future holders of any and every bond issued thereunder, without preference and priority or distinction as to lien or otherwise, of any one bond over another bond, and providing and covenanting that if the Palmer Company should duly pay the said bonds and interest thereby secured according to the tenor and effect thereof, as recited, and should duly keep and perform all and singular the covenants and agreements contained, then, and in that event, the said deed of trust should terminate and thereafter be void; otherwise, to continue and remain in full force and effect.

"It was further expressly agreed that until default should be made by the said Palmer Company in the payment of the principal and interest of the said bonds, or any of them, and that until default should be made in respect of some act or covenant, obligation, or agreements therein required to be done, performed, or kept by the said Palmer Company, the said Palmer Company should be suffered and permitted to retain actual possession of all and singular the premises thereby conveyed, and by managers to use and operate the same, with the rights and franchises pertaining thereto, and to collect, receive, take, use, and enjoy the earnings, income, rents, issues, and other proceeds thereof. And the said Palmer Company did further covenant and agree, that it would well and truly pay unto the lawful owners or holders thereof for the time being the said 65 bonds, and which of them when and as they should become due and payable, according to their tenor and effect or when declared due and payable as provided by said deed; and likewise would well and truly pay all interest which should from time to time become due and payable upon said bonds, when and as the same should become due and payable, and that it would likewise promptly pay off all taxes, assessments, fees, license charges, which had accrued upon or might be levied or imposed upon the properties so conveyed, or upon the said Palmer Land & Cattle Company as a corporation; and the Palmer Land & Cattle Company did further covenant and agree that it would keep all the buildings and structures erected or which hereafter might be erected upon the lands so conveyed, sufficiently insured against loss and damage by fire, and would assign the policies taken out from time to time to the said James W. Bell, trustee, as further security under said deed; that in case of loss by fire the said Bell, trustee, should permit the said Palmer Company to apply all moneys received from insurance policies to rebuilding and restoring or repairing the property destroyed or damaged; and the certificate of the president and treasurer of the said company as to moneys needed for such application should be sufficient warrant to the trustee for paying over said moneys and the property so secured, restored, and rebuilt may be and become without any other conveyance to the operation and lien of this indenture. It was further covenanted and agreed that if the Palmer Company should fail or refuse to effect insurance as provided, or should fail to pay taxes, assessments, fees, or license charges levied or imposed upon it for the purpose conveyed, the trustee, upon demand of any bondholders, and upon being provided with sufficient funds for the purpose, might effect such insurance, pay such taxes, fees, and license charges, and the premiums of such amounts so paid by the lawful interest thereon should be a lien upon the franchises and premises thereby conveyed and be included as a part of the amount of the obligations secured by said deed, payable on demand with interest.

"And it was further covenanted and agreed that if default should be made in the time and the punctual payment of the interest upon said bonds or any of them to another part of such interest when such interest should become due and payable, or in case default should be made in any wise in respect to the payment and discharge of the taxes, assessments, fees, and insurance premiums mentioned, or in any part thereof, and said default should continue for six months, then and in either event at the option of the holders of a majority in interest of the then outstanding bonds served, expressed in writ-

ing to the said trustee, the whole of the principal of said bonds should become and be made due and payable with like effect, as if the said bonds had regularly matured according to their tenor and effect. In case the holders of a majority in interest of the said bonds then outstanding should, as provided for, declare the principal of all the bonds thereby secured to be due and payable, or in case default should be made in the payment of said bonds or any of them or any part of them for the sum become due, according to the tenor and effect thereof, then, and in either event, it was further covenanted and agreed that, as soon as such default, and any holder of any of said bonds should in writing request or desire, or his heirs or assigns should think fit, the said trustee should proceed at such time and place as he or they should think best to sell the property, rights, and franchises thereby conveyed, or so much thereof as might be necessary to sell, at public auction to the highest bidder; having first given notice for four weeks of the time, terms, and place of sale, in one or more newspapers published in the counties of Smyth and Washington, Va., and should apply the proceeds of sale to first paying taxes, and other like charges yearly due and unpaid, including any sums which might have been paid by any bondholder on account of any past due taxes, assessments, fees, license charges, compensation to amounts to the equal pro rata payments of the said bonds then outstanding, without priority or preference of one bondholder over another, and the price, if any, should be paid to the said Palmer Company. The said deed of trust was duly acknowledged on the 5th day of March, 1904, by the said Palmer Land & Cattle Company, incorporated, by Charles F. Palmer, president, and attested by W. F. Smyth, secretary. And the same was acknowledged on the 7th day of March, 1904, by the said trustee, and admitted to record on the 7th day of March, 1904. Copies of said deed, and deed of trust, are filed as part of this bill marked 'C. F. P. 1,' and 'C. F. P. 2,' respectively.

"8. Complainant alleges that Charles F. Palmer was, moreover, at this time engaged in an extensive lumber business, which was being conducted by one V. H. Thomas, under the firm name and style of Palmer, Thomas & Co.; and in this business he owned and was operating valuable machinery, stock, sawmills, and tramways in the counties of Smyth, Wythe, and Bland, in the state of Virginia, and in the Western District of Virginia. To the same fraudulent end he procured another charter of incorporation under the name of the Palmer-Thomas Lumber Company; the incorporators of which were Charles F. Palmer, president and treasurer, W. F. Smyth, secretary, and V. H. Thomas, director—likewise chosen as figureheads and dummies without any financial interest in the said company, except perhaps that the said Thomas was to receive a portion of the profit. The company was capitalized at \$50,000, all of which has been issued. The date of this charter was the 1st day of March, 1904, and on the same day a deed was made conveying all the partnership effects to said corporation; and the said Palmer owns the entire capital stock thereof. The property so conveyed is shown by the deed hereinafter filed, marked 'V. H. T.'

"9. Your complainant alleges that, since these nominal incorporations thus variously made, the said Charles F. Palmer has continued his management and control of the property conveyed and transferred to them, without accounting to anybody, and your orator as one of his creditors would seem to have been effectually bound and gagged, as by a highwayman, and left on the roadside without legal redress; whilst his despoiler is left to enjoy the fruits of his enterprise. By this species of legerdemain he has sought to cover up and shield his property from his creditors. A copy of the deed of conveyance to the said Palmer-Thomas Lumber Company is filed as part of this bill, marked 'V. H. T.'

"10. The intention was by this first-named deed, on the part of Charles F. Palmer, to convey all his real estate to the said corporation, the Palmer Land & Cattle Company, retaining the management and control thereof, subject to the obligations of the deeds for 30 years, and retaining in his own hands a vast amount of personalty under his control, and subject to his own disposition, so as to delay, defeat, and defraud such of his creditors as might be selected by him as victims.

"11. A large amount of the stock and bonds secured by the said deed of trust named in clause 7 have been transferred by the said Charles F. Palmer as collateral security for past due debts to certain of his creditors, individuals and banks, state and national, the exact amount transferred or the proportion of which to each, complainant is unable to designate. The holders of these securities, the amount and value of which can only be ascertained by an account, are, as far as complainant can ascertain approximately, as follows, viz.: The Lynchburg National Bank, the Bank of Chilhowie, the estate of A. C. Cummings, of which Walter S. Preston is executor, the First National Bank of Lynchburg, Va., the Chatham National Bank of the city of New York, the National Bank of Virginia, the Marion National Bank, the Bank of Marion, the American National Bank, the Citizens' Bank of Lebanon, Va., the Radford Trust Company, the Drovers' & Mechanics' National Bank of Baltimore, Md., the American Bank of Orange, the Saltville Bank of Saltville, Va., the Bank of Wytheville, Va., the Bank of Glade Springs, Va., the People's National Bank, Lynchburg, Va.

"12. Your complainant is informed and believes that the said named Charles F. Palmer, before and after effecting the incorporation of the said named Palmer Land & Cattle Company, conveyed, transferred, and assigned to his wife, Mrs. Susan M. Palmer, valuable real and personal property and money, which legally and equitably belongs to his creditors, and is justly applicable to the debts of your orator hereinbefore enumerated. And he alleges that the said Mrs. Sue M. Palmer, or he on her behalf, has invested the proceeds of the said bonds and other property and money so given, assigned, and transferred to her in a tract of land near Abingdon, Va., for which she paid \$7,000 in cash, which was conveyed to her by James W. Bell and wife, consisting of 70 acres, as shown by the deed executed to her herewith filed as part of this bill, marked 'J. W. B.' Simultaneously with the execution of the said deed on the 20th day of September, 1904, the said Palmer and wife executed a deed of trust on the said land so conveyed to her to H. W. Straley, Jr., and J. I. Hurt, trustees, to secure a debt of \$4,000, loaned to her, and due two years after date according to the terms of the said deed of trust. Upon the said land are a number of valuable dwelling houses, the rent of which is considerable, which she is collecting and appropriating. The said Mrs. Palmer, or he for her, has erected a dwelling house, which is as yet unfinished, of great value, and which must have cost as much as \$8,000 to \$10,000 in its erection and appointments.

"13. Your complainant charges that Mrs. Palmer had not means of her own outside of what has been given her by her husband with which to make such a purchase or to erect such a house, or to acquire such property. Your complainant charges that this gift, transfer, and assignment to Mrs. Sue M. Palmer was made by Charles F. Palmer with the view, purpose, and intent to defeat and defraud his creditors, and that the said Mrs. Sue M. Palmer had notice thereof, and that, moreover, any such gift, transfer, or assignment to her was voluntary and made with the intent to hinder and delay his creditors in the collection of their just claims, of which she had notice, and that such gift, transfer, assignment, and conveyance to the said Mrs. Palmer was not made upon a consideration deemed valuable in law, and that the same is void as to complainant as creditors of the said Charles F. Palmer.

"14. Your complainant alleges that the said Charles F. Palmer, with intent to hinder, delay, and defeat the claims herein asserted by complainant, having transferred and assigned to various banks and creditors of his, by way of collateral security, various amounts of the stock and bonds of the said incorporated companies as stated, that in some instances the amounts so held as collateral are largely in excess of the demands of the said persons and banks against him, and that upon a fair accounting, even if the holdings of the said creditors should be shown to be valid and unimpeachable and superior to the claims of the complainant as above set forth, that there would be a surplus in the hands of such holders, which would be liable to the claims of your complainant. And in this connection complainant charges that the amount and value of the property, securities, and money given and transferred to the said Susan M. Palmer, even if given or transferred to her by way of compensation for her release or relinquishment of her contingent dower in the

real estate of the said Charles F. Palmer, is out of proportion to the value of such relinquishment, and cannot be sustained in equity against the claims of complainant herein asserted.

"15. Your complainant alleges, moreover, that the said Charles F. Palmer is the owner of a tract of land in Washington county, Va., known as the 'Conevey Land' lying on the public road leading from Midway to Emory & Henry College, in Saltville magisterial district, in the vicinity of Meadow View.

"16. Complainant alleges that the conveyance of Charles F. Palmer and wife to the Palmer Land & Cattle Company, set forth in paragraph No. 7, was a transparent attempt to convert his realty into personalty, and amounted to no more than a conveyance to himself, made to facilitate a scheme of fraud upon his creditors.

"17. Complainant alleges that the property mentioned in the said deed to the Palmer Land & Cattle Company was retained in the possession of the said Palmer and has continued in his use, enjoyment and control without accountability to his creditors. The attempt to place this property, under the contingencies named in the deed of trust to Bell, trustee, at the disposal of the trustee, or some of his creditors, cannot be sustained in a court of equity, and the said deed of trust is illegal upon its face and void. An actual change of the possession of the property, and especially the personal property, named in said deed of assignment, was essential, and without this the said deed is fraudulent per se, and void as to existing creditors. The said personal property was valuable, worth many thousand dollars, and that a large amount of said personal property has been and is being converted by the said Charles F. Palmer to his own use. And in this connection complainant charges that the said trustee had notice of the intent with which the said trust was made. It is submitted that the said deed of trust to J. W. Bell, trustee, contravenes the powers of the grantor therein, under the law, as a corporation, to tie up for an unreasonable time, upon contingencies, and reserve to itself power over the property conveyed, incompatible with the avowed purpose of the deed and adequate to the defeat thereof. The said corporation, which is virtually and in effect Charles F. Palmer, by the terms of said deed is suffered to remain in the possession of the said property conveyed and the enjoyment thereof without accountability until default is made in the payment of the debts secured, and request of the creditors to foreclose; in this case the creditor being Charles F. Palmer himself, who was the sole owner of the stock and bonds, and without accountability to the trustee either arising from a sale thereof or the renting thereof, or otherwise. The law does not authorize such an agreement. It is fraudulent per se; and the owners of the bonds secured under such an agreement, even though bona fide, which they are not, and cannot be, are not protected over other creditors of the grantor, legal or equitable. It is palpable and manifest from the face of this deed of trust, and the deed of Charles F. Palmer and wife made contemporaneously therewith, and recorded on the same hour of the same day, therewith, that they contained illegal provisions for the benefit of the said Charles F. Palmer, and were so intended; and that the same are prejudicial to other creditors of the said Palmer; and this was sufficient notice to persons dealing with such stock and bonds of the illegal and fraudulent character thereof. The said Charles F. Palmer by this manipulation has sought to shield his property from his other creditors, and those claiming benefits thereunder, and he cannot in equity, or under the statute of Virginia, be permitted to enjoy benefits at the expense of other creditors of the debtor, who are thereby hindered and delayed in the collection of their debts, by this palpable subterfuge.

"18. Complainant alleges that the said George W. Palmer died possessed of considerable property which is liable to the claims of the creditors of his estate, of whom your complainant is one. Among other things he owned certain certificates on the Bank of Abingdon, Va., a defunct corporation of which D. A. Preston is the receiver under a decree of the Circuit Court of Wythe county, Va. The said Charles F. Palmer qualified as administrator of the estate of George W. Palmer, and gave bond as such upon which H. L. Morgan entered as security. Complainant alleges that said certificates of deposit are worth several thousand dollars; that the said Charles F. Palmer committed

a devastavit of the said estate by making use of the said certificates for his private benefit, by converting the same to his own use in the payment of an individual debt to the First National Bank of Abingdon, Va., to which he transferred said certificate as collateral security, and which said bank in turn sold the said certificate to one J. I. Hurt. The said certificates were bought and paid for by George W. Palmer in his lifetime, and were indorsed and transferred in blank, and were never transferred on the books of said bank, nor was the receiver notified of the said transfer—hence one dealing with said certificates was put upon inquiry and notice of the ownership thereof. Your complainant charges that the said First National Bank of Abingdon, Va., knew, or had the means of knowing, that the said devastavit was being committed, and the said J. I. Hurt also had notice thereof that the said certificates belonged to the estate of George W. Palmer; that the said certificates have not yet been paid by D. A. Preston, the trustee of the Bank of Abingdon. The said devastavit having been committed, the security upon the bond of the administrator is responsible to the extent of his suretyship on said bond.

"19. Complainant alleges that the act of incorporating the said named companies or either of them was done with the view to defraud, and the conveyances to them were made in order to so dispose of the stock and bonds thereof, and thereby to facilitate the end of hindering and delaying the creditors of Charles F. Palmer or any of them in the collection of their debts, and not for the legitimate ends of the business of such corporations, and was an act of fraud upon the rights of such creditors which will not be permitted to cloak and shield the property from the claims of his creditors; and that all who have dealt with or claim to be purchasers of such stock or the bonds of the said incorporated companies had notice of the fraud, alleged in this bill, and that any such dealings tended to delay, hinder, and defraud the other creditors of Charles F. Palmer in the collection of their debts against him; that, moreover, the transfer of the stock and bonds of the said named incorporated companies, in so far as they were made, were only for the security of antecedent and pre-existing debts, and not for any new advance or credit, and that hence the takers and holders thereof cannot be considered as bona fide purchasers thereof; that the said named antecedent creditors not having surrendered or canceled their pre-existing debt upon receiving such additional collateral securities are not entitled to be considered in a court of equity as bona fide purchasers thereof, and complainant alleges that in no case was the antecedent debt or the pre-existing security surrendered. The said transferees have parted with no value, surrendered no existing right, nor placed themselves in any worse legal position as to their debts than before, in consideration of the transfer complained of.

"Being without adequate remedy at law, and only relievable in a court of equity, and in order to prevent a multiplicity of suits, and to the end that the rights of the parties hereto may be asserted and determined, your complainant prays that Charles F. Palmer in his own right; and Charles F. Palmer, administrator of the estate of George W. Palmer, deceased; and the Palmer Land & Cattle Company, incorporated; and the Palmer-Thomas Lumber Company, incorporated; and the L. A. Palmer Company, incorporated; the Holston Mercantile Company, incorporated; the Holston Salt & Plaster Company, incorporated—which said companies are corporations created by the laws of the state of Virginia, and existing and doing business in the Western District of Virginia; and Charles F. Palmer and Leon A. Palmer, late partners under the firm name and style of L. A. Palmer & Co.; James W. Bell, trustee, under a deed of trust executed to him by the Palmer Land & Cattle Company; Mrs. Susan M. Palmer, wife of Charles F. Palmer; Walter S. Preston, executor of A. C. Cummings, deceased; the Lynchburg National Bank; the Bank of Chilhowie, Va.; First National Bank of Lynchburg, Va.; the Chatham National Bank of New York City; Marion National Bank, Marion, Va.; the Bank of Marion, Marion, Va.; the American National Bank of Orange, Va.; the Citizens' Bank of Lebanon, Va.; Radford Trust Company of Radford, Va.; Drivers' & Mechanics' National Bank of Baltimore, Md.; the American Bank of Orange, Va.; the Saltville Bank of Saltville, Va., a corporation created by and existing under the laws of the state of Virginia; the Bank of Wytheville, of Wytheville, Va., a corporation created by and existing under the laws of

the state of Virginia; the Bank of Glade Spring, of Glade Spring, Va., a corporation created by and existing under the laws of the state of Virginia; the People's National Bank of Lynchburg, Va.; the First National Bank of Abingdon, Va.; V. H. Thomas; and W. F. Smyth and H. L. Morgan; S. F. Akers, trustee, in a deed of trust executed to him as trustee by the Holston Mercantile Company; and Wyndham B. Robertson and George E. Worden, directors in the Holston Mercantile Company—be by due and proper process of subpoena made parties defendant to this bill, and that they answer the same, but an answer under oath is expressly waived.

"(1) That a receiver be appointed to take charge of the assets, lands, stock, farming implements, tools, machinery, appliances, goods, wares, merchandise, choses in action, notes, bonds, and evidences of debt, books, papers, contracts, appurtenances, and appointments of the said named incorporated companies, viz., the Palmer Land & Cattle Company, incorporated; the Palmer-Thomas Lumber Company, incorporated; the L. A. Palmer Company, incorporated; the Holston Mercantile Company, incorporated; and the Holston Salt & Plaster Company—to utilize and preserve and care for and account for the same under the future orders of this court, so that the same may be subject to the decrees and orders that may be made in regard thereto upon the future consideration of the rights of the parties or any other creditors of Charles F. Palmer, claiming an interest therein. (2) That a writ of injunction may issue inhibiting and enjoining any disposal by sale or otherwise of any of the property held by the said incorporated companies, except by and under the order of this court; through and under its appointees and receivers, and until the further order of this court. (3) That the agents, servants, and employees of the said named incorporated companies, their respective directors, officers, and managers, and said respective companies be required to turn over, in full possession and control, to said receiver, the properties conveyed. (4) That the conveyances of Charles F. Palmer and Susan M. Palmer, his wife, to the Palmer Land & Cattle Company, of date March 1, 1904, and the conveyance of the Palmer Land & Cattle Company to James W. Bell, trustee, of date March 1, 1904, and the conveyances of Charles F. Palmer and B. H. Thomas to the Palmer-Thomas Lumber Company of date March 1, 1904, and the conveyance of the Holston Mercantile Company to S. F. Akers, trustee, of date September 18, 1905, and the deed of J. W. Bell and wife to Susan M. Palmer of date _____ day of _____, 19—, be declared fraudulent and void as to the claims herein asserted by the complainant as being intended to hinder, delay, and defraud complainant as a creditor of Charles F. Palmer in the collection of his debts as evidenced by the judgments named in this bill. (5) That the assets and property of the said L. A. Palmer Company consisting of all its machinery, stock, goods, wares, and merchandise, choses in action, creditors, and holdings, be declared subject to the debts of the said complainant against the partnership of L. A. Palmer & Co. and Charles F. Palmer, and the estate of George W. Palmer, of which the said Charles F. Palmer is the personal representative, and that the same and the proceeds thereof be applied by the receiver to the payment of your complainant's said debt, as the property of L. A. Palmer & Co. and of Charles F. Palmer, and that the property, assets, and effects of the Holston Mercantile Company in the hands of S. F. Akers, trustee, and the property of the Holston Salt & Plaster Company be taken in possession by the said receiver, and subjected to the debts against Charles F. Palmer herein asserted; that the land known as the 'Conevey Place' be sold.

"That all necessary and proper accounts be taken by a commissioner of this court, showing what assets, real and personal, of the estate of George W. Palmer, deceased, went into the hands of Charles F. Palmer as executor, and what thereof and to what extent the said estate, or the personal representative thereof, and his security upon his official bond as upon and for a devastavit of said estate, is liable for the debts of complainant herein asserted; that all necessary and proper accounts be ordered; that the receiver or receivers of the various and sundry properties may be authorized to take full charge of the same, and to dispose of the same and account therefor under the orders of this court; and that general relief be extended in the premises in view of the rights and equities of the complainant and of the other parties

to this bill; and that such general relief may be extended in the premises as to equity seems meet.

"And as in duty bound, your complainant will ever pray, etc.

"A. P. Fowler,

"Receiver of the American Exchange National Bank of Syracuse, New York.

"By His Solicitor.

"Daniel Trigg, Solicitor for Compt."

We have deemed it necessary to set out the complainant's bill at length, in order that the point before us might be fully understood. Filed with the bill and as exhibits thereto are certified copies of the several judgments set out in the bill, as are also copies of the deeds in trust, deeds of conveyance, etc., therein referred to, but we do not think it material to present them in this opinion. The defendant C. F. Palmer, and C. F. Palmer, as partner in L. A. Palmer & Co., answered at length. Some others of the defendants also filed answers and one or more of them filed special pleas. The defendants Walter S. Preston, the First National Bank of Abingdon, the Holston Mercantile Company et al., the Bank of Wytheville, the Drovers' & Mechanics' Bank of Baltimore, the People's National Bank of Lynchburg, and Charles F. Palmer, as administrator of Geo. W. Palmer, deceased, severally demurred to the bill, the ground upon which the demurrers were based being, chiefly, that complainant's bill was multifarious. On this ground the court, on June 8, 1906, dismissed the bill, having entered the following decree:

"This cause coming on to be heard at a former day of this term, and arguments of counsel having been heard, and, as the court is of the opinion that the complainant's bill is multifarious, it is adjudged, ordered, and decreed that said bill be and the same is hereby dismissed; but without prejudice to the right of complainant in a new suit or suits. It is further ordered that Walter S. Preston, executor; People's National Bank of Lynchburg; Holston Mercantile Company; W. B. Robertson; George E. Worden; S. F. Akers, trustee; Chas. F. Palmer, Adm'r; Bank of Wytheville; Drovers' & Mechanics' National Bank of Baltimore; and First National Bank of Abingdon—do recover of complainant their costs in this behalf expended, to be taxed by the clerk."

From this decree the complainant appealed to this court, and the question of multifariousness thus raised by the demurrers to the bill is alone for our consideration. The bill charges, substantially, that the complainant had judgments rendered and docketed in the Circuit Court of the United States for the Western District of Virginia, amounting in the aggregate to about \$80,000 against the defendants, Charles F. Palmer et al., and that the said Palmer, in order to defeat the collection of these judgments, had transferred his property, real and personal, as set out in the bill, to certain partnerships, corporations, and companies, of which he was a member, and had caused the deeds in trust and the conveyances mentioned in the bill to be made by which his property was transferred and conveyed with the fraudulent purpose of defeating the collection of complainant's judgments. In other words, by the terms of his bill the complainant is seeking to pursue certain property which, in the outset, as is alleged, was that of the defendant Charles F. Palmer, and which, as is further alleged, is liable to the lien of complainant's judgments, or should be subjected to their satisfaction, the further allegation being that the property has

been fraudulently conveyed by Palmer, or the ostensible ownership thereof, through various fraudulent schemes and devices, changed with the purpose and intent of putting it beyond the reach of complainant in proceeding by execution on the said judgments. The bill sets out various and sundry corporations, partnerships, and companies which are alleged to have been mere creatures or contrivances of Palmer, through which to carry out his fraudulent and unlawful schemes, the purpose of which on the part of Palmer, as alleged, was to defeat the complainant in the collection of said judgments by thus conveying, covering up, and beclouding the title of his (Palmer's) property. The prayer of the bill is for the writ of subpoena to parties named therein, and the relief contemplated is for injunction restraining the further transfer or disposition of the property described as that of Palmer and for a receiver to take charge of the same; also, that the several deeds in trust, transfers, and conveyances alleged in the bill be declared void and set aside, and that the said property be subjected, or as much thereof as may be necessary for that purpose, to the payment of complainant's judgments, and for an account. As shown by the bill, the individuals who are named as trustees in the deeds in trust, the grantees in the deeds of conveyance, the individual members of the partnerships and the incorporated companies named, all of them, as alleged, being the instrumentalities and agencies adopted and used by Palmer in the inception, progress, and consummation of his fraudulent purpose to defeat the complainant in the collection of his judgments, are made defendants. There is also a class of parties defendant composed of banks, both national and state, alleged in the bill to have been unlawfully preferred in assignments made by Palmer or to be otherwise interested in the property involved.

Is this bill bad for multifariousness? We think not, and we are of the opinion that there was error in sustaining the demurrer and dismissing complainant's bill on that ground. If we understand the bill aright it seeks but a single object and that is to reach through a court of equity property which it is alleged should be subjected to the satisfaction of certain judgments for money recovered in a court of law, on the ground that the property has, by its owner, a defendant in the said judgments, been fraudulently conveyed, disposed of and perverted with the intent to deprive the complainant of his right and that the said defendant, with this end in view, has so devised and carried out his schemes of fraud through the transfers, conveyances, and dispositions of the property, as alleged, as to place it beyond the reach of legal process. The property which the complainant is pursuing was owned and possessed by the defendant Charles F. Palmer, as is alleged, and was liable for the payment of the judgments, but that the said property, in the progress of Palmer's fraudulent scheme, and in order to carry it out, has passed through or is now lodged in one or more of the defendants, each claiming some interest therein, or having some alleged right or title thereto, to be affected if complainant's bill be true. Under such conditions the bill is not multifarious, because there is not that distinct or separate cause of action contemplated by this term. It may be that in such a great number of parties it will be

disclosed in the course of the proceeding that some of them are without interest, or that there is a misjoinder of parties, but this would not constitute a multifarious bill to be dismissed on demurrer, but would create a situation for discontinuance or dismissal only as to such parties as are improperly brought in, and as to the subject-matter, should the action become so complicated and confused as to embarrass the court in its investigation, the remedy furnished is that the court may *ex mero motu* refuse to pass upon matter not germane to the principal subject of the action.

Starting with Palmer, who had the fraudulent design of so disposing of and covering up his property as to deprive the complainant of his legal remedy to have it subjected to the payment of his judgments, the bill sets out a connected story, detailing the various schemes, artifices, and plans resorted to by him in order to accomplish his purpose. With this beginning, based upon the fraudulent intent of Palmer and the purpose he had in view, the object of complainant's bill is to reach the property wherever or with whomsoever it may be found. It is said in *Gaines v. Chew*, 2 How. (U. S.) 619, 11 L. Ed. 402, that "what shall constitute multifariousness is a matter about which there is a great diversity of opinion." We concede this to be true, and we readily recognize the fact that in many instances it is difficult to draw a distinction between a bill which is bad for multifariousness and one that is not. However, we think that the line is sufficiently clearly drawn to establish the principle that where the object of the suit is single and it happens that different persons have separate interests in distinct questions which arise out of the single object, it necessarily follows that such different persons must be brought before the court in order that the suit may conclude the whole subject, and in order to determine whether a suit is multifarious or in other words contains distinct matters, the inquiry is not whether each defendant is connected with every branch of the cause, but whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct. *Salvidge v. Hyde*, 5 Mad. Ch. 138.

In *Gaines v. Chew*, from which we quote above, a bill was filed against the executors of an estate and all those who purchased from them, and the court held that the demurrer for multifariousness should be overruled, and in delivering the opinion the court said:

"The complainants have made defendants the executors named in the will of 1811, and all who have come to the possession of property, real and personal, by purchase or otherwise, which belonged to Daniel Clark at the time of his death."

And whilst the court in that case used the language we have quoted, yet in further commenting upon the doctrine it said:

"In general terms a bill is said to be multifarious which seeks to enforce against different individuals demands which are wholly disconnected. In illustration of this it is said if an estate be sold in lots to different persons, the purchasers could not join in exhibiting one bill against the vendor for a specific performance."

This last declaration is founded in reason, because although it was one parcel of land in the outset, yet when it was divided and sold to

several different purchasers, there was no such community of interest or connected right as to authorize all of them to be joined as complainants in the same action. Each purchaser's right was entirely separate and distinct from that of the others.

In delivering the opinion of the Supreme Court of North Carolina in *Bedsole v. Monroe*, 40 N. C. 313, Chief Justice Ruffin said:

"If the grounds of the bill be not entirely distinct and not whole; if they arise out of one and the same transaction or series of transactions, forming one course of dealing and all tending to one end; if one connected story can be told of the whole; then the objection (multifariousness) cannot apply."

In our opinion the principle thus laid down is maintainable not only on the ground that the basis of complainant's bill is one series of transactions connected and carried out for the purpose of accomplishing a particular end, but it is enforced on the well-established principle of avoiding a multiplicity of suits, so as not to take, as is so often said, "two bites at a cherry," but dispose of the whole subject of controversy and its incidents and corollaries in one action. Following in the same line, it is well said in the case of *Fisher v. Trust Company*, reported in 138 N. C. 227, 50 S. E. 660, that "if the fountain is tainted, so likewise is the water that flows from it into all the streams." The decision in the *Bedsole Case* is in entire harmony with Mr. Story in his treatise on Equity Pleading, § 271, wherein he says:

"The rule is that if the grounds of the complainant's bill be not entirely distinct and unconnected; if they arise out of one and the same transaction, forming one course of dealing and all tending to one end; if one connected story can be told of the whole—the objection of multifariousness cannot be sustained."

See, also, *Oliver et al. v. Piatt*, 3 How. (U. S.) 333, 11 L. Ed. 622.

In a leading North Carolina case (*Parish v. Sloan*, 38 N. C. 610), the principle we are considering is discussed in a most forceful and, to our minds, conclusive manner. There the plaintiff filed a bill alleging that Dixon Sloan, one of the defendants, was indebted, and executions were issued against him, and certain negroes were sold, some of them being bought by the defendant Faison, and the remainder by Daniel C. Moore, and on the same day Dixon Sloan sold other slaves to Faison upon the agreement that the latter should convey the negroes purchased at the sheriff's sale to David D. Sloan, in trust for the wife of Dixon Sloan, during her life, and after her death to her children, the other defendants. It was alleged that this transfer was made in fraud of creditors, etc. It was further alleged that John C. Moore was security for Dixon, and held a mortgage from Sloan on several negroes to secure him, and that later Dixon Sloan mortgaged to John C. Moore other negroes to secure another creditor. It is then alleged that all the debts secured by the mortgage were paid by the sale of some of the negroes conveyed to John C. Moore. The bill prayed that the debts due the complainant be paid out of the negroes mortgaged to John C. Moore, and if they were not sufficient, then out of the negroes conveyed to David D. Sloan in trust for Mrs. Dixon Sloan and her children. There was a demurrer filed to this bill upon the ground that it was multifarious, in that the slaves sold by Faison, sheriff, were in

no way connected with the mortgage of the slaves to Moore. In overruling the demurrer, the Supreme Court of North Carolina said:

"But when one general right is claimed by the complainant, though the individuals made defendants have separate and distinct rights, yet they may all be charged in the same bill, and a demurrer for that cause cannot be sustained."

The same doctrine is laid down by Chancellor Walworth in the case of *Boyd v. Hoyt*, 5 Paige (N. Y.) 65, and in the case of *Whaley v. Dawson*, 2 Sch. & Lef. 370, it was held that, in English cases, demurrers, because the complainant demanded in his bill matters of distinct nature against several defendants not connected in interest, have been overruled where there has been a general right in the complainant covering the whole case, although the rights of the defendants may have been distinct; and so it was held in the case of *Dimmock v. Vixby*, 20 Pick. (Mass.) 368, that where one general right is claimed by the complainant, although the defendants may have separate and distinct rights, the bill of complaint is not multifarious. The essential unity of the proceeding in the case before us consists in the fact that the property of C. F. Palmer, the debtor, is alone sought to be appropriated to his own debt, and the gist of the bill is that the various parties named as defendants are the mere conduits used by the defendant Palmer to fraudulently put his property beyond the reach of his creditor.

We do not think the bill should have been dismissed for multifariousness, and the decree sustaining the demurrers on this ground is, in our opinion, error. The said decree of the Circuit Court of the United States for the Western District of Virginia is therefore reversed, and the cause remanded.

Reversed.

THE MYRTIE M. ROSS.

(Circuit Court of Appeals, Sixth Circuit. March 2, 1908.)

No. 1,720.

1. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Under rule 11 of the Circuit Court of Appeals (150 Fed. xxvii, 79 C. C. A. xxvii), requiring assignments of error to "set out separately and particularly each error asserted and intended to be urged," general assignments, such as that the court erred in decreeing for the appellee or in not sustaining a cross-bill, are insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2997.]

2. CONTRACTS—ACTION FOR COMPENSATION—PERFORMANCE.

Under a contract entered into on December 1st, by which libellant agreed to raise a steamer which had been sunk in Lake Erie by a gale a few days previously, and to complete the work that fall, weather and ice permitting, the failure to so complete it held, under the evidence, not due to any lack of due diligence in prosecuting it, but to stormy weather, which delayed the work until it was completely stopped by ice, and injury resulting to the vessel before work could be resumed in the spring, to the action of the elements, and not to libellant's negligence, which would preclude him from recovering the contract price when the work was completed.

Appeal from the District Court of the United States for the Eastern District of Michigan.

This is an appeal from a decree in a salvage case. The Myrtle M. Ross, a small steamer trading between Lake Erie and Detroit and St. Clair river ports, owned by appellant, laden with coal, was sunk during a gale November 19, 1900, in Lake Erie, about a mile and a half from the channel toward the Canadian shore. The appellee, McMorran, doing business under the name of the "Port Huron Wrecking Company," owned a wrecking steamer, the Groh, at Port Huron, together with several pontoons; one Dieffenbach being in general charge of wrecking operations. November 27th (eight days after the Ross was sunk) Nowlin, with one Carry, came to Port Huron to see McMorran about raising the boat. McMorran was away. They had an interview with Dieffenbach, the result of which was that Nowlin offered to pay \$800 for raising the boat, while Dieffenbach refused to take less than \$1,000 without McMorran's approval. The next day (November 28th), on McMorran's return, the latter wired Nowlin's brother (who acted for the latter in receiving the telegram): "One thousand dollars is the lowest." November 30th appellant replied by wire: "You can have job raising Ross. Letter will follow," and on the same day wrote as follows: "Telegraphed you this p. m. that I would accept of your offer in raising and delivering the boat Myrtle M. Ross into port, either at Marine City or Detroit, which will let you know later on which place we wish same delivered at. Will send man to go with you when ready. You to proceed to raise the boat at once. Better wire me as soon as you are ready to start, so I can send man on. We will require you to put three chains under boat when raising her, as we do not wish to have her strained, but I believe this is the understanding with you." December 1st McMorran replied, as follows: "I have your favor of the 30th relative to raising the Myrtle M. Ross. We will attempt to raise and deliver her at Marine City or Detroit, weather and ice permitting, but with the understanding that if the ice is not such that it is safe to go to Detroit that we have the option of taking her to the nearest point of safety and that the money for raising her, namely, \$1,000, be paid as soon as boat is raised and delivered at nearest point possible from where she now lays. We will start putting chains under her at once if this is in accordance with your wishes. Please let me know at once." No reply was made to this letter.

The wrecking master, Dieffenbach, got the wrecking outfit ready December 1st and got opposite the wreck at 7 or 8 o'clock the following morning. The wrecking crew immediately made fast to the spar and to the boiler house of the Ross. The latter had then been sunk 13 days. She was in about 20 feet of water, headed about north, sitting on an even keel, and had settled in the bottom about 5 or 6 feet aft and 6 feet forward. Her cabins and smokestack were gone. According to the diver's testimony the after side of the forecabin, where the bulkhead was, was out, and a plank was out of the starboard quarter, together with the covering board. Part of her stanchions were afloat. The diver at once went down and began jetting a hole under the wreck. He got one hole through and the chain pipe in place by the evening of December 3d. The chain was put through by noon of the next day. The forward chain was through by 5 p. m. on the 5th. To put the other chain through would require only an hour. The wrecking party at once started for Port Huron, reaching that place about 11 p. m. The entire day and nearly all the night of the 6th was spent pumping out the pontoons and getting them ready for service. The wrecking party left Port Huron with the pontoons early in the morning of the 7th and got to the dock near the wreck on the evening of that day, too late to go to work. On the preceding day Nowlin sent one Brown, an experienced wrecker, to act as mate of the Groh during wrecking operations, with the understanding that Brown was to measurably represent appellant, and was to be paid by the latter in case McMorran refused to pay him. Brown went to Port Huron, was employed by McMorran, joined the wrecking party there and went to the wreck with the pontoons, remaining until the wrecking operations were finished. On December 7th, the day the wrecking party reached the dock with the pontoons, Nowlin wired McMorran: "Unless you receive other instructions from me, deliver Ross

to Detroit. Wire progress made." During the 8th, 9th, and 10th the weather was too rough to work. On the 11th the chains under the Ross were picked up, hooked onto the pontoons and were about ready for a lift. Before the lift was completed a strong wind sprang up, making it impossible to go on with the work. Before the wreck was left, the pontoons were sunk from within 10 inches to 2 feet of their tops. Three days later, and as soon as the storm permitted, the party returned to the wreck and found the pontoons had broken loose, one going far away to the eastward and the other lying near the wreck, tipped over, but not against the wreck. Ice had already begun to form. It was decided that it was too late in the season to raise the boat, and the pontoons were with difficulty gotten away and into port. Brown made a personal report to Nowlin of the wrecking operations. On December 19th McMorran wrote Nowlin as follows: "Referring to steamer Myrtie Ross, would say that owing to the constant blowing, the wind and ice going, we are obliged to discontinue operations on the steamer, and shall not be able to do any more until spring, unless weather should turn warm." No reply to this letter was made.

On June 6th following, the wrecking party, after two days "sweeping," found the wreck. The bulwarks, rail, deck frames and afterdeck and the upper works generally were gone. The stem was found cut off a foot and a half above the deck at the hawser pipes, the anchor was pulled way out on the chain, and the rudder was about 25 or 30 feet astern, the boat sitting up straight, sunk in the mud, 10 feet aft and 6 feet forward. By June 18th the Ross was raised. In the operation a hole was cut through the deck and a chain put under the deck beam to assist in pulling the boat out of the mud. On June 18th McMorran wrote Nowlin: "Are you prepared to receive and pay for delivery of the steamer Myrtie Ross? I expect she will be at Marine City today or tomorrow." Nowlin refused to receive the boat or to pay the contract price for raising her, claiming that McMorran had not carried out his contract, and demanded damages for the alleged breach. The boat was libeled for the contract price of \$1,000, together with \$300 additional for six days' services of the Groh during the time Nowlin was declining to receive the Ross. Pending the libel proceedings, the boat was sold to McMorran for \$900. The appellant's answer to the libel alleged an absolute guaranty by McMorran to raise the Ross and to deliver her in good condition at Detroit or Marine City during the fall of 1900; alleged that the libelant had abandoned work on the steamer in December, when it was possible by due diligence to raise and deliver her that fall, and admitted a refusal to pay the contract price until the damages were adjusted. Appellant filed also a cross-libel, setting up the same absolute guaranty to raise and deliver the Ross during the fall of 1900 for the price stated, charging a breach of that agreement, the unnecessary abandonment of work in the fall, and alleging that by reason of defective appliances used and appellee's negligence, including the leaving of the Ross exposed during the winter to the forces of wind, waves, and ice, the boat had been practically ruined, and appellant damaged to the extent of \$8,000.

The district judge found that no unconditional agreement was made by McMorran to raise and deliver the boat that fall, but that the contract was only to attempt to do so, weather and ice permitting; that McMorran began and prosecuted the wrecking operations with due diligence and with care and skill, and was obliged to suspend on December 11th, on account of bad weather and ice; and that the injuries to the Ross were not occasioned by McMorran's negligence or default. Decree was entered in favor of McMorran for \$1,300.

Upon this appeal, the errors assigned are these: (1) That the court erred in ordering and decreeing the recovery by libelant of the sum of \$1,300 and interest on \$1,000 from June 18, 1904. (2) That the court erred in not sustaining appellant's cross-bill. (3) That the court erred in dismissing appellant's cross-bill. (4) That the court erred in not awarding damages in favor of the appellant and against libelant, on appellant's cross-bill.

J. H. Clark, for appellant.

F. H. Canfield, for appellee.

Before SEVERENS and RICHARDS, Circuit Judges, and KNAPPEN, District Judge.

KNAPPEN, District Judge (after stating the facts as above). Rule 11 of the Circuit Court of Appeals (150 Fed. xxvii, 79 C. C. A. xxvii) requires the appellant, in assigning the errors, to "set out separately and particularly each error asserted and intended to be urged." Under the repeated decisions of this court, and of others of the Courts of Appeals the assignments of errors presented are too vague and indefinite to comply with this rule. *P. P. Mast & Co. v. Superior Drill Co.*, 154 Fed. 45, 50, 83 C. C. A. 157; *Deering Harvester Co. v. Kelly*, 103 Fed. 261, 43 C. C. A. 225; *McFarland v. Golling*, 76 Fed. 23, 22 C. C. A. 23; *Smith v. Hopkins*, 120 Fed. 921, 57 C. C. A. 193; *United States v. Lee Yen Tai*, 113 Fed. 465, 51 C. C. A. 299; *United States v. Ferguson*, 78 Fed. 103, 24 C. C. A. 1; *Grape Creek Coal Co. v. Farmers' Loan & Trust Co.*, 63 Fed. 891, 12 C. C. A. 350; *Doe v. Waterloo Mining Co.*, 70 Fed. 455, 17 C. C. A. 190. The rule, however, provides that "the court at its option may notice a plain error not assigned." We have exercised this option, and have examined the record for the purpose of determining whether appellant is entitled to relief under the rule.

1. What was the contract between the parties? This is purely a question of fact, and is so conceded by counsel for both sides. The evidence as to what occurred at the interview between Nowlin and Dieffenbach, on November 27th, is conflicting, the former claiming that an agreement was reached for the raising of the boat that fall, leaving only the question of whether McMorran would take less than \$1,000, while Dieffenbach claims that no terms were agreed upon. The question must largely be decided by reference to the correspondence between and conduct of the parties, and the practical construction thereby placed by them respectively thereon. Considering this correspondence and conduct of the parties, we are satisfied that the contract made by McMorran was not to raise the boat in any event that fall, but to attempt to so raise and deliver her, weather and ice permitting. Among the considerations which prompt us to this conclusion are these: The suggestion in Nowlin's letter of November 30th, that McMorran should proceed to raise the boat at once, scarcely accords with the existence of a guaranty to raise the boat at all hazards during that season. McMorran's letter of December 1st, in which he states merely that he will attempt to raise and deliver the boat, weather and ice permitting, is out of harmony with an alleged understanding on his part that he has guaranteed to immediately raise and deliver the boat. A recognition of McMorran's construction of the contract is further evidenced by the fact that no protest was made by Nowlin against the quitting of the work on December 15th, even upon the receipt of McMorran's letter of December 19th, stating that no more work could be done that fall, and especially in view of the fact of Brown's report to Nowlin of the wrecking operations. We are further impressed by the fact that Dieffenbach had, at the time of his interview with Nowlin, no actual knowledge of the condition of the wreck or of the work to be done upon it, and with the im-

probability that, without such knowledge, and in view of the lateness of the season and the danger of immediate stoppage of the work by weather and ice, an experienced wrecker would have been so apparently imprudent as to enter into a guaranty to raise the boat in any event. It is sufficient to say, without further detail of reasons prompting the conclusion, that, in our opinion, the district judge rightly construed the contract between the parties.

2. Was the failure to raise the boat during the fall due to a lack of diligence in the wrecker? It was certainly the wrecker's duty to exercise reasonable diligence toward effecting the raising of the boat. What is reasonable diligence must be measured by the attending circumstances, taking into account the lateness of the season and the liability to interruption by storm and ice. In this case a higher degree of diligence was required than would have been necessary earlier in the season. The only respects in which it can seriously be suggested that the wrecker failed in his duty of diligence is in not employing two divers for work at the same time, in not carrying on the work of putting chains under the wreck during the night as well as day, and in not having the pontoons available, so as to avoid interruption of the work by going after them. Upon the question of the reasonable requirement of two divers and of a double equipment for day and night work, the testimony of those experienced in the business is conflicting. On the part of the appellant several witnesses testified that in their judgment, at that season of the year and under the circumstances shown, two divers should have been used at the same time and the work carried on both night and day. On the contrary, an equal number of witnesses (aside from Dieffenbach) and of apparently equal competency, testified that under the circumstances shown, and during the work of putting the chains under the boat, preparatory to lifting, it would have been unusual and extraordinary to work two divers at once and to work nights; the drift of some of this testimony being that two divers could not well work to advantage together, and that jetting could not well be carried on at night; some of the witnesses drawing a distinction in those regards between wrecking by means of lightering or patching and deep-water wrecking by pontoons, such as employed here. Upon the whole, we are the more impressed with the contention of the appellee, and are inclined to the view that there was not such apparent exigency as to require what would apparently have been an unusual degree of expedition. Several considerations, apart from the direct testimony of the experts, fortify us in this view: It was greatly to the interest of the appellee to finish the work as speedily as practicable. On December 1st, immediately upon the acceptance of McMorran's terms, the latter started promptly for the wreck, without waiting for reply to his communication, and there is no room for complaint that time was lost by failing to work nights, except during the work of putting the chains under the boat. The testimony does not satisfy us, either through the amount of compensation provided or otherwise, that the parties contemplated the unusual night work by divers.

As to the pontoons: Manifestly, had Dieffenbach taken the pontoons with him when he first went to the wreck, the work of getting

the chains under the Ross would have been delayed by practically the time required to pump out the pontoons, and by the additional time that would be required in getting to the wreck with them, as the Groh or some other boat was evidently needed for pumping out the pontoons, and the small distance between Port Huron and the wreck required but little time for traveling, and this was done nights. The preparation of the pontoons required an entire day and the greater part of the following night. There is, moreover, apparently some force in the suggestion that it could not be surely known until the wreck was examined whether the pontoons could certainly be used, although their use was contemplated; and the work at the wreck would apparently have been hampered to some extent by the necessity of caring for the pontoons while awaiting their use. Unless, therefore, the circumstances were such as to have made it incumbent on the appellee to provide an additional tug and crew for preparing and taking charge of the pontoons, it would not appear that appellee unnecessarily delayed the raising of the Ross by going back after the pontoons. We are not satisfied that the exigencies were such as to require such additional tug and crew, or that such course was contemplated by either party. We are not convinced that the District Judge erred in his conclusion that the appellee had prosecuted the work with due diligence.

3. Is the appellee responsible for the injuries suffered by the Ross after wrecking operations were begun? It follows from the conclusion that lack of diligence in the work of wrecking is not satisfactorily shown, that appellee should not be held responsible for injuries by the elements, as ice and sea, or from passing boats. Appellant contends, however, that substantial injuries were occasioned by the action of the pontoons during the storm which raged from December 8th to 10th, while the pontoons lay near the wreck. The wrecking work having been under prosecution in good faith, the burden is on appellant to show negligence, and the judgment of the wrecker should not be weighed with scrupulous nicety. *Gilman v. The Tyler*, 3 Woods, 111, 113, Fed. Cas. No. 5,446. While there is evidence tending to show that the pontoons were left where they might, through the action of the storm, strike the wreck, and that substantial injuries were caused by such action rather than by the heavy ice or by passing boats, we are strongly impressed with the testimony to the contrary, especially that of the diver, whose means of observation were better than those of any other witness. His testimony related to the condition of the Ross not only before the wrecking operations were begun (before detailed) and again following the storm of December 8th to 10th, but also at the time the wreck was raised in June. His testimony is explicit that the situation of the pontoons was such that they could not have struck the Ross in such way as to cause the damage appearing in the spring. He fortifies this statement by testimony that after the December storm he went down and made the lifting chain fast to the wreck, so he could find it on his return; that at that time the wreck was in substantially the same condition as when it was first examined; that the only damage done by the wrecking operations was the breaking off of the spar. It is not without significance that

Brown, who, as before said, in a measure represented Nowlin in the wrecking operations and who had had two years' wrecking experience, although produced as a witness for appellant, gave no testimony as to the causing of any damage by the pontoons.

On the whole, we are unable to see that the District Judge has erred in his conclusion that the appellant has failed to sustain the burden of proof that the injuries in question were due to the negligence of the wrecker.

The decree appealed from is affirmed.

NOTE.—The following is the opinion of Swan, District Judge, in the District Court:

SWAN, District Judge. The libel in this case was filed to recover compensation for the services of libellant's wrecking outfit in raising the steamer Myrtie M. Ross which was, in the latter part of November, 1900, while crossing Lake St. Clair, laden with a cargo of coal, swamped and sunk. The claim of the libellant is for \$1,300, with interest. A cross-libel was filed by the owner of the Myrtie M. Ross, who alleges that he made a contract with McMorran to raise the steamer for the sum of \$1,000 for which McMorran was to deliver her in good condition at Marine City or Detroit during the fall or winter of 1900, and for such services libellant agreed to pay \$1,000; that the contract was partly oral and partly in writing. The proofs show that on the 27th of November, 1900, Nowlin and one Capt. Carry went to Port Huron for the purpose of getting the necessary aid to raise the boat. Libellant McMorran was not at home, but some negotiations were had between Nowlin and one Dieffenbach, who was the manager or wreck master of the wrecking outfit. Dieffenbach refused to make a price to Nowlin for the services contemplated. Nowlin offered to pay \$800 for the work, but Dieffenbach would not close a contract at that figure without submitting the matter to McMorran. Nowlin and his companion left Port Huron without seeing McMorran, but it was arranged with Dieffenbach that he or McMorran would wire Allen L. Nowlin, the brother of respondent and cross-libellant, at Detroit, the next day, the lowest price for which McMorran would raise the boat. The following day Allen L. Nowlin received from McMorran a telegram addressed to himself at Detroit which reads, viz.: "One thousand dollars is the least." November 30th, two days after the telegram was sent, Allen L. Nowlin wired the Port Huron Wrecking Company, which represented McMorran, "You can have the job raising Ross; letter will follow." The letter of A. L. Nowlin mentioned in the telegram is dated Clarence, Mich., November 30, 1900, and reads as follows:

"Port Huron Wrecking Co.,

"Gentlemen: Telegraphed you this p. m. that I would accept your offer in raising and delivering boat Myrtie M. Ross into port either Marine City or Detroit, will let you know later on which place I wish same delivered at. Will send a man to go with you when you are ready; you to proceed to raise boat at once. Better wire me as soon as you are ready to start so I can send man on. We will require you to put three chains under boat when raising her as we do not wish to have her strained, and I believe this is the understanding with you.

"Yours truly,

A. L. Nowlin."

This correspondence is claimed to constitute the contract between the parties for raising the boat, or, as it is put in the brief of counsel for the Myrtie M. Ross—that is, the verbal agreement made by Arthur W. Nowlin and Mr. Dieffenbach in the presence of Capt. Carry; together with the telegram of the Port Huron Wrecking Company dated November 28, 1900; respondent's telegram of November 30, 1900, and the letter of even date therein mentioned. The theory of this contention is mainly that the Port Huron Wrecking Company's telegram in connection with Nowlin's negotiations with Dieffenbach completed the contract. Nowlin returned to Detroit where he found a letter from McMorran bearing date December 1, 1900, as follows:

"Allen L. Nowlin, Detroit, Michigan.

"Dear Sir: We have your favor of the 30th relative to the raising of the Myrtle Ross. We will attempt to raise and deliver her at Marine City or Detroit, weather and ice permitting, but with the understanding that if the ice is not such that it is safe to go to Detroit that we may have the option of taking her to the nearest point of safety and that the money for raising her, viz., \$1,000, to be paid as soon as the boat is raised and delivered at the nearest point possible from where she now lies. We will start getting chains under her at once in accordance with your wishes. Please let me know at once.

"Yours truly,

Henry McMorran.

Nowlin testifies that he did not receive this letter until some time after he had accepted Mr. McMorran's offer of \$1,000 owing to the fact that he was out of the city. The proofs do not show that McMorran made any offer as respondent claims. On the contrary the letters and telegrams prove that libelant on November 28th wired as Dieffenbach had promised, that \$1,000 would be the lowest price for which he would contract. After the receipt of Nowlin's telegram of November 30th quoted above, and calling his attention to a letter which would follow, McMorran neither wired nor wrote Nowlin any communication except that of December 1, 1900. And while Nowlin's telegram of November 30th says "you can have the job," etc., and the letter of that date, which last could not have reached McMorran until the 1st day of December, 1900, until he, McMorran, wrote the letter of December 1st which is his final and definite action upon the telegram and letter of Nowlin just mentioned, McMorran's letter of December 1st is therefore the answer to Nowlin's telegram and letter of November 30th. He does not contract to raise the Ross, but limits his engagement to "an attempt," conditioned on weather and ice permitting; the payment upon performance of the price to be paid, and the right to deliver the Ross at the nearest safe port if ice prevented taking wreck to Detroit. The letter closes: "Please let me know at once." Nowlin made no answer to this letter or its closing request. Nowlin states that he did not receive it until some days after it was mailed. The fact remains that he received it, and never dissented from or objected to the terms it specified as the conditions on which libelant would undertake the work, nor yet to the qualification of libelant's undertaking contained in the words, "we will attempt to raise and deliver her at," etc. In short Nowlin's letter of November 30th subjoined to his telegram of that date contains certain conditions qualifying the telegram. Libelant answered these with his letter of December 1st stating the terms on which he would attempt the work, etc., and requested an answer. Nowlin failed to answer although he knew that libelant had commenced work on the wreck. Nowlin therefore is estopped to deny that libelant's undertaking was neither absolute nor to be performed in any given number of days and that libelant was working under the terms of his letter of December 1st. McMorran sent his wrecking outfit to the Ross at once on December 1st, and, after working there many days, cold weather and the wind prevented a continuance of the wrecking operations, and the effort to raise the steamer that fall was suspended until spring, when the vessel was raised in the month of June.

It is the claim of the cross-libelant that in the performance of the work in the spring the steamer was greatly injured (although he does not abandon his claim that the work was done under the contract alleged to have been created by the correspondence), and damages are claimed to the amount of \$6,000 for the total loss of the vessel inasmuch as she was so injured that she had to be practically rebuilt. It is also charged that injuries were occasioned by the manner in which the work of the wreckers was done in raising the Ross. Another charge is that the work was not prosecuted with diligence, and that it should have been done in four or five days, and that it could have been done in that time if a larger equipment had been provided and the pontoons had been brought to the work at the time the preparatory work was done upon the steamer to put her in readiness for use of the pontoons. These complaints have been the subject of a large amount of testimony which is conflicting and irreconcilable.

The claim of the libellant included not only the \$1,000 which McMorran agreed to accept and which was to be paid, as he states in his letter of December 1st, as soon as the boat was raised and delivered, but also for six days' delay on the part of Nowlin in not meeting his payment, and detaining the steamer by refusing to accept delivery of the vessel and otherwise, whereby libellant lost the use of the wrecking steamer *Mary Groh* which was used in raising the *Myrtle M. Ross*, the services of which were worth \$50 per day. Many criticisms are made by Nowlin upon the manner in which the work was done, including damages to the boat in the work of raising which are not sustained by the testimony. After the suspension of the work, December 19th, for the winter, because of the weather conditions which prevented its continuance, the steamer *Myrtle M. Ross* lay sunk all winter. The evidence preponderates that the damage she received was caused by the ice during the winter; that it was impossible to continue the work, and that libellant was not in fault for postponing it. Another charge is that libellant was guilty of negligence which prevented the rising of the *Ross* before the close of navigation because the pontoons were not brought down to the wreck when the steamer first came, whereby she was compelled to return and lost a day's work and was not able to complete the work before winter set in. The testimony as to whether conditions from and after December 19th shows that the velocity of the wind and the low temperature were such as to prevent further operations. The wrecking steamer was in charge of libellant's employé, a competent master, and its conduct was committed to his judgment. There is no evidence impugning the wreck master's competency. Indeed, one of the cross-libellant's witnesses testifies that whether the pontoons should have been brought down earlier was a matter upon which judgments might differ. The fact that others would have brought the pontoons to the wreck when the work was begun does not condemn the master's judgment. *The Star of Hope*, 9 Wall. 230.

A further charge is that the failure to raise, before the weather and ice conditions made it impossible, was in part caused by failure to work nights in raising the wreck, and doing the work for which divers were required for that purpose. This ground is negatived, I think, by a preponderance of testimony, that the night work required could not be satisfactorily done, and no fault can be imputed to libellant for not prosecuting the work at night although the season was late. The contract did not call for it, either expressly or by implication; nor did the negotiations had with Dieffenbach at Port Huron according to his own testimony require it. There are other charges less important which are set forth in the cross-libel, but these are not sustained by a preponderance of testimony.

The libellant is entitled to a decree for the amount claimed in his libel, namely, \$1,300, \$1,000 whereof was specified as the compensation which he was to have received upon delivery of the wreck at the designated place, and \$300 for the detention of his wrecking steamer from June 18th to June 24th, inclusive.

The cross-libel must be dismissed with costs. The libellant is also entitled to interest on the \$1,000, and to costs. This compensation is based upon the agreement of the parties evidenced by McMorran's letter of December 1, 1900, which is the measure of his right to recovery for the wrecking operations and for the detention of the wrecking steamer by Nowlin's refusal to accept the *Ross* in the following June.

WESTERN LUMBER CO. v. WILLIS.

(Circuit Court of Appeals, Ninth Circuit. March 6 1908.)

No. 1,466.

1. CONTRACTS—INTERPRETATION—RELATION OF PARTIES.

In the interpretation of a contract, the court may consider the relation of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was made, and determine the intention from the entire agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 752.]

2. SAME—IMPOSSIBILITY OF PERFORMANCE.

Plaintiff agreed to point out public lands to defendant's timber inspector who would estimate the timber, whereupon defendant would acquire it from the government by selecting the same in lieu of forest reservation lands after acquiring the right to make such selection by purchase from persons holding forest reserve lands as authorized by Act Cong. June 4, 1897, c. 2, 30 Stat. 36, and would pay plaintiff \$1 per 1,000 feet of timber on land so pointed out, examined, and estimated, less the cost of purchasing the reservation scrip necessary to acquire such lands. Held that, as such act constituted a standing offer by the government to exchange any of its lands vacant and open to settlement for a like quantity of similar land within a forest reservation, such contract was not objectionable as impossible of performance; the only lands which defendant could acquire by exchange under such act being lands vacant and open to settlement, the title of any of which defendant could acquire by the exchange of title to forest reserve lands.

3. SAME—ILLEGALITY—PUBLIC POLICY.

A contract by which plaintiff agreed to point out timber lands belonging to the United States, subject to exchange for reservation lands and which defendant agreed to procure by purchasing the title to reservation lands and exchange the same for the lands pointed out, was not illegal as against public policy because the right of exchange created by Act Cong. June 4, 1897, c. 2, 30 Stat. 36, was not assignable; no assignments being contemplated by such contract.

4. FRAUDS, STATUTE OF—"CONTRACTS FOR BROKER'S SERVICES."

A contract for plaintiff's services in the discovery and pointing out of public timber lands to defendant's timber inspector, who was to estimate the timber on such lands, and procure title thereto in defendant by exchanging forest reserve lands therefor, and pay plaintiff a certain sum per 1,000 feet of timber on the land, less the cost of reservation scrip necessary to acquire the lands, was not a contract for brokers' services in purchasing land within the Montana Code, requiring contracts for broker's services to be in writing.

5. MASTER AND SERVANT—ACTION FOR COMPENSATION.

Where a complaint for timber cruiser's services alleged that plaintiff was to be paid on certain terms for all land that he should discover and point out to defendant's timber inspector, which land was to be acquired by defendant in lieu of forest reserve lands under Act Cong. June 4, 1897, c. 2, 30 Stat. 36, and Act June 3, 1900, c. 791, 31 Stat. 614, which limited the land subject to such exchange to vacant nonmineral lands open to settlement, plaintiff's testimony that the lands included were those open to entry excluding unsurveyed lands, mineral lands, Northern Pacific Railroad lands, lands appropriated or selected by others, lands not subject to entry under the timber and stone act, and lands not patented to the defendant, did not create a variance between the complaint and the proof.

6. SAME.

Where plaintiff contracted to point out public timber lands to defendant's timber inspector who was to estimate the timber thereon and pay plaintiff \$1 per 1,000, less the cost of reservation scrip necessary to be purchased in order to obtain the lands pointed out by exchange, the contract excluded lands not accessible or not sufficiently timbered to justify their exchange, and hence there was no variance between the contract pleaded and plaintiff's testimony that lands that were not estimated by defendant's timber inspector, and which were not accessible or not sufficiently timbered to justify their purchase, were to be excluded.

7. SAME—QUESTION FOR JURY—PRESUMPTIONS.

In an action for breach of a timber cruiser's contract only covering lands sufficiently timbered to justify exchange for reservation lands, whether certain tracts were in fact excluded for failure to contain a sufficient quantity of timber was for the jury, and it would be presumed, when the jury determined that a tract was excluded, it also excluded the testimony relating to the timber thereon.

8. SAME—CONTRACT—BREACH BY DEFENDANT.

Where a timber cruiser's contract provided that defendant should pay \$1 per 1,000 for timber on land pointed out by plaintiff which defendant would acquire by exchange for reservation scrip, less the cost of purchasing the scrip, etc., plaintiff was entitled to recover for lands pointed out which were subsequently patented to another because of defendant's failure to obtain title from the United States by reason of its delay and without fault on plaintiff's part.

9. SAME—EVIDENCE.

Where a timber cruiser's contract required him to point out public timber lands, subject to entry to defendant's timber inspector, whereupon such inspector would estimate the timber on the lands according to which estimate plaintiff was to receive payment, and such inspector, though a witness, testified that he had lost his field book, and had no estimates made by him in 1900 which had been sent to defendant's agent who testified that he did not know what had become of them, plaintiff was entitled to prove by another estimator who estimated the timber on the land in that year for another that the land averaged 400,000 feet to each 40-acre tract.

In Error to the Circuit Court of the United States for the District of Montana.

John M. Evans, W. M. Bickford, George F. Shelton, and Charles A. Ruggles, for plaintiff in error.

Elmer E. Hershey, Thomas C. Marshall, and Henry C. Stiff, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This was an action at law by the defendant in error (plaintiff below) to recover from the plaintiff in error 'defendant below) money alleged to be due upon a contract. The contract set forth in the complaint is as follows:

"That on the 1st day of January, 1900, the said defendant made and entered into a contract with the said plaintiff, whereby the said defendant agreed with the said plaintiff that all lands that he would discover and point out to one G. W. Sparks, a timber inspector in the employ of said defendant, that the said defendant would have the said Sparks estimate the said timber on such lands, and that all lands so discovered and pointed out and indicated to the said Sparks, timber inspector of the defendant, aforesaid, the said defendant would acquire and purchase said land from the government of the United States, by selecting the same in lieu of forest reservation lands, the right to make which selections the said defendant would acquire by purchase from divers and sundry persons of forest reserve lands, said location or selection being under the act of June 4, 1897, commonly known and what is called forest reservation scrip, and that the said defendant would pay to the said plaintiff one (\$1.00) dollar per thousand feet for every thousand feet of timber on lands so pointed out, examined and estimated by the said Sparks, less the cost of purchasing the scrip necessary to select, locate and acquire said lands."

The breach of the contract, as charged in the complaint, is as follows:

"That, pursuant to said contract, this plaintiff began work for the said defendant in January, 1900, and in and about the performance of the contract as agreed to be done and performed by him, and in pursuance thereof discovered, pointed out, and indicated to the said Sparks lands meeting all the requirements of the said contract, and the same were inspected and estimated by the said Sparks and the timber found to be standing thereon amounted to seventy-three million five hundred thousand (73,500,000) feet, which at one

(\$1.00) dollar per 1,000 feet, would amount to seventy-three thousand five hundred (\$73,500) dollars; that the cost of scrip so-called, or, in fact, forest reservation lands, necessary to be relinquished to acquire the above timber lands at the time was and is forty-four thousand one hundred (\$44,100) dollars, leaving a net balance due to the said plaintiff on account thereof of the sum of twenty-nine thousand four hundred (\$29,400) dollars."

The defendant in its amended answer denied the existence of any contract between the plaintiff and the defendant as set forth in the complaint; denied that the plaintiff had done or performed any work under any such contract for the defendant, or that there was any amount due or owing from the defendant to the complainant as alleged in the complaint. The statute of limitations was also pleaded as a separate defense. In the reply the plaintiff denied the affirmative allegations of the amended answer.

The case was tried by the court with a jury and resulted in a verdict for the plaintiff in the sum of \$3,650. The case is here upon writ of error.

Before the introduction of testimony, counsel for the defendant objected to the introduction of evidence upon the ground that the complaint did not state a cause of action against the defendant. The objection was overruled, and the ruling of the court is assigned as error. It is contended that the contract alleged in the complaint was upon its face impossible of performance, and therefore void, for the reason that the consideration of the contract was to be determined exclusively upon the basis of the purchase by the defendant from the government of the United States of all lands pointed out by the plaintiff, and that, as the defendant could not compel the United States to sell all of the lands pointed out by the plaintiff, the contract was impossible of execution. In the interpretation of a contract, the court may consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was made. *Rock Island Ry. Co. v. Rio Grande R. R.*, 143 U. S. 596, 609, 12 Sup. Ct. 479, 36 L. Ed. 277. In construing a contract, the intention is to be collected, not from detached parts of the contract, but from the whole of it. *Canal Co. v. Hill*, 15 Wall. 94, 103, 21 L. Ed. 64; 9 Cyc. 579. The method of procedure which the defendant was to pursue in purchasing from the government the lands pointed out by the plaintiff is stated in the contract set forth in the complaint. The lands were to be purchased from the government by selecting the same in lieu of forest reserve lands, and the right to make such selections the defendant was to acquire by the purchase of lands from the owners of forest reserve lands. The exchange was to be made under Act June 4, 1897, c. 2, 30 Stat. 36, which reads:

"That in cases in which a tract covered by * * * a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected."

We find this act to be a standing offer on the part of the government to exchange any of its land that is vacant and open to settle-

ment for like quantity of similar land within a forest reservation for which it had previously issued a patent. *Olive Land & Development Co. v. Olmstead* (C. C.) 103 Fed. 568, 573; *Cosmos Exploration Company v. Gray Eagle Oil Co.* (C. C.) 104 Fed. 20, 40-41. There is also a provision relating to the terms upon which lands vacant and open to settlement may be exchanged for an unperfected bona fide claim within a forest reservation, but that provision has no bearing in this case. Manifestly the only lands which the defendant could acquire by exchange with the United States under the act of June 4, 1897, were lands of the United States that were vacant and open to settlement; and the title to all or any of such lands the defendant could acquire by the exchange of title to forest reserve lands. The contract in this respect was not only possible of performance, but the United States invited all persons holding title to the lands within forest reserves to come forward and exchange such title for title to any lands that it might have elsewhere vacant and open to settlement. It was the policy of the government to make such exchanges that the forest reserves might be free from occupation by settlers; and the services which the plaintiff contracted to perform in discovering and pointing out lands of the United States vacant and open to settlement were to be rendered for the purpose of enabling defendant to make selections of such lands to be received in exchange for the title to forest reserve lands. There is certainly nothing in such a contract legally impossible of performance.

It is further objected that the contract is illegal as being against public policy, and therefore void. It is said in support of this objection that the right created by the act of June 4, 1897, is a personal right, and is not assignable. Decisions of the Secretary of the Interior are referred to as establishing this rule. *John K. McCornack*, 32 Land Dec. Dep. Int. 578; *Albert L. Bishop*, 33 Land Dec. Dep. Int. 139; *Heirs of George Liebes*, 33 Land Dec. Dep. Int. 458. But the contract under consideration does not provide that the defendant shall acquire the title to lands of the United States pointed out by the plaintiff by the exchange of forest reserve lands which it is to acquire by assignment. On the contrary, it is specifically provided that the defendant is to acquire the forest reserve lands by purchase. It was to become the owner of the lands with full title, and such lands were to be exchanged in one transaction for the full title of lands of the United States elsewhere vacant and open to settlement. The act of June 4, 1897, does not provide that the owner of lands in forest reserve may have a floating right to select lands elsewhere, or that there shall be issued to him a certificate of a right of selection. No scrip in any form is issued by the United States in exchange for title to forest reserve lands. The Interior Department, in the execution of this law, has required from the beginning that a relinquishment by the owner of forest reserve lands and a selection by him covering all the relinquished land shall be presented together, and the matter disposed of as a single transaction. The contract in terms referred to such a transaction, and was therefore legal.

It is next objected that the contract was for the purchase of land, and that, in order to authorize a person to act as agent for another in

purchasing land, the contract, under the Civil Code of Montana, must be in writing. The contract was for services to be rendered by the plaintiff in the discovery and pointing out of lands to a timber inspector who was to estimate the timber on such lands. The plaintiff was in no sense employed as an agent or broker to negotiate for the purchase of the forest reserve lands, nor was he employed to negotiate with the officers of the United States for the exchange of such lands for lands of the United States. This was the business of the defendant. It was to acquire the forest reserve lands by purchase, and then to exchange such lands for lands vacant and open to settlement discovered and pointed out by the plaintiff. The plaintiff did not undertake to bring together the defendant and the owners of forest reserve lands, nor the defendant and the officers of the United States with respect to the transaction mentioned in the contract, nor did he undertake to render any service in the purchase and exchange of titles. His services, as he stated, were confined to the discovery and pointing out of lands to defendant's timber inspector.

It is next objected that there is a fatal variance between the contract as set forth in the complaint and the contract as described by the plaintiff's testimony. This objection is based upon the provision of the contract alleged in the complaint that the plaintiff was to be paid upon terms named for "all land that he would discover and point out to one G. W. Sparks, a timber inspector then in the employ of the said defendant." In plaintiff's testimony he stated that the lands included in the contract were those that were open to entry, and he excluded unsurveyed lands, mineral lands, Northern Pacific Railroad lands, lands appropriated or selected by others, lands that were not subject to entry under the timber and stone act, and lands that were not patented to the defendant. But the contract set forth in the complaint had a further provision identifying the land to be acquired by the defendant as lands to be selected in lieu of forest reserve lands under Act June 4, 1897, c. 2, 30 Stat. 36. By a subsequent act, approved June 6, 1900 (31 Stat. 614, c. 791), it was provided that all selections of land in lieu of a tract covered by an unperfected bona fide claim, or by a patent, included within a public reservation, as provided in the act of June 4, 1897, should be confined to vacant surveyed nonmineral public lands which are subject to homestead entry, not exceeding in area the tract covered by such claim or patent, provided that nothing in the amendatory act should be construed to affect the rights of those who previous to October 1, 1900, should have delivered to the United States deeds for lands within forest reservations and made application for specific tracts of lands in lieu thereof. The act of June 4, 1897, as amended, plainly excluded the lands described by the plaintiff in his testimony as not within the terms of his contract. And, as the lands described by plaintiff as being excluded from the contract were not vacant lands open to settlement under the act of June 4, 1897, or the amendatory act of June 6, 1900, there was no variance between the contract as alleged in the complaint and the contract as described by plaintiff in his testimony.

It is further objected that the plaintiff in his testimony excluded lands that were not estimated by the timber inspector, lands that were not accessible, and lands that were not sufficiently valuable for the timber standing thereon to warrant their purchase, and that there was a variance in this respect between the contract set forth in the complaint and the contract described by the plaintiff in his testimony. The contract as set forth in the complaint, interpreted reasonably and as a whole, also excludes such lands. The lands were to be discovered and pointed out by the plaintiff to a timber inspector who was to estimate the timber on such lands. Manifestly lands upon which there was no timber were not to be inspected, and were therefore not within the contract. But the fact that lands were discovered and pointed out by the plaintiff and were timber lands of the United States vacant and open to settlement did not necessarily bring them within the terms of the contract. They were to be selected by the defendant, and it was to pay the plaintiff, for services in discovering and pointing out such lands, \$1 per 1,000 feet of timber on such lands examined and estimated by the timber inspector, less the cost of purchasing the forest reserve lands necessary to locate and acquire said lands. If lands discovered and pointed out by the plaintiff did not have an estimated quantity of timber sufficient to pay these expenses, plaintiff's services would be idle and useless and without any compensation. It is therefore clearly within the terms of the contract that the lands plaintiff would discover and point out should be estimated by the inspector, that they were to be accessible lands, and lands sufficiently valuable for the timber standing thereon to warrant their purchase. It is also equally clear that lands that did not come within these requirements were excluded from the terms of the contract as set forth in the complaint. There is, therefore, no variance between the contract and plaintiff's testimony in this respect.

A number of objections are made that testimony was admitted as to the amount of timber standing upon certain tracts of land which it is claimed by the defendant were not included in the contract. But whether such lands were in fact excluded from the contract was a question of fact for the jury to determine from the testimony, and this testimony was directed to specific subdivisions of the various sections of land, as was also the testimony concerning the standing timber on such subdivisions. The presumption, therefore, is that, when the jury determined that a tract of land was excluded from the contract, it also excluded the testimony relating to the timber on such lands.

It is objected that testimony was admitted with respect to the timber standing on certain sections of land discovered and pointed out by the plaintiff to defendant's timber inspector, but selected by one Daly for a rival corporation, and for which Daly obtained patent from the government. This testimony was admitted on the claim of plaintiff that defendant had an opportunity to acquire the title to these lands between the time they were pointed out by the plaintiff and their selection by Daly, and that it was no fault of the plaintiff that defendant failed to secure title to these lands. The plaintiff claimed that, having performed his part of the contract, these lands were included within its terms. The question was one of fact for the jury, and the court

properly submitted it to the jury for determination. The claim of the defendant that the lands were unconditionally excluded from the terms of the contract because no patent was obtained by the defendant for the lands disregards the question of fact whether the defendant had used due diligence in proceeding to obtain a patent for the lands.

It is further objected that under the contract the estimate of Timber Inspector Sparks as to the quantity of timber on the several tracts of land inspected by him was conclusive; that notwithstanding this provision of the contract the court admitted the testimony of one Vogel as to the amount of timber on certain tracts of land selected by Daly, and the court further informed the jury in its instructions that Vogel placed the average upon the Daly selections at 400,000 feet to 40 acres, and that such estimate might be used by the jury as the basis for the lands embraced in the Daly selections. Sparks was a witness for the plaintiff on the trial. He testified that he had lost his field book, and that he had no estimates made by him of the timber in 1900; that he made his report to McLaughlin, the agent of the defendant. McLaughlin was called as a witness for the defendant, and testified that they had received estimates from Sparks for certain tracts of land, but did not know what had become of them. Sparks testified as to estimates made by him in 1906. The witness Vogel who was called by the plaintiff testified to estimates made by him in the year 1900 of the timber on the Daly selections. He stated that the average was 400,000 feet to each 40-acre tract. The estimates made by the witness appear to have been made about the same time as the first estimate made by Sparks, and, as far as appears from the record, was the best evidence available as to the timber on these sections in the year 1900 when the contract was entered into between the plaintiff and defendant. We see no error in admitting this testimony or in submitting it to the jury with respect to the Daly selections.

It will not be necessary to discuss the remaining assignments of error. The questions involved are substantially the same as those we have been considering, or relate to questions of fact submitted to the jury by the court with proper instructions.

The judgment of the Circuit Court is affirmed.

KENTUCKY DISTILLERIES & WAREHOUSE CO. v. LILLARD et al.

(Circuit Court of Appeals, Sixth Circuit. March 18, 1908.)

No. 1,707.

1. ~~APPEAL AND ERROR—EXCEPTIONS, BILL OF—SETTLEMENT—NOTICE—RECORD.~~

Notice of the settlement of a bill of exceptions being necessarily given by one counsel to the other would not ordinarily appear in the records of the court.

2. ~~EXCEPTIONS, BILL OF—TIME—EXTENSION—MOTION FOR NEW TRIAL.~~

Where a motion for a new trial has been made or some other relief against the judgment which the court has power to grant has been prayed, and the court, instead of dismissing the motion, holds it for further consideration and disposition at a subsequent term, the judgment is not final until the expiration of the term at which the court disposes of the objec-

tions made thereto, and hence a bill of exceptions settled within that term is in time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, § 69.]

3. CONTRACTS—CONTEMPORANEOUS CONSTRUCTION.

When the construction of a contract is in doubt, the construction which the parties have placed thereon during the course of its execution may be applied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 753.]

4. CUSTOMS AND USAGES—PROOF.

Less distinct and certain proof of the existence of a custom is required when the parties in making their contract apparently have in mind a usage which, if tangible, may not be so old or universal and uniform as it must be to warrant a presumption that the parties knew the custom, and contracted with reference thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs and Usages, §§ 41-46.

Presumptions as to customs and usages, see note to *Great Western Elevator Co. v. White*, 56 C. C. A. 394.]

5. SAME—FINDINGS—EVIDENCE.

Evidence *held* to justify a finding that a contract for the sale of distillery slops to be delivered by the distillery company to cattle feeders at the feeding lot, which had been leased to the distilling company, was made subject to a custom or usage requiring such company to equip the feeding lot with pens, troughs, tanks, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs and Usages, §§ 41-46.]

6. SALES—CONSTRUCTION OF CONTRACT—DELIVERY.

A contract for the sale of distillery slops for feeding provided that the distillery company would sell and deliver, and defendants would purchase, receive, and accept, at the feeding lot recently leased by the distilling company the slop, etc.; and another paragraph declared that defendants should have the privilege of using the necessary troughs and tubs which the distilling company was to place in the feeding lot so leased. *Held*, that such provisions fairly implied a duty on the part of the distilling company to place the tubs, troughs, etc., in a suitable manner for conducting the feeding, and that they should be connected with the tanks and tubs by pipes in the usual manner.

7. DAMAGES—CONTRACT—BREACH.

In an action for the price of distillery slops to be used for feeding, defendant counterclaimed that, by reason of plaintiff's failure to furnish the feeding lot with sheds, tanks, troughs, pipes, division fences and other facilities for feeding cattle therein, defendant's cattle to the number of 1,100 had greatly suffered from hunger, exposure, and disease, from which many of them died, and the rest were much diminished in weight and value from what they would have been if the lot had been properly equipped. There was evidence that 67 of the cattle had died from starvation and from crowding in great numbers around the few troughs that had been furnished, and of their value. It was also shown that, 1,340 failed to fatten to the extent they might reasonably be expected to do, with evidence of such extent, and that these cattle became thin and poor and could not be sold for more than 75 cents per hundred pounds less than if they had attained the condition they would have attained under conditions required by the contract, and that extra time and labor was necessary and bestowed, and that extra feed had been supplied to save the failing animals. *Held*, that such damage was not objectionable, as either speculative or remote.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 65-70.]

8. SAME—EXCESSIVENESS.

A verdict for defendants on such counterclaim for \$7,000 was not so grossly excessive as to permit a court of review to interfere.

9. SAME—DUTY TO MITIGATE DAMAGES.

Where a distilling company under a cattle-feeding contract was bound to construct certain furnishings and fittings in the feeding lot, but failed to do so, the cattle owner was excused from himself providing such furnishings in order to mitigate his damages by the distilling company's repeated promises to remedy its neglect, so long as the cattle owner had ground to expect that such promises would be fulfilled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 124-132.]

In Error to the Circuit Court of the United States for the Eastern District of Kentucky.

Wm. M. Bullitt, for plaintiff in error.

L. C. Willis and T. L. Edelen, for defendants in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The plaintiff in this cause brought suit to recover the balance due from the defendants on a contract for supplying them with slops from its distillery, for cattle feeding. The defendants admitted the execution of the contract, and that the slops had, in a way, been supplied; but advanced a counterclaim based on allegations that the plaintiff had not made such delivery as it was bound to do by the terms of the contract, and had otherwise failed to perform its stipulations; for which they demanded damages, to be offset against the demand of the plaintiff, to the extent of its demand, and a judgment for the overplus. This counterclaim was rested upon the ground that the plaintiff was to furnish the feeding lot with sheds, tanks, troughs, pipes, division fences, and other facilities for feeding cattle in it, which it had failed to do; and that in consequence of this neglect their cattle, to the number of about 1,100, had greatly suffered from hunger, exposure, and disease, from which many of them died, and the rest much diminished in weight and value from what they would have been if the feeding lot had been properly equipped. The plaintiff demurred to the counterclaim, and the demurrer was sustained. The defendants declining to plead further, final judgment was entered, and the defendants brought the record here for review on a writ of error. The judgment was reversed. 134 Fed. 168, 67 C. C. A. 74. The parties pleaded to issues on the merits. A trial thereon by a jury has been had, resulting in the establishment of the counterclaim by a verdict and judgment for the defendants for the sum of \$7,000; and the case is now brought here by the plaintiff. Counsel for defendants make a preliminary objection to the bill of exceptions, and move to strike it from the record. The objection is a serious one, because the bill of exceptions is indispensable to any effective review of the rulings of the court below.

The facts on which the motion is made are these: A judgment in favor of the defendants for \$7,000 was entered in the usual form on October 4, 1905. On the following day, the court being still in session, the plaintiff entered a motion for a new trial, and the entry on the journal was "the court not being sufficiently advised on said motion takes

time." The court thereupon assigned the motion for argument on the 3d day of April, 1906. The motion was argued by counsel for both parties at a session of the court at Covington, before the commencement of the next term at Frankfort where this cause was pending. The next term of the court at that place passed without any proceedings in this cause; and nothing further was done until February 27, 1907, when an order was entered denying the motion for a new trial, and giving the plaintiff 60 days within which to prepare and file a bill of exceptions. On the 17th of April, 1907, a bill of exception was presented to the court by the plaintiff and was allowed by the judge, and was filed and ordered to be made a part of the record in the cause. And an entry to that effect was made upon the journal of that day. It is stated by counsel for defendants at the bar that the bill was allowed without any notice of its intended settlement, and in vacation. From the record it would seem, however, that the court was in session when the bill was presented, and, on being allowed by the judge, was ordered to be made part of the record, and the record must control. We do not intend any implication that we think a bill of exceptions may not be settled by the judge in vacation. As to whether notice was given of its intended settlement, or whether counsel for plaintiff was present, the record is silent. Inasmuch as the notice if given would pass from counsel for one party to those of the other, it would not ordinarily appear in the records of the court. No motion was made in the court below for amendment of the bill; nor was any complaint made there, nor is there here, that the bill does not truly and fairly represent the proceedings on the trial of the cause. The principal ground on which the motion to strike it out is based is that the court lost control over the case upon the lapse of the term at which the judgment was entered. This is undoubtedly the rule, if at the expiration of the term the judgment continues final. But if a motion for a new trial has been made or some other relief against the judgment which that court has power to grant has been prayed, and the court, instead of dismissing the motion, holds it for further consideration and disposition at a subsequent term, the judgment is not final, but subject to the further action of the court until the expiration of the term at which the court disposes of the objections made to the judgment. It is sufficient to cite the cases of *Merchants' Ins. Co. v. Buckner*, 98 Fed. 222, 39 C. C. A. 19, a case decided by this court, and the opinion by Judge (now Justice) Day in discussing this subject, and *Minahan v. Grand Trunk Western Ry. Co.*, 138 Fed. 37, 41, 70 C. C. A. 463; citing *Ward v. Cochran*, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195. The motion must be denied.

The contract and the pleadings are fully stated in the report of our former decision (134 Fed. 168, 67 C. C. A. 74), to which, to save time and space, we refer for details. Epitomized, the facts are that on November 18, 1902, the plaintiff had a distillery in Anderson county, Ky., the refuse from which it was intended, as is customary, to utilize by feeding it to cattle. The defendants owned a 30-acre lot adjacent to the distillery, and proposed to engage in cattle feeding. And on that day, and the day following, the parties—that is, the distillery company and the Lillards—made two written agreements. By one, the Lillards

leased their lot for the term of 10 years to the company at an annual rental of \$250 for the purpose of enabling the company to furnish cattle-feeding grounds to those who would purchase the slops and use the grounds for the feeding. The other was a contract whereby the company agreed to furnish the Lillards with all the slop made from the daily consumption of 1,200 bushels of grain from December 25, 1902, to May 25, 1903, and deliver it at the feeding lot which it was leasing from the Lillards. The principal controversy is over the construction and effect of the stipulation in the contract about the delivery of the slop to the defendants; and more particularly upon the effect of a usage or custom which, as the defendants pleaded, existed in that locality, requiring the seller of slops to furnish to the vendee a feeding lot provided with sheds, tanks, troughs, pipes for delivering the slops to the troughs, and other facilities necessary for the use of the lot for feeding the slop to cattle. And we may remark, in passing, that it was because of the error of the court below in holding that such a custom was repugnant to the express stipulations of the contract we reversed the judgment on the former hearing. Upon the trial which has since been had, the lease and the contract were put in evidence. A considerable number of witnesses were produced by both parties who gave testimony concerning the existence of the usage which the defendants claimed to have existed, and further testimony was given in regard to the fault of the plaintiff in neglecting to furnish the grounds with the facilities for the delivery and feeding of the slop as it was claimed it should have done, and the damages resulting therefrom. Evidence was also given in regard to the failure of the defendants to relieve themselves from the consequences of the neglect of the plaintiff, by themselves procuring and constructing in the yard the required furnishings. Several exceptions were taken by the plaintiff to the rulings of the court upon the trial. But counsel for the plaintiff has brought the questions involved within easy compass by stating them as follows:

"(1) There should have been a peremptory instruction in favor of the Kentucky Company, because the Lillard Bros. did not prove the existence of any custom or usage which required the Kentucky Company, to equip the feeding lot with pens, troughs, tanks, etc. (2) The damages are not sufficiently proven, are too speculative and remote, and the judgment is grossly excessive. (3) Lillard Bros. did not use reasonable exertion to save themselves from the loss arising from the alleged breach of the contract, and therefore they cannot charge the Kentucky Company with damages which with reasonable expense and exertion they could have prevented."

With regard to the first of these questions, it must be taken to be whether there was any evidence having substance and which might reasonably convince the jury of the fact that the alleged custom existed. For neither could the court below, nor could this court, in such circumstances, weigh the evidence in its own balance. If the testimony was pertinent and had significance the jury were the sole judges of its value. *Mt. Adams, etc., R. Co. v. Lowery*, 74 Fed. 463, 20 C. C. A. 596; *Travelers' Insurance Co. v. Randolph*, 78 Fed. 754, 24 C. C. A. 305; *Minahan v. Grand Trunk Western Ry. Co.*, *supra*. To begin with, it appears that the distilling company leased this lot "to be used as a cattle feeding lot," and there was granted to it "the right

to lay upon it pipes and to build sheds and houses for the storage of forage." The defendants were to build an inclosing fence, but it was distinctly understood that all inside or partition fences should be built at the expense of and maintained solely by the company. If the company should furnish slop to defendants, no rent should be paid for that year. The company was given the privilege of removing "all pipes, fixtures, buildings and material which it may place thereon during the continuance of this lease" at its expiration. The lessors were given the refusal during the continuance of the lease to buy the slop at its market price—that is, at the price paid for other slop in Kentucky to be fed in similar conditions. From all this it might be fairly inferred that the company expected to sell its slop to cattle feeders during the time the lease was to run. It contracted to give at all times the refusal to the Lillards of the slop at the market price, and to put in the division fences, and expressly secured the right to lay pipes and build buildings as it might deem necessary in the conduct of said business—that is, the cattle-feeding business. This did not make it obligatory upon the company to build any structure upon the land or do anything else to it, unless perhaps it should sell slop to the Lillards. But it has some significance in showing its understanding that if it should sell slop to cattle feeders, the company would be required to fit up the lot for the business. And there was evidence tending to show that after the contract was made, and after the defendants had brought their cattle into the lot, they called the company's attention to the fact that the furnishings had not been supplied, and that the company, not denying its obligation, repeatedly promised to put them in. Now, as the contract did not expressly require that the company should furnish the fittings, it could only have been moved to recognize its obligation by a knowledge that it was customary for the distiller to do that, and that it would be expected as an incident to the contract. When the construction of a contract is in doubt, the construction which the parties put upon it during the course of its execution is a very safe guide. *Columbus, H. V. & T. Ry. Co. v. Pennsylvania Co.*, 143 Fed. 757, 74 C. C. A. 647. Less distinct and certain proof of the existence of a custom is required when the parties in making their contract apparently have in mind a usage which if tangible may nevertheless be not so old or so universal and uniform as it must be to warrant a presumption that the parties knew the custom and contracted with reference to it. The testimony of the witnesses in regard to the usage in question did not in all respects quite agree, but there was a general trend in the proof that it was usual to expect that in ordinary circumstances—that is, when, as here, the full market price was paid—the seller of the slop would supply the conveniences for feeding, though the rule would be different if the price was diminished to such an extent as to balance the cost of supplying them, in which case the vendee would be expected to supply them. And we think that the proof of the prevalence of such a usage and of the fact that the parties had it in mind in making their contract was sufficient to warrant the jury in giving it effect in their verdict. And, further, it may be observed that there seems room for the application of the rule that when one of the parties knows that the other party understands it to mean something which

is possibly within the range of its terms, the contract shall be taken in that sense. The contract was that the first party "subject to all the terms and conditions hereto will sell and deliver, and second party will purchase, receive and accept at the feeding lot recently leased from W. F. Lillard * * * the slop," etc. This does not define any particular place in the lot. It might mean in the troughs where the cattle were to find it, and if the latter, it might mean that tanks, tubs and pipes would be necessary for its distribution. The fourth paragraph of the contract is that, "second party shall have the privilege of using the necessary troughs and tubs which first party is to place in the feeding lot leased from W. F. Lillard." The necessary tubs and troughs were to be placed in the lot by the company. This would seem fairly to imply that they should be placed in a suitable manner for conducting the feeding, and that they should be connected with the tanks and tubs in such a way as to make them usable, and the usual way was by pipes.

2. It is said that the damages were not sufficiently proven; that they are too speculative and remote; and that the judgment is grossly excessive. This contention is so groundless that it may be dismissed with a few words. There was evidence that 67 of the cattle died from starvation, and from crowding in great numbers around the few troughs, and of their value; that 1,340 failed to fatten, to the extent they might reasonably be expected to do with the quantity of feed fed to them, and the extent was proved; that these cattle became thin and poor, and could not be sold for more than 75 cents per 100 pounds less than if they had attained the condition which would have reasonably been expected if the conditions had been proper; that extra time and labor became necessary and was bestowed; and that extra feed had to be supplied to keep up the failing animals and save them. From the testimony shown in the record, we think the jury might have given the defendants a larger verdict than they did. And the damages were not remote. They were the natural and probable result of conditions for which the plaintiff was responsible. If the damages seem large, they are not, so far as we are permitted to judge, out of proportion to the fault.

3. In substance, this allegation of error is that the defendants did not take measures to remedy the fault of the plaintiff by supplying the proper furnishings themselves, and thereby mitigate the damages. The rule of law thus appealed to is certainly well settled. *Lawrence v. Porter*, 63 Fed. 63, 11 C. C. A. 27, 26 L. R. A. 167; *Warren v. Stoddart*, 105 U. S. 224, 26 L. Ed. 1117. And the court gave it to the jury; but with the modification, which the evidence suggested, that if the failure of the defendants to take such action was fairly attributable to the circumstances that upon repeated requests the plaintiff promised from time to time to remedy his neglect by putting in the furnishings, such facts would excuse the defendants so long as they had ground for expecting the plaintiff would do its duty. This modification of the rule was also correct. But a party who grounds his complaint upon an allegation that the other party was at fault in confiding in his representations and promises is not entitled to much favor, and the burden is upon him to show, at least, from what time the other should

have abandoned his faith, and set about retrieving his error and minimizing the damages. *Lillard v. Kentucky Distilleries, etc., Co.*, 134 Fed. 178, 67 C. C. A. 74, and the cases there cited. Not only is this burden not sustained, but there is no exception and assignment of error which properly presents any ruling of the Circuit Court upon any other relevant point of law upon this subject which we can review.

The judgment should be affirmed, with costs.

WATER, LIGHT & GAS CO. V. CITY OF HUTCHINSON.

(Circuit Court of Appeals, Eighth Circuit. March 9, 1908.)

No. 2,675.

1. ELECTION OF REMEDIES—INCONSISTENCY OF ALTERNATE REMEDIES.

Where plaintiff sued a city on an express contract for lighting and was defeated, such suit did not constitute an election of remedies precluding plaintiff from thereafter maintaining a suit on a quantum meruit for the reasonable value of the service rendered, such remedies not being inconsistent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Election of Remedies, §§ 12-15.]

2. JUDGMENT—RES JUDICATA—NATURE OF ACTION.

Where plaintiff was defeated in a suit on an express contract for lighting on the ground that the contract had not been substantially performed, the judgment rendered in such suit was not *res judicata* against plaintiff's right to maintain a subsequent suit on a quantum meruit under the rule that when judgment goes for the defendant in an action on an express contract on the ground that the contract had not been performed, such judgment is not a bar to a second action to recover the reasonable value of the same service.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1089, 1090, 1234-1241.]

3. SAME—REMEDY CHOSEN BY MISTAKE.

The fact that a party through mistake attempts to exercise a right to which he is not entitled or has made choice of a supposed remedy which never existed, and pursued it until the court adjudged that it never existed, does not preclude him from afterwards pursuing a remedy for relief, to which in law and good conscience he is entitled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1089, 1090, 1234-1241.]

4. JUDGMENT—ESTOPPEL—DIFFERENT DEMAND.

A judgment in a former cause will not operate as an estoppel in an action on a different claim or demand unless the matters actually litigated and determined are the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1234-1247.]

In Error to the Circuit Court of the United States for the District of Kansas.

Frank Doster and H. S. Lewis, for plaintiff in error.

C. M. Williams and A. C. Malloy (F. F. Prigg, on the brief), for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. Broadly stated, the question for decision on this record is whether or not, under the facts pleaded, a suit founded upon an express written contract for electric lights furnished by the plaintiff in error to the defendant city, and judgment for the defendant, is a bar to a subsequent quantum meruit action for the value of the service so rendered by the plaintiff and enjoyed by the defendant. As judgment was directed in favor of the defendant on the pleadings, we must look to them for the facts. The petition, in substance, alleges that the plaintiff furnished electric lights for the defendant on its streets at its special instance and request, from the month of July, 1903, to the month of November, 1905, inclusive; that the reasonable value of the light service so furnished was \$262.04 per month, aggregating the sum of \$7,423.81, with interest on each of the monthly bills rendered, the itemized account of which was attached to the bill. The answer, after denying that the plaintiff furnished said light at the special instance and request of the defendant, and alleging that such service was voluntary on the part of plaintiff against the objection of defendant, pleaded in bar of the action that on the 14th day of July, 1904, the plaintiff, in the United States Circuit Court for the District of Kansas, instituted against it an action to obtain judgment for the electric light service aforesaid, as also for moneys alleged to be due the plaintiff for hydrant rental in said city, and that in said action the plaintiff recovered judgment for the sum of \$8,301.77, which it pleads as an adjudication of the controversy in question. The defendant filed with the answer the record, pleadings, proceedings, etc., in said original suit as a part of the answer, to which reference is made, from which it appears that the first 12 counts of the original petition were based upon the written contract between the plaintiff's assignor and the defendant city for electric lights furnished to the defendant, covering the same monthly items sued for in the present action. Other counts in the original petition were for extra lighting service alleged to have been furnished by the plaintiff to the defendant. The other counts of the petition were for water furnished by the plaintiff's assignor to the city under written contract, amounting to \$7,540, for which judgment was prayed, with interest. It seems from the verdict returned therein that the jury found the issues for the plaintiff on the counts for hydrant rental alone. As to the extra lighting service sued for, the court directed a verdict for the defendant, on the ground that no evidence was adduced in support thereof. The charge of the court to the jury in said first action, which is presented as a part of the defendant's answer, explicitly required that to warrant a verdict for the plaintiff on account of the electric lights furnished, they must find that the light was substantially in accordance with the terms and agreements of the contract sued on; but if the jury should "fail to find by the greater weight of all the credible testimony in this case that the plaintiff has substantially kept and performed its contract with the defendant city in regard to the lighting of said city, then and in that event your verdict will be for the defendant on this branch of the case." The reply to the answer in the present action, after admitting the institution of the former suit on the counts for electric light furnished alleged that:

"Said plaintiff avers that, as to said electric light service, its demand for payment therefor was made wholly on a claim of express contract liability to it on the part of said defendant, and in nowise on a claim for the reasonable value of the light service furnished by it, as by it now alleged; said plaintiff further avers that on the trial of said action it is only proved by said defendant, and found by the jury, and adjudged by the court, that said defendant was not under any express contract liability to plaintiff to pay for said electric light service, but it was not in the pleadings in said cause in anywise alleged, nor by the plaintiff proved, nor by the jury found, nor by the court adjudged, that said defendant was not obligated to pay said plaintiff for the reasonable value of the electric light service furnished by said plaintiff to said defendant during the period of time alleged in the pleadings in said cause, and alleged in the plaintiff's petition herein."

In other respects the reply tendered the general issue as to the new matter pleaded in the answer.

While not contending that the plaintiff had not the right in the first instance to a quantum meruit action, the position of defendant's counsel is that the plaintiff was entitled to pursue only one remedy, and having made its election to sue upon the express contract and lost, it is barred from thereafter resorting to the action quantum meruit. Judged by their argument, their position divides itself into two aspects, election of remedy and *res adjudicata*. It is true that where a man has a right to choose one of two modes of redress which are so inconsistent that the assertion of one involves the negation or repudiation of the other, his choice of the one, with knowledge of such facts as would authorize a resort to either, will preclude him from going back and electing again, as a litigant may not assume contradictory positions. This is illustrated by the principle applied in *Robb v. Vos*, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52, where an attorney, without the knowledge of his principal, fraudulently consented to a judgment and obtained the proceeds of the sale under execution thereon. After knowledge of the facts the client appeared in an action in the state court and set up claim to the proceeds, founded upon the proceedings under the judgment and execution. It was held that he was estopped from proceeding in equity to set aside the sale on the ground that the attorney had no authority to appear for him. He was estopped, because he ratified the act by undertaking to obtain the proceeds. So in *Thompson v. Howard*, 31 Mich. 309, 312, where a father brought an action of *assumpsit* for a minor son's wages, and after the jury disagreed he discontinued suit, and brought an action for enticing away and harboring his son. It was held that his attitude was double and inconsistent. In the case where a contract was voidable for fraud, which the party wronged could affirm or rescind, he could not maintain an action for the sum due under the contract and, failing, then bring an action which repudiated the contract and proceed as upon a disaffirmance. "One is to recover damages in respect to the breach of the contract, the other can be maintained only by showing that there was no contract. * * * By bringing the first action, after knowledge of the fraud practiced, the plaintiff waived the right to disaffirm the contract, and the defendant may justly hold him to the election." *Conrow v. Little*, 115 N. Y. 387, 393, 394, 22 N. E. 346, 347, 5 L. R. A. 693.

So, it is said in *Connihan v. Thompson*, 111 Mass. 272:

"The defense of waiver by election arises where the remedies are inconsistent, as where one action is founded on an affirmation, and the other upon a disaffirmance of a voidable contract for the sale of property."

But such is not the case under review. It is familiar practice where A, under special contract, has done work for B, such as undertaking to build a house and the like, being apprehensive that he may not have come up to the full measure of the requirements of the contract, he may in a suit for the enforcement of the contract add a second count in quantum meruit. There is under the Code practice, extant in the state of Kansas, no legal incompatibility in counting separately on the two causes of action. He is entitled to so plead to meet the contingency of the proofs, so as to avoid the disaster of going out of court on failure to show full performance of the contract. Most certainly the court would not drive him to an election before hearing the evidence; and when at the close of the proofs there should be evidence sufficient to go to the jury on the two aspects of the case, it would be an abuse of discretion on the part of the court to deny the plaintiff the right to take the opinion of the jury on both issues, under proper direction that the plaintiff is not entitled to recover on both counts. Both causes of action are *ex contractu*, one resting upon promise of the parties, the other upon promise which the law implies. As each count would constitute a separate cause of action, we know of no established rule of procedure that would compel the plaintiff to embrace them in one action.

The case of *Maeder v. Wexler* (Sup.) 87 N. Y. Supp. 400, arising under the New York Code, which is closely followed in Kansas, is apposite; in which it was held that a judgment in favor of the defendant on a building contract, because of failure of proof of performance by the plaintiff, is not a bar to a subsequent action for the reasonable value of the work done and materials furnished. After adverting to the fact that in the action on the contract the plaintiff failed for the reason that the contract had not been performed substantially, the court said on the subsequent action for the recovery of the value of the work:

"This question was not determined, nor entertained even, the court deciding that the contract had not been sufficiently performed, but that as action was on the contract alleging performance there was nothing left to do but to dismiss the complaint as to that branch of the action without attempting to proceed and ascertain what was done, and what should be paid for. That action was on the contract, and, failing to prove performance, the plaintiff could not in the same action fall back on another theory and prove, for instance, an excuse for nonperformance and recovery on a quantum meruit. In the present form of action, however, we can discover no reason why it should not be at liberty to attempt to recover for the reasonable value of the work actually performed, and the materials actually furnished."

After adverting to the fact that the defendant urged in the former action that the plaintiff recovered for certain extra work outside of the contract which covered the work now sued for, the court said:

"We do not think that rule applies, or ought to apply in this case. The plaintiff attempted to combine all his demands arising out of the entire trans-

action in a single suit—those on the contract, as well as those for extra work. He has not sought to vex the defendant by separate actions, but the contrary. The fact that he failed to recover on a part of his claim on the theory first attempted ought not to debar him from trying again on any other ground that the law recognizes and permits. The institution by a party of a fruitless action which he has not the right to maintain will not preclude him from asserting the rights he really possesses."

The authorities abundantly support the proposition that, when judgment goes for the defendant in an action on express contract on the ground that the contract had not been completed by the plaintiff, "such judgment is not a bar to a second action to recover the reasonable value of the same services." *Rossman v. Tillyen*, 80 Minn. 160, 83 N. W. 42, 81 Am. St. Rep. 247; *Arthur Fritsch M. Co. v. Goodwin Mfg. Co.*, 100 Mo. App. 414, 74 S. W. 136; *Henrietta Bank v. Barnett* (Tex. Civ. App.) 25 S. W. 456; *Kirkpatrick v. McElroy*, 41 N. J. Eq. 539, 7 Atl. 647; *Marsh v. Masterton*, 101 N. Y. 401, 5 N. E. 59; *Buddress v. Schafer*, 12 Wash. 316, 41 Pac. 43; *City of Davenport v. Allen* (C. C.) 120 Fed. 172. The fact that a party through mistake attempts to exercise a right to which he is not entitled, or has made choice of a supposed remedy that never existed, and pursued it until the court adjudged that it never existed, should not and does not preclude him from afterwards pursuing a remedy for relief, to which in law and good conscience he is entitled. *Wm. W. Bierce Lumber Co. v. Hutchins*, 205 U. S. 340, 347, 27 Sup. Ct. 524, 51 L. Ed. 828; *Barnsdall v. Waltemeyer*, 142 Fed. 415, 73 C. C. A. 515; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 85 N. W. 698, 53 L. R. A. 603, 84 Am. St. Rep. 867; *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1.

In respect of the judgment in the former suit, constituting *res adjudicata*, the rules laid down in *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195, are apt and comprehensive:

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

After citing the case of *Washington, Alexandria & Georgetown Steam Packet Company v. Sickles*, 24 How. 333, 16 L. Ed. 650, which was a much stronger case for the defendant than the one at bar, the court said:

"It is not believed that there are any cases going to the extent that, because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand; although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause because it might have been determined in the first action."

It is the identity and the legal quality of the subject of the two actions, as well as the identity of parties, which create the estoppel. It

may not depend so much upon the identity of the thing sued for "but rather from the want of identity in the issues involved in the two actions." This is aptly illustrated by the case of *Buttrick v. Holden*, 8 Cush. (Mass.) 233. The action was for breach of contract to convey land. The defendant, inter alia, interposed the defense that theretofore the plaintiff brought bill in equity, based on the contract for a specific performance, in which the rights of the parties in the premises were tried out, and the bill was dismissed. It is true there were other parties to that suit, but Chief Justice Shaw hit the mark by saying:

"A judgment for the defendants in that suit does not tend to negative the defendant's breach of contract, on which this action at law is brought."

The rule as expressed by Bigelow on Estoppel, p. 75, is as follows:

"The peculiarity of the plea of former judgment consists in the fact that it shows that a certain claim or demand has already been tried and determined. To this end it must be shown that there is identity between the present, and the previous cause of action. The question then to be decided is whether the two causes of action are the same. If they are not identical the defense is not good."

In *McCall v. Jones*, 72 Ala. 371, the court said:

"The rule of *res adjudicata* or former recovery is confined to those causes where the parties to the two suits are the same, the identical point is directly in issue, and the judgment has been rendered in the first suit on that point."

In his work on Judgments (volume 1, § 259), Freeman says:

"The best and most invariable test as to whether a former judgment is a bar is to inquire whether the same evidence will sustain both the present and the former action. If this identity of evidence is found, it will make no difference that the form of the two actions is not the same. * * * Whatever be the form of the action, the issue is deemed the same whenever it may, in both actions be supported by substantially the same evidence. If so supported, a judgment in one action is conclusive upon the same issue in any other suit, though the cause of action is different. On the other hand, if different proofs are required to sustain two actions a judgment in one of them is no bar to the other. If the evidence in a second suit between the same parties is sufficient to entitle plaintiff to a recovery, his right cannot be defeated by showing any judgment against him in any action where the evidence in the present suit could not, if offered, have altered the result."

To the same effect is the text in 2 Black on Judgments, § 726. See, also, *Taylor v. Castle*, 42 Cal. 372.

In the former action between these parties, the special written contract declared on having been admitted by the answer, it was only necessary for the plaintiff to show a substantial compliance with its requirements respecting the lights, and the failure of the defendant to pay therefor. As the contract fixed the amount of recovery, no proof was necessary as to the value of the material and services rendered; and no such evidence would have been admissible under the pleadings. Whereas under the petition in the present action the plaintiff is required to go into the question as to the character of the material, the extent of the services rendered, the reasonable value thereof, and the enjoyment of the lights by the defendant. The only office the special contract might perform in this action would be to limit the amount of recovery.

The case of *Franklin v. Matoa Gold Mining Co.*, recently decided by this court (C. C. A.) 158 Fed. 941, presents an apt illustration of the rule of law in question. The action was predicated of a verbal contract for the delivery of certain bonds of the company for professional services rendered. The plea interposed by the defendant was that the contract was not in writing, and was, therefore, within the statute of frauds. This defense was sustained. But it was held that the plaintiff was entitled to maintain action quantum meruit. No question could successfully arise in such second action that the former judgment was *res adjudicata*. Notwithstanding the lights furnished by this plaintiff may not have been such as the contract called for, it would offend the common sense of justice that the city should use and enjoy what was furnished without paying the reasonable value thereof, not exceeding the contract price.

If there be any uncertainty as to whether the recovery had by the plaintiff in the former suit embraced the items of the account sued on in the present action, resort may be had both to the record and extrinsic evidence, "showing the precise point involved and determined." *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214.

It results that the judgment of the Circuit Court must be reversed, and the cause remanded, with directions to grant a new trial.

EXCELSIOR COAL CO. v. GILDERSLEEVE et al.

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

No. 161.

1. SALES—BREACH OF WARRANTY—ACTION—MATTER TO BE PROVEN.

In an action for breach of warranty in connection with a sale, plaintiff must show the warranty, a breach, and damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1253.]

2. SAME—IMPLIED WARRANTY.

That the sellers of a barge agreed to construct four coal bins in it to be loaded and unloaded separately implies a warranty of fitness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 772-776.]

3. JUDGMENT—RES ADJUDICATA—IDENTITY OF ISSUES.

In an action for breach of warranty respecting a barge sold by defendants, judgment for plaintiff in limitation of liability proceedings brought by plaintiff after an accident, in which one man was killed and others were injured, caused by a defective condition of a bulkhead on the barge, did not establish a breach of warranty on defendants' part, since the matter before the court in the limitation of liability proceedings had wholly to do with plaintiff's liability to the damage to claimants, and had nothing to do with defendants' liability to plaintiff; any consideration of what defendants did or omitted to do being wholly collateral to the issues, and any finding with respect thereto not being binding upon defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1244-1247.]

4. TRIAL—EVIDENCE—IRREGULARITY ADMITTED—EFFECT.

Though, in an action for breach of warranty respecting a barge sold by defendants, a judgment in limitation of liability proceedings brought by plaintiff after an accident in which one man was killed and others were injured, caused by a defective condition of a bulkhead on the barge, did not establish a breach of warranty on defendants' part, as claimed by

plaintiff, the entire record of such proceedings, including the stenographer's minutes, being in evidence, and embracing testimony which, if properly established, would have been admissible independently, and, no objection being made to the irregularity of the proof, the jury had a right to consider such testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 261-263.]

5. APPEAL AND ERROR—REVIEW—DIRECTED VERDICT.

In reviewing an order directing a verdict for defendant, the United States Circuit Court of Appeals must give plaintiff the benefit of all inferences fairly deducible from the testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4024.]

6. SALES—BREACH OF WARRANTY—QUESTION FOR JURY.

In an action for breach of warranty respecting a barge sold by defendants, *held*, under the evidence, improper to direct a verdict for defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Sales, §§ 1303-1308.]

In Error to the Circuit Court of the United States for the District of Connecticut.

Writ of error to review a judgment entered upon the verdict of a jury directed by the court in favor of the defendant.

Carpenter, Park & Symmers (James K. Symmers, of counsel), for plaintiff in error.

E. H. Rogers and J. Parker Kirlin, for defendants in error.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This is an action to recover damages for an alleged breach of warranty in connection with the sale of a barge. In such an action the plaintiff must allege and prove: (1) The warranty. (2) The breach. (3) The damages.

Although the complaint is involved, it may be construed as alleging that the barge was constructed with four coal bins to be loaded and unloaded separately, and was warranted fit for such use. In support of these allegations testimony was introduced that the defendants when they sold the barge agreed to construct the bins for such purpose. This implied a warranty of fitness. With respect to a breach of warranty, the complaint alleges that, while said barge was being unloaded some eight months after the sale, one of the bulkheads collapsed, killing one man and injuring others—all this by reason of the defective construction of the bulkhead. The plaintiff did not rely upon the testimony of witnesses to show the breach of warranty, but sought to establish it as an adjudicated fact binding upon the defendants by way of estoppel. Accordingly the plaintiff offered in evidence the judgment and entire record in limitation of liability proceedings instituted by the plaintiff after said accident.

The petition in these proceedings alleged that the petitioner was the owner of the barge; that the bulkhead gave way injuring several persons; that their injuries were not caused by any fault of the barge or of the persons in charge of her, but were caused by the fault of the persons unloading the cargo; that the injuries were occasioned without the privity or knowledge of the petitioner; and that suits had been

brought for the recovery of damages for such injuries. The petitioner prayed for an appraisal of its interest in the barge, for a limitation of its liability, and for an order restraining suits and requiring damage claimants to prove their claims in the proceedings. The damage claimants filed answers denying that the damage was caused through no fault of the barge or of the persons in charge of her, and alleging affirmatively that the persons in charge of the barge and of the discharge of the cargo were the agents of the petitioner, and that the damage was caused by their negligence. The plaintiff claimed that the defective construction of the bulkhead, involving a breach of the defendants' warranty, was established by the judgment in these limitation proceedings. The trial court admitted the judgment and entire record in evidence, but subsequently directed a verdict for the defendant upon the ground that the judgment failed to establish as *res adjudicata* the alleged breach of warranty. The first inquiry, therefore, is as to what the judgment in the limitation of liability proceedings did establish.

The limitation of liability statute is for the protection of shipowners, and provides that the liability of the owner for any fault occurring without his privity or knowledge shall not exceed the value of his interest in the vessel. An essential question under the petition for limitation of liability thus was whether the petitioner had any knowledge of the fault which gave rise to the liability. Unless this were shown, the owner was not entitled to the exemption of the statute. But manifestly the determination of the question of the petitioner's knowledge at the time of the accident failed to show defective construction at the time of the warranty. What the petitioner knew or was ignorant of established in no way the defendant's breach of warranty. The charge of negligence in the discharge of the vessel undoubtedly involved an inquiry as to the condition of the vessel at the time of the accident. If the bulkhead had then been insufficiently secured, it might have constituted negligence to discharge one bin before the other; but it was immaterial whether the bulkheads had been originally constructed improperly, or whether they subsequently became insecure. The question was as to the conditions as they existed at the time of the accident, and any inquiry as to conditions before that time was outside the issues. In other words, the matter before the court in the limitation of liability proceedings had wholly to do with the liability of the owners to the damage claimants, and had nothing to do with the liability of the vendors to the owners. Any consideration of what the defendants did or omitted to do was wholly collateral to the issues, and any finding with respect thereto not binding upon the defendants. "The former verdict is conclusive only as to facts directly and distinctly put in issue, and the finding of which is necessary to uphold the judgment. The doctrine of estoppel is restricted to facts directly in issue, and does not extend to facts which may be in controversy, but which rest in evidence, and are merely collateral. * * * No judgment or decree is evidence in relation to any matter which came collaterally in question, nor to any matter incidentally cognizable, or to be inferred from the judgment only by argument or construction." *Freeman on Judgments* (4th Ed.) §§ 257, 258.

As we have pointed out, any inquiry in the limitation of liability proceedings involving the condition of the vessel at the time of the warranty was merely incidental to the inquiry whether there had been negligence in discharging the vessel. If the petitioner had been held free from negligence, it would not have proved that the defendants did not break their warranty. That the petitioner was held liable does not prove they broke it. The defendants were entitled to their day in court. They had a right to try out the question whether they broke their warranty. Evidence which would have been most important in an action against them by the owner had no place whatever in the limitation of liability proceedings. Thus in case the defendants could have shown that the men upon the barge had taken down the bulkheads after the plaintiff purchased it and had put them up again improperly it might have been a good defense. But there is no theory upon which such evidence could have properly come into the limitation proceedings.

The trial court, therefore, was right in holding that the judgment in the limitation proceedings did not establish a breach of warranty on the part of the defendants. If that had been the only question involved in the direction of the verdict, the action of the court would have been correct. But the case did not stand in that way. The entire record, including the stenographer's minutes, had been admitted in evidence, and was in the case. It embraced the testimony of the defendant Oliver Gildersleeve. This testimony, if properly established, would have been admissible independently. But no objection was made to its irregular proof. It was admitted before the jury, and they had the right to consider it. In this testimony it appears that the witness was repeatedly inquired of regarding that most essential question, whether the bulkheads were so constructed that the pockets could be loaded or unloaded separately. The witness would not answer that they were so constructed and finally answered:

"We build those bulkheads as the parties want them, and it is up to them to say what they can do."

Moreover, the defendants cross-examined the witness Keeler in the present case and he testified as to the construction of the bulkheads and that they were not built in the customary way.

Considering all the testimony, therefore, and giving the plaintiff the benefit of all the inferences fairly to be drawn from it (as we are bound to do when a case comes up from a directed verdict), we are unable to say that there was not evidence to warrant the jury in bringing in a verdict for the plaintiff.

There was error in the direction of a verdict. The judgment is reversed, and cause remanded for a new trial.

NATIONAL CANDY CO. v. MILLER

(Circuit Court of Appeals, Eighth Circuit. March 9, 1908.)

No. 2,661.

1. MASTER AND SERVANT—INJURIES TO SERVANT—DANGEROUS MACHINERY.

Where plaintiff was injured while operating a candy cutter, and it was undisputed that the practical operation of the cutter in admitting the cardboard with the candy thereon to pass under the fender over the knives could not well have admitted of a smaller space than that allowed between the fender and the moving candy, the machine was not defective as not sufficiently safeguarded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 228-231.]

2. SAME—"FELLOW SERVANTS."

Where plaintiff employed to operate a candy-cutting machine obtained the candy to be passed through the machine from his foreman, who had no authority to hire or discharge his co-employees, he was plaintiff's fellow servant, so that plaintiff could not recover for the foreman's negligence in furnishing him candy which was not sufficiently cooled to be cut in safety by the machine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 486-492.

For other definitions, see Words and Phrases, vol. 3, pp. 2716-2730; vol. 8, p. 7662.

Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668, Flippin v. Kimball, 31 C. C. A. 286.]

3. SAME—FELLOW-SERVANT LAW.

The Missouri fellow-servant law does not extend to the employment of servants in a candy factory engaged in cutting slabs of candy by a machine.

4. WORDS AND PHRASES—"FIXED."

The word "fixed," as ordinarily used, means securely placed, fastened, settled, immovable, unalterable.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2829-2830.]

5. SAME—"TRAVERSE."

The word "traverse," when used as a verb, primarily means to lay in a cross direction, to cross, while the participle "traversing" implies adjustable laterally, having a lateral or swinging motion.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, p. 7083.]

6. MASTER AND SERVANT—INJURIES TO SERVANT—STATUTES—MACHINES.

Mo. Rev. St. 1899, § 6434 (Ann. St. 1906, p. 3217), provides that no minor or woman shall be required to work between the "fixed or traversing" parts of any machine while it is in motion. Plaintiff, a minor, was employed to operate a candy-cutting machine, the knives of which were covered by a hood and protected by wooden guards. The candy was handed to plaintiff in slabs on pieces of cardboard, and he was directed to shove this under the knives by seizing the cardboard with his thumb and first finger, and pressing the candy from the rear with the palm of his hand toward the fender. The cardboard was about 18 inches square, and the candy thereon from 10 to 12 inches square, so that plaintiff had ample opportunity to disengage his hand from the cardboard before any jerking motion of the machine could have drawn his hand under the knives. Held, that plaintiff was entirely outside of and away from the motion of the machine, and was therefore not entitled to predicate an action for injuries to his hand by being caught in the machine on such section.

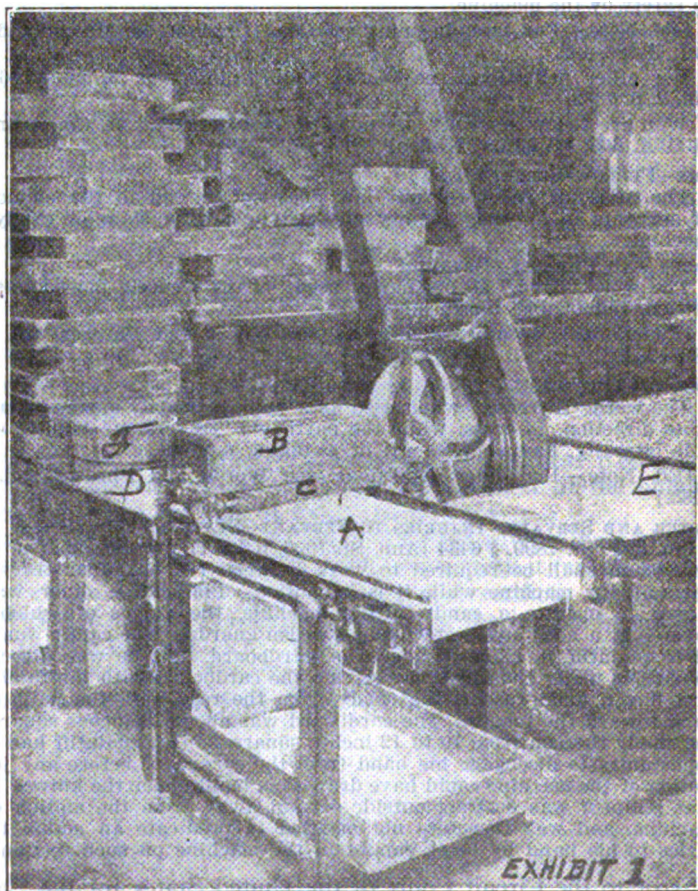
In Error to the Circuit Court of the United States for the Eastern District of Missouri.

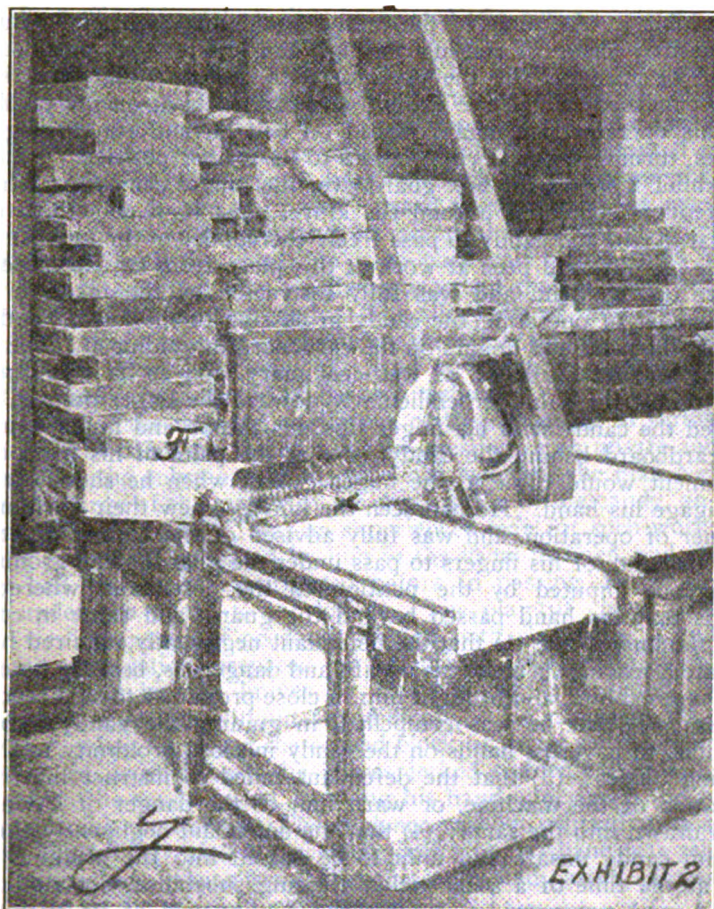
William R. Gentry (J. E. McKeighan and M. F. Watts, on the brief), for plaintiff in error.

William R. Scullin (Harry H. Haeussler, George A. H. Mills, and F. A. Chopin, on the brief), for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. This is a writ of error to have reviewed the judgment obtained by the defendant in error (hereinafter designated the plaintiff) against the plaintiff in error (hereinafter designated the defendant) for personal injury. At the time of the injury the plaintiff was a minor between 16 and 17 years old, well developed mentally and physically. The defendant was conducting a candy factory in the city of St. Louis, and the plaintiff was in its employ as an operator. The cutting machine at which he worked is best illustrated by the two exhibits hereto attached:





When at work the plaintiff stood at the side of the machine where the revolving belt, A, ran. The candy was placed by a fellow workman named Nemuth, who prepared it, on the table, E, from which the plaintiff took it, placing it upon a cardboard on the belt, A, to be run under and cut into squares by the knives. The belt, A, is the conveyor passing over two rollers, like an ordinary belt in a factory. The knives were under the box or hood, B, to protect them, and prevent any one from coming in contact with them when working about the machine. Protruding from beneath this hooded box were wooden guards or fingers, marked "C" in Exhibit 1, and "X" in Exhibit 2. The candy, when placed on the cardboard as the belt revolved, was carried directly under the finger guards to the knives. The object of the finger guards, extending the length of the knives, was to prevent the hand or fingers of the operator from being carried too near to the moving knives. After the candy was thus passed under the

knives, and cut into strips, it came out upon a table, designated as "D" in Exhibit 1. As some of the candy would slip, and not be cut into the desired shape in passing through the knives, that portion of it would be sprinkled by the operator with a little sugar kept in the bucket marked "F" in the exhibit, and carried back on the cardboard by this operator, and again placed on belt A, and run through the knives, turning it out at right angles to its former position.

Exhibit 2 shows the box guard over the knives removed. The finger fenders stand out beyond the knives, just high enough to admit the cardboard and candy to pass freely thereunder to the knives.

The plaintiff had been at work at this place from two to three days before the accident, and was fully instructed by the foreman as to the manner of operating the candy in passing to the knives, and how to hold his hand and fingers on the cardboard in guiding it. The manner of holding the hand, as was customary, and as he was directed, was to hold the palm perpendicularly, toward the finger guards, as he steered the candy with his finger tips, his thumb and finger being on the cardboard behind the candy, so that the palm of his hand in the movement would come to the finger guard, when he should at once disengage his hand. He had seen the knives, knew their position and manner of operation, and was fully advised of the danger of permitting his hand, or his fingers to pass under the guard. The grounds of negligence imputed by the petition to the defendant, whereby he claims that his hand passed beyond the guard, and came in contact with the knives, are (1) that the defendant negligently required him to operate a machine which was unsafe and dangerous, because its operation exposed him, and brought him in close proximity to said revolving blades; (2) that he was compelled, in guiding the candy into said machine, to have his hands on the candy in close proximity to the revolving blades; (3) that the defendant failed to instruct him in the operation of the machine, or warn him of the danger of having his hand drawn into the same; (4) that the defendant negligently furnished him candy unsafe and unfit to be passed into the machine, as it was at the time of a soft, sticky, clinging substance, not sufficiently cooled, and not provided against the contingency of its sticking to said knife blades; (5) that the defendant failed to provide proper and sufficient guards or shields around said blades; (6) that at the time of the accident there was in force in the state of Missouri the following provisions of the statute, to wit: Rev. St. 1899, §§ 6433, 6434 (Ann. St. 1906, p. 3217):

"Sec. 6433. Belting, etc. To be Guarded—The belting, shafting, gearing and drums, in all manufacturing, mechanical and other establishments in this state, when so placed as to be dangerous to the persons employed therein or thereabouts while engaged in their ordinary duties, shall be safely and securely guarded when possible; if not possible, then notice of its danger shall be conspicuously posted in such establishments.

"Sec. 6434. Minor Or Woman Not To Clean Or Work In Certain Places About Moving Machinery—No minor, or woman shall be required to clean any part of the mill, gearing or machinery in any such establishment in this state, while same is in motion, or work between the fixed or traversing parts of any machine, while it is in motion by the action of steam, water or other mechanical power."

The petition charges that defendant disregarded said statutory provisions in failing to safely guard the belt of said cutting machine, and failing to post notices of the danger of coming in contact with them, and requiring the plaintiff, a minor, to work upon and between said cutting machine, and between the fixed and traversing parts of the same while it was in motion. It is quite apparent from the foregoing statement of facts that there is no foundation for the imputed negligence as to the character of the machine which the defendant was operating, or in its failure to properly guard the knives of the machine. The evidence was undisputed that its practical operation in admitting the cardboard with the candy on it to pass under the fender could not well have admitted of a smaller space than that allowed between the fender and the moving candy. The allegation of failure to advise the plaintiff of the manner of operating the candy on the conveyor and the danger to him of suffering his hand or fingers to pass under the guard is wholly contradicted by his own testimony.

In respect of the imputed negligence of the defendant in furnishing to the plaintiff candy on the occasion in question in an unsafe and unfit condition, the substance of the evidence was that the man Nemuth who had charge of the matter of the preparation of the candy, and delivering it on the table, E, was an experienced man for such work, and that the candy was prepared by him in the usual manner, and no difficulty had ever been experienced before in passing candy so prepared under the guard to the knives. The plaintiff claims that the candy was composed of cocoanut, coated with chocolate. Candy of the same composition, prepared by Nemuth in appropriate block, had been passed under the knives by the plaintiff immediately before the block in question, without any difficulty. He claims in his testimony that, when he placed the second block of candy on the conveyor, by reason of its stickiness, the knives jerked suddenly the cardboard upon which the candy rested, carrying his hand underneath the fender in contact with the knives. The evidence without contradiction showed that immediately after the accident just after his hand was released from the machine, it was found that the candy had passed successfully through on to the table, D, properly cut.

On this state of the proof the court in its charge said:

"I do not believe that the testimony here produced would justify the court in submitting to you the question as to whether the defendant was guilty of negligence in the kind or character of the candy used. The testimony of the plaintiff on that subject was not satisfactory and clear. Men of general knowledge know that candy is a substance that sticks and is liable to clog. So far as the court instructs you, it limits this inquiry to the statute (section 6434)."

If there was any fault in the matter of the composition and preparation of the particular block of candy in question, it was that of the man Nemuth, who prepared it. He and the plaintiff were fellow servants, working in the same department, the one mixing and preparing the blocks of candy and delivering it to the other to be run through the machine. The fact that Nemuth may have been the foreman of the gang working on his floor in that department, the evidence failing to show that he was authorized to hire or discharge his co-employés,

did not destroy the relation of fellow servants between them, working under a common master. *Weeks v. Scharer*, 111 Fed. 330, 49 C. C. A. 372; *Id.*, 129 Fed. 333, 64 C. C. A. 11; *Louisville & N. R. Co. v. Stuber*, 108 Fed. 934, 48 C. C. A. 149, 54 L. R. A. 696; *N. P. Co. v. Hambly*, 154 U. S. 358, 359, loc. cit., 14 Sup. Ct. 983, 38 L. Ed. 1009. The fellow-servant law of Missouri does not extend to the employment in which the plaintiff and Nemuth were engaged as servants.

Aside from all this, the trial court ruled that the plaintiff had failed to make out a case to go to the jury on any of the grounds of negligence alleged in the petition, save that predicated on said section 6434, Rev. St. Mo. As recovery was had upon this statute, and the plaintiff did not sue out any writ of error on the court's ruling, the only remaining question for our determination is: Did the evidence bring the plaintiff's case within the purview of said statute? Under the charge of the court the recovery must have been had upon the latter clause of section 6434 of the statute, to wit, in requiring the plaintiff, a minor, to "work between the fixed or traversing parts of the machine while it is in motion."

It must be conceded that this statute is not perspicuous. Precisely what is meant by the "fixed" or "traversing" parts of the machine is difficult to define. Under the title "Construction of Statutes," section 4160, 1 Rev. St. Mo. 1899 (Ann. St. 1906, p. 2252), it is declared that:

"Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law, shall be understood according to their technical import."

The word "fixed," as ordinarily used, and as defined primarily by the dictionary, means "securely placed, or fastened; settled, immovable; unalterable." The verb "traverse," primarily means, "to lay in a cross direction, to cross"; while the participle "traversing" implies "adjustable laterally, having a lateral motion, or swinging motion." This statute would be more comprehensible and susceptible of practical application if it read, "between the fixed and traversing parts of any machine"; because it may be easily perceived that it was the conception of the Legislature that women and minors were assumed to be less observant of cautiousness and concentrated consideration, and would be exposed to a more special danger when working between the parts of a machine fixed with traversing motion, crossing or laterally adjusted. In short, that they would be liable to be caught and injured when engaged about such constructed parts of a machine than if working in a different position. Be this as it may, it is to be kept in mind that the statute does not interdict the employment of women or minors to work at or about any machine, but it is directed only against requiring them to work between the designated parts of the machine. This distinction was not guardedly kept in mind by the trial judge in his charge to the jury when he said:

"The court charges you, as it has heretofore charged you, that the employment of a minor in that establishment about the machinery described to you was an act of negligence upon the part of the defendant."

It hardly admits of debate, as shown by the photograph, that where the plaintiff was assigned to do his work, to the left of the table, A, he was not between either the fixed or traversing parts of the machine, but was outside of and away from such motion.

It is, moreover, contrary to the physical facts that the plaintiff should have sustained his injury but for his own negligence. As the candy on the cardboard, according to his testimony, was passing for the first time under the knives, if he was observing the instructions given, the tip of his thumb and first finger was on the cardboard pressing the candy from the rear with the palm of his hand towards the fender. So if, as a matter of fact, the motion of the knives was arrested by reason of the stickiness of the candy, that would have occurred the moment the knives came in contact with the front block of the candy. As the cardboard was about a foot and a half square, and the candy placed thereon was from 10 to 12 inches square, he had ample time to disengage his hand from the cardboard in the rear of the candy before the jerking motion could have possibly drawn his hand under, if he had been giving any heed to the situation.

The request made by the defendant that no recovery could be had predicated of said section 6434 of the statute should have been given. It results that the judgment of the Circuit Court must be reversed and the cause remanded, with directions to grant a new trial.

SARGENT v. BLAKE.

(Circuit Court of Appeals, Eighth Circuit. March 19, 1908.)

No. 2,623.

1. BANKRUPTCY—FRAUDULENT TRANSFER UNDER SECTION 67E—PAYMENT BY INSOLVENT OF INDIVIDUAL DEBTS WITH PARTNERSHIP PROPERTY IS NOT—FACTS—CONCLUSIONS.

K. and M. were partners. They and the partnership were insolvent. K. took \$234.34 with M.'s consent out of the partnership funds for himself, and in consideration thereof and of M.'s covenant to assume and pay the partnership debts conveyed to him the remainder of the partnership property and the partnership business. Immediately thereafter M. paid to Mrs. S., his mother, out of the funds which had been partnership property, \$3,731.90, which he owed her for money he had borrowed to put in to the partnership business. Mrs. S. did not have reasonable cause to believe that any preference was intended by this payment, nor did she have any cause to believe that it was made with intent to hinder, delay, or defraud creditors of the firm, or of the firm partners. K. and M. had no intent to hinder, delay, or defraud creditors to any greater extent than the payment to Mrs. S. would necessarily hinder or prevent them from collecting their debts. Within four months K. and M. and the partnership were adjudged bankrupts. The trustee brought suit to recover the \$3,731.90 of Mrs. S.

Held the trustee was not entitled to recover this money of Mrs. S.

2. SAME—INTENT TO HINDER, DELAY OR PREVENT COLLECTIONS UNLAWFULLY REQUISITE TO FRAUDULENT TRANSFER.

Intentional transfers by insolvents to secure or pay pre-existing debts within four months prior to the filing of a petition in bankruptcy which are not voidable as preferences under section 67e, or violative of other provisions of law, and which are made without intent to hinder, delay, or defraud creditors more than such securities or payments necessarily

have that effect, do not evidence an intent to hinder, delay, or defraud creditors within the meaning of section 67e of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449).

It is not every intent to hinder or delay creditors in collecting, or to prevent them from collecting, but an intent to do so unlawfully only that is denounced by that section.

3. SAME—SECTION 5F GOVERNS PROPERTY OF BANKRUPTS WHEN PETITION IS FILED.

Act July 1, 1898, c. 541, § 5f, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), enunciates a rule of administration of partnership and individual property, and it governs only such partnership and such individual property as the alleged bankrupts owned at the time the petition is filed and that which has been previously transferred fraudulently, or to make a voidable preference.

4. PARTNERSHIP—PARTNERS HAVE RIGHT OF DISPOSITION UNTIL PARTNERSHIP PROPERTY IS PLACED IN CUSTODY OF THE LAW—PREFERENCE OF PARTNERSHIP CREDITORS THEN FIRST ATTACHES.

Until partnership property is placed in the custody of the law by some suit or act which invokes the interposition of a court to administer it, partners, with the consent of each, have the right and the power to convert it into individual property, to apply it to the payment of individual debts in preference to the debts of the partnership, or to make any other disposition of it in good faith which does not constitute a voidable preference. Insolvency does not destroy or diminish this right of disposition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 112, 113.]

The right of the creditors of a partnership to be paid out of the partnership property in preference to the individual creditors does not attach until an application is made to some court for the administration of the partnership property, nor then, unless some partner has at that time that right, for the preferential equity of the partners is the mere right to enforce the right of the partners to compel such a preference.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 315.]

Before the partnership property is placed in custodia legis it is not held in trust for the partnership creditors, and they have no lien upon it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 315.]

5. BANKRUPTCY—PARTNERSHIP—PAYMENT OF INDIVIDUAL DEBT WITH PARTNERSHIP PROPERTY BY INSOLVENT NO EVIDENCE OF INTENT TO DEFRAUD UNDER SECTION 67E.

When all the partners consent, their application of the partnership property to the payment of an individual debt of a partner within four months of the filing of a petition in bankruptcy, and while the partners and the partnership are insolvent, does not evidence any intent to hinder, delay, or defraud the creditors of the partnership within the meaning of section 67e of the Bankruptcy Law, Act July 1, 1898, c. 541, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), and it is not void or voidable where the creditor paid has no reasonable cause to believe that a preference was intended thereby.

6. PARTNERSHIP—CONTRACT—CONSIDERATION—THE ASSUMPTION BY AN INSOLVENT OF THE DEBTS OF AN INSOLVENT PARTNERSHIP WAS A VALUABLE CONSIDERATION.

The covenant of an insolvent partner to assume and pay the debts of an insolvent partnership is a valuable consideration sufficient to support a conveyance of an interest in the partnership property.

7. SAME—ASSUMPTION OF PARTNERSHIP DEBTS CREATES NO TRUST OR LIEN IN FAVOR OF PARTNERSHIP CREDITORS.

The assumption of payment of partnership debts by one partner in consideration of an absolute conveyance of the partnership property to

him by the other creates no trust in and fastens no lien upon the property thus conveyed in favor of the partnership creditors prior to any request for the interposition of a court to administer the partnership property.

(Syllabus by the Court.)

Appeal from the District Court of the United States for the Southwestern Division, Judicial District of Missouri.

For opinion below, see 152 Fed. 263.

Willard P. Hall (A. E. Spencer, on the brief), for appellant.

Edwin A. Krauthoff (Arthur Miller, Samuel Feller, and Karnes & New, on the brief), for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. In December, 1902, King and Maxwell formed a partnership in the business of dealing in paints, oils, glass, and other articles at Kansas City, in the state of Missouri, under the name of King & Maxwell Paint & Glass Company, and Maxwell borrowed \$3,500 of his mother, Mrs. Sargent, to put into the business, and gave her his promissory note for the money payable with interest in three years from the date of the note. He paid the interest on it from time to time until on June 11, 1904, he paid her \$2,500 of it, and on June 14, 1904, \$1,231.90, the amount still owing upon it, and she surrendered the note to him. During the year 1903 and the first half of the year 1904 the company made a profit, or the partners thought it made a profit, of \$3,800. Between February 1, 1904, and June 18, 1904, \$9,096.08 which was derived from the sales of merchandise by the partnership was deposited in the banks to the credit of the company, and prior to June 11, 1904, all this money, except \$3,731.90 subsequently paid to Mrs. Sargent and \$867.60 paid for merchandise bought, was drawn out of the bank by the partners as individuals. On June 11, 1904, or a day or two before that day, Maxwell learned that King, who had the financial management, had drawn out all the money that he had put into the firm as capital and his half of the profits, which amounted to about \$4,400 in all, with the exception of \$234.34. Maxwell was dissatisfied with King's action, and upon consultation they agreed that in consideration of \$234.34 paid to him out of the moneys of the company, and of Maxwell's covenant to assume and pay all the firm debts, King should sell and convey his interest in the property of the company and in the business to Maxwell, should authorize Maxwell to carry on the business in the name of the company, and should agree to keep out of any like business for a year. On June 11, 1904, the \$234.34 was paid to King, and he executed and delivered to Maxwell a formal bill of sale, in which the terms just stated were clearly embodied, and delivered to him the exclusive possession of the property and business of the company. At this time the partnership and each of the partners was insolvent, its liabilities were probably about \$25,000 and its assets about \$15,000, but each of the partners testified that he did not know or think at that time that the firm was insolvent. After Maxwell had purchased the interest of his partner in the firm property and business, and had receiv-

ed his bill of sale and exclusive possession and control of the property, and on the same day, he bought a draft for \$2,500 with a check which he drew in the name of the company upon the moneys that had been theretofore deposited to its credit in a bank, and he sent this draft to his mother in part payment of his note. On June 14, 1904, he bought in the same way and sent to her another draft for \$1,231.90, the balance then owing on the note she held, and she surrendered it to him paid. King testified that he never consented to the application of the partnership funds to the payment of the individual debt of Maxwell to his mother. Mrs. Sargent did not have reasonable cause to believe that it was intended by this payment to give her a preference over any other creditor of Maxwell or of the partnership. She did not know, believe, or have reasonable cause to believe that these payments were made with the intent on the part of Maxwell to hinder, delay, or defraud any of his creditors or any of the creditors of the company, or that they were made out of the funds or property of the partnership. On June 23, 1904, a petition in bankruptcy was filed, and on August 1, 1904, the partnership and the individuals King and Maxwell were adjudged bankrupts. The evidence at the final hearing in this suit disclosed no facts material to the questions before this court which have not now been stated. Upon these facts the court below rendered a decree that the amounts paid to Mrs. Sargent belonged to the estate of the partnership, "the partnership firm," in the words of the decree, "at the time of said payments by said James E. Maxwell to the defendant Laura A. Sargent, being insolvent, and the same having been so paid to the defendant in fraud of the equitable preferential right thereto of the partnership creditors of said partners" and that she should pay them back to the trustee of that estate with interest. Mrs. Sargent appealed from this decree.

This suit was instituted by the exhibition in the court below of a bill in equity against Mrs. Sargent alone, in which the trustee set forth two inconsistent causes of action, first, that Maxwell paid Mrs. Sargent \$3,731.90 out of the funds of the partnership with intent to hinder, delay, or defraud its creditors at a time when it was insolvent and did not owe her anything, and that Mrs. Sargent knew this at the time she received the payment; second, that Maxwell paid her this \$3,731.90 with intent to prefer her over his other creditors of the same class, that the payment did thus prefer her, and that Mrs. Sargent had reasonable cause to believe that the payment was intended to give such a preference. The proof was that the bill of sale from King to Maxwell had been made and delivered so that it had made all the debts of the company his individual debts by his assumption of them, and all its property his individual property before he paid Mrs. Sargent, and that she had no cause to believe and did not believe that any preference was intended, nor that the payment was made to hinder or defraud any creditor. The result was that at the close of the evidence the first cause of action upon the face of the transaction failed, because the payment was not made out of the funds of the partnership, and the second failed, because Mrs. Sargent had no cause to believe that a preference was intended by the payment. Bankruptcy Law of July 1, 1898, c. 541, 30 Stat. 562, § 60b (U. S. Comp. St. 1901, p. 3418, § 60b).

In order to escape from this conclusion counsel for the trustee invoke the provision of section 5f of the bankruptcy law that the net proceeds of the property of the partnership shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts, and the provisions of section 67e that transfers made by a bankrupt within four months of the filing of the petition against him with the intent on his part to hinder, delay, or defraud his creditors shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration, that unexempt property so transferred shall remain a part of the estate of the bankrupt, and shall pass to his trustee whose duty it shall be to reclaim and recover it for the benefit of the creditors, and they argue that the bill of sale from King to Maxwell, and the contract of payment of the note by Maxwell to Mrs. Sargent, were void under these sections because their effect was that property of the partnership estate was applied, after the firm and the partners were insolvent, to pay the individual debt of one of the partners.

The only evidence that Maxwell intended to hinder or defraud the creditors of the partnership is that, while the firm and the partners were insolvent, King conveyed his interest to Maxwell, and the latter paid his mother in preference to his other creditors. The only way in which Maxwell could have made this payment in bad faith would have been to have made it in whole or in part in secret trust for himself, or with the actual intent to hinder or defraud the creditors of the company more than the mere payment of the debt to his mother out of the property of the former partnership, in preference to the claims of the partnership creditors, must necessarily have delayed or prevented their collection of their claims, and there was no evidence of any such trust or intent. The evidence was that he intended to pay his mother in preference to the partnership and to other creditors, that his mother had loaned him the money to engage in and conduct the partnership business, that he had purchased the interest of his partner, and that as soon as the business and the property became his he paid her the debt which he owed her.

The facts that the payment to Mrs. Sargent had the inevitable effect to deprive the creditors of the partnership of an opportunity which they would otherwise have had to collect their claims in whole or in part, and that Maxwell knew that this would be its effect, and hence must have intended that result, do not establish the fact that he intended to hinder, delay, or defraud those creditors within the meaning of section 67e. It is every intent to hinder, delay, and defraud creditors unlawfully only, not every intent to hinder or delay them in collecting, or to prevent them from collecting, their claims that avails to avoid a transfer under that section. An insolvent debtor has the *jus disponendi* of his property until the commencement of proceedings in bankruptcy against him. He has the legal right to secure and pay his debts with it provided always the security or the payment is not violative of any of the acts of Congress or of any of the laws of the land. A preference of one creditor over others by such a payment or by such security, which is free from actual or constructive fraud, and

from any purpose to affect other creditors injuriously beyond the necessary effect of the security or preference, is valid and lawful, and it cannot evidence such an intent to hinder, delay, or defraud creditors as will make it void or voidable under section 67e. *Coder v. Arts*, 152 Fed. 943, 947, 82 C. C. A. 91; *Sabin v. Columbia River Lbr. & Fuel Co.*, 25 Or. 15, 34 Pac. 692, 695, 42 Am. St. Rep. 756; *Lampson & Powers v. Arnold*, 19 Iowa, 479, 484; *Stewart v. Dunham*, 115 U. S. 61, 66, 5 Sup. Ct. 1163, 29 L. Ed. 329.

Since the payment and the preference were made in good faith, the only question remaining is, were they unlawful? If so, they were made with intent to hinder, delay, and defraud creditors within the meaning of the law, if not, they were made without any such intent, and they were not voidable. If Mrs. Sargent had been a creditor of the partnership, the payment could not have been avoided, and if she was paid out of the individual property of Maxwell the payment was not voidable, because she had no cause to believe that a preference was intended thereby. Did the facts that both partners and partnership were insolvent when the bill of sale and payment were made, and that the payment was made after the bill of sale was delivered out of funds which had been partnership property before King sold and conveyed his interest to Maxwell render the payment illegal and voidable? Counsel for the trustee argue that this question should be answered in the affirmative, because, as they contend, (a) the net proceeds of all the partnership property which were applied to the payment of individual debts within four months preceding the commencement of proceedings in bankruptcy against it must be appropriated to the payment of the partnership debts to the exclusion of the individual debts of the partners under section 5f; (b) that the sale by King to Maxwell was fraudulent and void; (c) that notice of the sale was not immediately given to the bank; and (d) that the assumption of the firm debts by Maxwell fastened a trust or lien upon the firm property in favor of the firm creditors. They cite, in support of their first contention, *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, *Davis v. Bohle*, 92 Fed. 325, 34 C. C. A. 372, *In re Sievers* (D. C.) 91 Fed. 366, and *In re Knight* (D. C.) 125 Fed. 35, in which the courts have held that, inasmuch as the making of a general assignment is an act of bankruptcy, property conveyed by such an assignment passes to the trustee in bankruptcy as of the date of the assignment as against the assignee, as against purchasers from him after the bankruptcy proceedings are instituted, and as against purchasers from him who have not paid for their purchases, where the bankruptcy proceedings are commenced within four months after the general assignments, and they argue by analogy that, wherever a payment of an individual debt is made out of the partnership property within four months of the institution of bankruptcy proceedings, the title to the trustee relates back and attaches to that property as of the date of the payment. They insist that the mere fact that partnership property is applied to the payment of individual debts within the four months constitutes the transaction a fraudulent transfer or preference although the payee has no reason to believe it was intended as such, and they cite *In re Jones* (D. C.) 100 Fed. 781, 783;

In re Gillette (D. C.) 104 Fed. 769, 771, 772; In re Head (D. C.) 114 Fed. 489, 490, 491; Collier on Bankruptcy (6th Ed.) p. 85; In re Johnson, Fed. Cas. No. 7,369; Collins v. Hood, Fed. Cas. No. 3,015; In re Cook, Fed. Cas. No. 3,150; In re Wilcox (D. C.) 94 Fed. 84. But the analogy between a general assignment and the application of partnership property to the payment of an individual debt, or the application of individual property to the payment of a partnership debt, for if one is fraudulent and void the other is, is neither complete nor persuasive, and the construction of section 5f here sought is neither expressed by the words of the section nor is it natural or reasonable. The parties against whom general assignments have been held futile to convey title against a trustee have all been volunteers, parties who neither paid nor surrendered anything before the bankruptcy proceedings were commenced, and as they held no higher title or better equity than the bankrupt their titles passed to the trustee. In the case at bar, on the other hand, Mrs. Sargent surrendered her note in good faith, and released her claim upon her debtor for \$3,731.90 before the bankruptcy proceedings were instituted. Unless the payment was unlawful, and for that reason evidenced an intent of Maxwell to defraud his creditors, a question to be further considered, the only act of bankruptcy here was the preference of Mrs. Sargent to other creditors, which by the express terms of section 60b was not voidable because she had no reasonable cause to believe that it was intended to give her a preference thereby. A general assignment is voidable without regard to such cause to believe.

The clause of section 5f upon which counsel rely is nothing but the familiar rule of administration of partnership and individual estates which has been imported into the bankruptcy law from the courts of equity. "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of the individual debts." The partnership property and the individual estate at what time, four months, or at some indefinite time within four months before the petition is filed, or at the time it is filed? This section treats of administration in the bankruptcy court and hence of the partnership and individual property, the title to which is in the bankrupt at the time the petition against him is presented to the court and that which he had transferred in fraud of his creditors. Section 70. Any other interpretation would produce intolerable vexation and confusion, for in the daily conduct of business partners are necessarily and constantly applying partnership property to the payment, not only of large individual obligations, but to the payment of their petty individual debts for living expenses, and are often devoting their individual property to the promotion of the partnership business and the discharge of the partnership debts. It never could have been, it never was, the intention of Congress that these transactions—these transformations of partnership into individual and of individual into partnership property within four months, or within any other time preceding the commencement of bankruptcy proceedings—should either be rescinded or avoided by subsequent adjudications in bankruptcy unless they were actually fraudulent or voidably preferential. It did

not make them fraudulent in themselves. The terms of section 5f and the natural and rational interpretation of them in the light of the general rules of law and of the entire act in which they appear, limit their application to partnership and individual property at the commencement of bankruptcy proceedings, and to property the transfer of which is fraudulent for other reasons than that partnership property was applied to the payment of individual debts, or individual property to the payment of partnership debts. This conclusion is in accord with the general principles applicable to the management and disposition of partnership property.

There are two rules of law which at different times apply to the management and disposition of the property of a partnership, first, partners own, and, with the consent of each, have the right and power to sell and dispose of the partnership property, to transform it into the individual property of one or more of the partners, to apply it or its proceeds to the payment of their individual debts in preference to those of the partnership, and to make such other honest disposition of it as they deem fit; second, in the administration of the property of a partnership in the courts the creditors of the partnership have the right to the application of the partnership property to the payment of the partnership debts in preference to the individual debts of the respective partners. The first is a rule of operation, the second a rule of administration. The first governs during the operation of the partnership business and the disposition of the partnership property by the partners, the second operates during the administration of the partnership property after it is brought into the custody of a court. The first rule prevails until by some suit or act the interposition of some court is invoked to administer the partnership property, and until that time the second rule is ineffective. Before the partnership property is placed in custodia legis for administration, it is not held in trust for the payment of the partnership creditors in preference to the creditors of the individual partners. The partnership creditors have no lien upon it, and no independent right to its application to the payment of their claims in preference to the claims of the creditors of the individual partners. Each partner, however, has the right to require the partnership property to be applied to the payment of the partnership debts in preference to the debts of the individual partners, to the end that he may not be required to pay the former out of his individual estate. The right of the creditors of the partnership to payment out of the partnership property in preference to the individual creditors is the mere right by subrogation or derivation to enforce this right of one of the partners after the partnership property has been placed in the custody of the law. Until it has been so placed each partner has plenary power at any time to release or waive this right, and if each partner has done so and at the time the property comes within the jurisdiction of a court no partner has this right, then no creditor of the partnership has it, for a stream cannot rise higher than its source.

Before the petition in bankruptcy was filed in this case, and before any of the property involved in this controversy was placed in the custody of the law, King had taken \$234.34 out of the partner-

ship property, and had transformed it into his individual property, with the consent of Maxwell, and in consideration of that consent, and of Maxwell's assumption of the partnership debts, had conveyed all his interest in the remainder of the partnership property to Maxwell, and had thereby transformed it into Maxwell's individual property, and out of that individual property Maxwell had paid his individual debt to his mother. Unless these releases of these partners were voidable and were avoided, neither of them had any right thereafter, and hence none of the creditors of the partnership had any right, to the application of the \$3,731.90 which had been paid to Mrs. Sargent to the payment of partnership obligations.

Counsel say that King's bill of sale and the release it evidenced were void (1) because he subsequently testified that he never consented to the payment of Mrs. Sargent out of the proceeds of the partnership property in preference to the creditors of the partnership, but his bill of sale contained that consent, for it granted full title and plenary power of disposition of all the partnership property, except the \$234.34 which he took as his share, to Maxwell, and he is estopped from avoiding the legal effect of the conveyance he made by subsequent testimony that he did not intend that it should have that effect; (2) because the assumption of the debts by the insolvent Maxwell was not a valuable consideration for King's conveyance, but while there are authorities to that effect (*Darby & Co. v. Gilligan*, 33 W. Va. 246, 249, 10 S. E. 400, 6 L. R. A. 740), the better reason and the weight of authority are to the contrary, for a promise to pay the debt of another, although the promisor may never be able to do so, creates a legal and a moral obligation burdensome to the promisor and presumptively beneficial to the promisee (*Ex parte Peake*, 1 Maddock's Chan. 191, 195, 198; *Howe v. Lawrence*, 9 Cush. [Mass.] 533, 556, 57 Am. Dec. 68, and cases there cited; *McDonald & Co. v. Cash & Hains*, 57 Mo. App. 536, 544, and cases there cited; *Kansas City Southern Ry. Co. v. Q. O. & K. C. R. R. Co.* [Mo. Sup., decided May 29, 1907] no opinion filed; *Gratton, etc., Co. v. Troll*, 77 Mo. App. 339) and the consent of Maxwell that King should withdraw the \$234.34, which he took, constituted in itself a sufficient consideration to sustain the bill of sale; (3) because King's sale was not accompanied by delivery in a reasonable time and followed by an actual and continued change of possession of the things sold as required by Rev. St. Mo. 1899, § 3410 (*Ann. St. 1906*, p. 1940), but the evidence is that it was accompanied by such a delivery and followed by such a change of possession; (4) because notice of the purchase by Maxwell was not immediately given to the bank in which the funds of the partnership were deposited, but this fact is not material because the bank paid out the moneys upon deposit with it without objection upon drafts drawn by Maxwell in the name of the partnership, which by the terms of the bill of sale he had the right to use for a year; (5) because the assumption of the partnership debts by Maxwell created a trust in favor of the partnership creditors and imposed an equitable lien upon the partnership property for their benefit, but the weight of authority and the better reason sustain the view that it

had no such effect at any time before the \$3,731.90 was paid to Mrs. Sargent or before an application was made for the interposition of a court to administer the partnership property.

There is another reason why this bill of sale cannot be disregarded in this suit. In the most favorable view to the trustee it was voidable only, not void. King, the grantor, has not set it aside. He cannot rescind or avoid it until he pays back the \$234.34 which he received, and proves to the satisfaction of some court that he was induced by some misrepresentation or deceit to make it, and there is no such evidence in this case.

Finally, counsel for the trustee argue that the bill of sale and the payment must be considered as a single transaction, that they evidence an application of partnership property to the payment of an individual debt of one of the partners within four months of the bankruptcy while the partnership and the partners were insolvent, and that such an application is unlawful, and proves the intent of the debtors to hinder, delay, and defraud the creditors. Concede that the entire transaction was the intentional payment of a debt of one of the partners out of the partnership property in preference to the partnership creditors; the question then becomes, may partners lawfully appropriate partnership property to the payment of their individual debts when they and the partnership are insolvent? Authorities are cited which either directly or indirectly indicate that this question should be answered in the negative. *Arnold v. Hagerman*, 45 N. J. Eq. 186, 198, 199, 17 Atl. 93, 14 Am. St. Rep. 712; *Flack v. Charron*, 29 Md. 311; *In re Estate of Edwards & Wigginton*, 47 Mo. App. 307; *Earle v. Art Library Pub. Co.* (C. C.) 95 Fed. 544; *Darby & Co. v. Gilligan*, 33 W. Va. 246, 249, 10 S. E. 400, 6 L. R. A. 740; *Till's Case*, 3 Neb. 261; *Roop v. Herron*, 15 Neb. 73, 78, 80, 81, 17 N. W. 353; *In re Jones* (D. C.) 100 Fed. 781, 783; *In re Gillette* (D. C.) 104 Fed. 769, 771, 772; *In re Head* (D. C.) 114 Fed. 489, 490, 491; *Collier on Bankruptcy* (6th Ed.) p. 85; *In re Johnson*, Fed. Cas. No. 7,369; *Collins v. Hood*, Fed. Cas. No. 3,015; *In re Cook*, Fed. Cas. No. 3,150. The decisions in these and many other cases have been carefully considered, but because insolvency does not deprive persons of their right to dispose of their property for lawful purposes, because the application of partnership property with the consent of all the partners to the payment of the individual debts of the partners in preference to those of the partnership is a lawful purpose so long as no application for the interposition of a court to administer the property is made, and the creditors paid have no reasonable cause to believe that a preference is intended, because until the partnership property is placed in custodia legis the rule of administration does not take effect and the preferential equities of the partnership creditors do not attach to it either by way of trust or lien, and because the Supreme Court, by whose determination this court must be guided, and the weight of modern authority have so determined, we are constrained to hold and do decide that, when all the partners consent, their application of the partnership property to the payment of an individual debt of a partner within four months of the filing of a petition in bankruptcy while the partners and the partnership are insolvent does not evidence any intent

on the part of the debtors to hinder, delay, or defraud the creditors of the partnership within the meaning of section 67e of the bankruptcy law, and it is not void or voidable where the creditor paid has no reasonable cause to believe that a preference was intended by the payment. *Case v. Beauregard*, 99 U. S. 119, 125, 126, 127, 25 L. Ed. 370; *Fitzpatrick v. Flannagan*, 106 U. S. 648, 656, 1 Sup. Ct. 369, 27 L. Ed. 211; *Huiskamp v. Moline Wagon Co.*, 121 U. S. 310, 323, 7 Sup. Ct. 899, 30 L. Ed. 971; *Ex parte Peake*, 1 Maddock's Chan. 191, 197, 198; *Allen v. Center Valley Co.*, 21 Conn. 130, 54 Am. Dec. 333; *Armstrong v. Fahnestock*, 19 Md. 58, 65; *Howe v. Lawrence*, 9 Cush. (Mass.) 553, 57 Am. Dec. 68; *Upson v. Arnold*, 19 Ga. 190, 63 Am. Dec. 302; *Goddard-Peck Grocery Co. v. McCune*, 122 Mo. 426, 25 S. W. 904, 29 L. R. A. 681; *Schmidlapp & Bros. v. Currie & Co.*, 55 Miss. 597, 599, 30 Am. Rep. 530; *Fulton v. Hughes*, 63 Miss. 61, 64; *McDonald & Co. v. Cash & Hains*, 57 Mo. App. 536; *Siegel v. Chidsey*, 28 Pa. 279, 70 Am. Dec. 124; *Case v. Ellis*, 4 Ind. App. 224, 30 N. E. 907; *Ex parte Ruffin*, 6 Ves. 119; *Kimball v. Thompson*, 13 Metc. (Mass.) 283; *Ladd v. Griswold*, 9 Ill. 25, 46 Am. Dec. 443; *Smith v. Edwards*, 7 Humph. (Tenn.) 106, 46 Am. Dec. 71; *Robb v. Mudge*, 14 Gray (Mass.) 534; *Baker's Appeal*, 21 Pa. 76, 59 Am. Dec. 752; *Sigler & Richey v. Knox Co. Bank*, 8 Ohio St. 511; *Wilcox v. Kellogg*, 11 Ohio, 394.

In *Case v. Beauregard*, 99 U. S. 119, 125, 25 L. Ed. 370, a partnership composed of May, Graham, and Beauregard was insolvent, and each of its members was insolvent. It owed the Fourth National Bank of New York \$235,000.89, and May owed the United States over \$300,000. In this state of the case May and Graham transferred their interest in the partnership property, which consisted of a lease and the equipment of a railroad, to the United States in part payment of May's individual debt. The United States sold this interest for \$228,000 to third parties who, with Beauregard, disposed of the partnership property for stock in the lessor railroad company. The bank brought a suit in equity against all these parties to set aside the transfers of the partnership property to pay the individual debt of May and to subject it, or its proceeds, to the payment of the bank's claim against the partnership on the ground that the creditors of the partnership were entitled to a preference in payment out of its property over the individual creditor of May, but the Supreme Court affirmed a decree which dismissed the bill because, before the interposition of a court was asked, the equities of the partners in the property of the partnership had been extinguished, and for that reason the derivative equity of the partnership creditor had come to an end at the same time. The court said:

"It is, therefore, always essential to any preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced. Thus, in *Ex parte Ruffin*, 6 Ves. 119, where from a partnership of two persons one retired, assigning the partnership property to the other, and taking a bond for the value and a covenant of indemnity against debts, it was ruled by Lord Eldon that the joint creditors had no equity attaching upon partnership effects, even remaining in specie. And such has been the rule generally accepted ever since, with the

single qualification that the assignment of the retiring partner is not mala fide."

In *Schmidlapp & Bros. v. Currie & Co.*, 55 Miss. 597, 599, 30 Am. Rep. 530, Harney and Washington were partners. Harney owed Odeneal, but neither Washington nor the firm was indebted to him. Harney conveyed and Washington consented to a transfer of all the partnership property and business to Odeneal in part payment of his individual debt. Odeneal took Currie into partnership with him, and Schmidlapp & Bros., who were creditors of the first partnership, attached the property formerly owned by that firm, on the ground that the transfer was made with intent to hinder, delay, and defraud the creditors of the partnership, and was therefore fraudulent and void as to them. The court refused to sustain the attachment, and said:

"If at a time when the firm was still in existence, when no legal liens of any sort had attached, when it was neither bankrupt nor contemplating bankruptcy, all the members have agreed to a particular disposition of its assets, and that disposition is neither colorable nor fraudulent—that is to say, is upon a bona fide consideration, and reserves no benefit to the grantors—inasmuch as none of the partners can be heard to complain of such disposition, so none of the creditors of the firm, or of the individual members composing it, can question or attack it."

In *Fulton v. Hughes*, 63 Miss. 61, 65, *Fulton and Hughes* were partners. On March 17, 1884, *Fulton* sold to *Hughes* all the partnership property except certain accounts valued at \$500, which he received to his individual use, and *Hughes* assumed and agreed to pay all the debts of the firm. On June 2, 1884, *Hughes* transferred the books and accounts, which belonged to the former firm, in payment of a debt of \$955 which the firm owed his mother, and in payment of his own individual debt of \$500 which he owed her. A creditor of the former firm garnisheed persons indebted to the firm, and the mother, to whom these claims had thus been assigned, appeared and contested the right of the firm creditor to collect. The court said:

"The creditors of the firm had no lien upon the goods or choses in action which had previously belonged to the firm, but which, on its dissolution, became the property of *Hughes*, and since he alone was owner, he might lawfully appropriate them to the payment of any debt which he owed, whether it was a debt due by the late firm or by himself alone."

To a similar effect are *Roach v. Brannon*, 57 Miss. 490, and *Eldridge v. Phillipson*, 58 Miss. 270. These cases, and the rule of the Supreme Court of Mississippi illustrated by them, have been adopted and approved by the Supreme Court of the United States in *Fitzpatrick v. Flannagan*, 106 U. S. 655, 658, 1 Sup. Ct. 369, 27 L. Ed. 211.

In *Fitzpatrick v. Flannagan*, 106 U. S. 648, 657, 1 Sup. Ct. 369, 27 L. Ed. 211, the partners and the partnership were insolvent from the commencement to the end of the transactions. One of the partners died. The surviving partner continued the business, applied some of the partnership property to the payment of his individual debt which he had incurred to borrow money to pay pressing obligations of the partnership. A creditor of the partnership attached the property on the ground that the surviving partner's transfer to pay his individual

debt was fraudulent and void as against the creditors of the partnership. The Supreme Court, speaking of this transfer which was made between the death of the deceased partner and the commencement of the attachment suit said:

"Any intermediate disposition of the property, made in good faith, even although it may have been specifically a part of the partnership assets, and even if it has been applied to the payment of his individual obligations, will be valid and effectual; and, without circumstances showing an actual intention to defraud, cannot be treated as a fraud in law upon partnership creditors," and a judgment which sustained the attachment was reversed.

The sale of the partnership property by King to Maxwell and the subsequent payment by Maxwell of his individual debt with the proceeds of a part of this property were not in themselves evidence of an intent on the part of the debtors to hinder, delay, and defraud the creditors of the partnership, the entire evidence in the case fails to convince that the debtors, or either of them, ever had any such actual intention, the creditor paid had no reasonable cause to believe that a preference was intended by the payment, and the trustee cannot recover of Mrs. Sargent the \$3,731.90 which she received in payment of the note of her son. The decree below must be reversed, and the cause remanded with directions to dismiss the bill, and it is so ordered.

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In re GRAINGER.*

(Circuit Court of Appeals, Ninth Circuit. February 3, 1908.)

No. 1,444.

1. CHATTEL MORTGAGES—VALIDITY—STATUTES—PROPERTY SUBJECT TO MORTGAGE.

Civ. Code Cal. § 2955, provides that mortgages may be made only on the personal property therein specified. Subdivision 8 includes upholstery, furniture, and household goods; and subdivision 18, the machinery, casks, pipes, tubes, and utensils used in the manufacture or storage of wine, fruit brandy, fruit syrup, or sugar; also wines, fruit brandy, fruit syrup or sugar, with the cooperage in which the same are contained. *Held*, that neither of such provisions authorized a chattel mortgage on a soda fountain, carbonator, candy machines, tables, chairs, and other utensils in a candy and ice cream store.

2. BANKRUPTCY—CHATTEL MORTGAGES—VALIDITY AS AGAINST CREDITORS.

Civ. Code Cal. § 2955, provides that mortgages may be made only on certain enumerated personal property, and section 2973 declares that mortgages of personal property other than that specified in section 2955 shall be valid between the parties, their heirs, legatees, and personal representatives and persons who, before parting with value, have actual notice thereof. *Held*, that a chattel mortgage of property other than that specified in section 2955, executed in good faith for a bona fide consideration, was valid against the mortgagor's trustee in bankruptcy and general creditors.

3. SAME—CONTRACT OF BANKRUPT—PERFORMANCE BY TRUSTEE OF—ORDER OF COURT.

Where a bankrupt had purchased a corn popper under a conditional sale contract with which he had not complied at the time bankruptcy intervened, the trustee was under no obligation to carry out the agreement and pay the balance of the contract price, and having sold the popper with

*Rehearing denied June 10, 1908.

other goods belonging to the bankrupt en masse, without regard to its present worth, he had no power to pay to the seller the balance of the purchase price without an order of court entered on notice to the creditors.

Petition for Revision of Proceedings of the District Court of the United States for the Southern Division of the Southern District of California.

Tanner, Taft & Odell, for bankrupt.

Shankland & Chandler, for petitioner.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

ROSS, Circuit Judge. There is no dispute about the facts of this case, which are in substance as follows: On the 31st day of October, 1905, the bankrupt and his wife borrowed of the petitioner \$1,500, giving their note therefor, payable on demand, and secured by a mortgage duly acknowledged, and accompanied by the affidavits of the mortgagors and mortgagee to the effect that it was made in good faith and without any design to hinder, delay, or defraud creditors, and which mortgage was duly recorded November 1, 1905, in the recorder's office of Los Angeles county, Cal., in Book 163 of Mortgages, page 207, covering certain real estate therein described and situated in the city of Redlands, county of San Bernardino, and also all the fixtures, appliances, tools, and machinery, except one piano and one desk situated in the store occupied by Grainger at No. 161 Pier avenue, Ocean Park, in the city of Santa Monica, county of Los Angeles. Subsequently, and about June 1, 1906, the bankrupt having an opportunity to sell the Redlands property, requested the petitioner to release the land from the lien of the mortgage, and to take from him a mortgage on all of his goods, fixtures, machinery, and furniture in the store at No. 161 Pier avenue, in the city of Santa Monica, being the same place in which was the personal property described in the first mortgage mentioned. Without any other consideration, the petitioner released the Redlands realty, and took from the bankrupt a new note executed by himself and wife for the preceding indebtedness of \$1,500, but making it payable in installments, \$100 to become due July 1, 1906, \$150 on the first days of August, September, and October, 1906, respectively, and other payments in monthly installments, with interest at the rate of 8 per cent. per annum, payable monthly. To secure this indebtedness, but without releasing the old chattel mortgage, the petitioner accepted a new chattel mortgage from the bankrupt and his wife, duly acknowledged by them on the 1st day of June, 1906, which mortgage was in due form and was accompanied by affidavits of the mortgagors and of the mortgagee, to the effect that the same was made in good faith, and without any design to hinder, delay, or defraud creditors, and which mortgage was recorded June 1, 1906, in Book 177 of Chattel Mortgages, page 196, Records of Los Angeles county. The goods and chattels covered by this second mortgage were in the store at No. 161 Pier avenue, Santa Monica, and consisted of 1 soda fountain, 1 carbona-

tor, 1 candy pulling machine, 3 showcases, 6 tables, 24 chairs, 8 stools, 1 cigar case, 1 cash register, 1 light and cooking plant, 1 candy cutter, 2 freezers, 1 2-horse power motor, marble slabs, about \$700 worth of ice cream, tubs and cans, 1 cream separator, milk cans, ice box, all candy jars and glasses, 1 dropping machine, 10 tons salt, stock of extracts, all linoleum, 1 candy furnace, copper kettles, 1 horse, 1 wagon, 1 popcorn crisp machine with popper, 8 ice cream cabinets, all candy tools, 1 popcorn popper, and all stock and raw materials therein. The indebtedness from the mortgagors to the petitioner was bona fide in every respect, and the mortgages were taken in good faith and without any idea either on the part of the petitioner or on the part of the bankrupt that he was in an insolvent condition, or that bankruptcy proceedings were contemplated.

On the 9th of August, 1906, Grainger filed his petition in bankruptcy, and was, on the 10th of that month, duly adjudicated a bankrupt. On the same day the Los Angeles Trust Company was appointed receiver of his estate, and qualified as such, and on the 20th day of the same month sold as perishable all candy, gum, and grape juice coming into its possession. On the 22d of August, 1906, the trust company was discharged as receiver and appointed trustee of the estate, and as such took possession of the property. It was then stipulated by the parties in interest that the trustee should sell all of the property pursuant to an order of the bankruptcy court, and that the lien of the mortgages of the petitioner, if any it had, should be transferred, and the moneys derived from the sale should be charged with the lien of the mortgages, if any there was. All of the property was sold on the 6th day of September, 1906, for the total sum of \$950, which sale was confirmed by the court. In due time the petitioner filed its petition with the court asking that the money derived from the sale of the goods be turned over to it on its mortgage indebtedness. The goods were sold en masse, and among them was a combination peanut and popcorn popper which on May 1, 1906, the bankrupt had ordered of the California Supply Company, at the price of \$155, of which he had paid \$50, leaving a balance due of \$105 of the purchase price. At the time he purchased the popper he agreed to sign a contract by which the supply company should retain title to the popper until the debt should be paid off at the rate of \$15 per month. The popper was delivered on the 16th of May, 1906, and on the 9th of June of that year Grainger signed the contract and paid the \$50 mentioned. That contract was never recorded, and the petitioner had no notice of its existence when it accepted the mortgage of June 1st covering the same. At the time the trustee took possession of the popper it had notice of the rights of the supply company, and its claim, and on August 16, 1906, the receiver was duly notified that the supply company claimed the popper, and received like notice as trustee, and on the day of sale the supply company notified the trustee at the place of sale that it claimed the popper, and also appeared before the referee when the order was made confirming the sale, and protested against such confirmation. The referee held that the supply company was entitled "to the sum of \$105 due upon the peanut and popcorn popper sold to the said bankrupt under contract on the 16th day of May, 1906," and also denied the petition-

er's petition for the money arising from the sale of the chattels covered by the mortgages under which it claimed, which action of the referee was affirmed by the court below when brought before it.

The claim of the petitioner here is that the court below erred in holding that the \$105 due the supply company on the contract sale of the popcorn popper should be paid to that company as a prior claim, and that the court also erred in holding that the petitioner had no lien on the chattels covered by its mortgages as against the creditors of the bankrupt or the trustee.

Section 2955 of the Civil Code of California provides, "Mortgages may be made upon the following personal property, and none other"—enumerating in 22 subdivisions a large number of chattels; subdivisions 8 and 13 being the only ones under which it is even claimed that the articles described in the chattel mortgages here in question come. Those subdivisions read as follows:

"8. Upholstery, furniture, and household goods."

"13. The machinery, casks, pipes, tubes, and utensils used in the manufacture or storage of wine, fruit brandy, fruit syrup or sugar; also wines, fruit brandy, fruit syrup or sugar, with the cooperage in which the same are contained."

We think it plain that the articles enumerated in the chattel mortgages here in question are not embraced by either of these subdivisions of section 2955 of the Civil Code of California. The above-mentioned section is a part of title 14, c. 2, art. 3, of the Civil Code, and succeeding sections of the same article prescribe the form of mortgages of personal property, and declare that such a mortgage "is void as against creditors of the mortgagor, and subsequent purchasers and incumbrancers of the property in good faith and for value, unless:

"1. It is accompanied by the affidavit of all the parties thereto that it is made in good faith and without any design to hinder, delay, or defraud creditors.

"2. It is acknowledged, or proved, certified, and recorded in like manner as grants of real property."

By a subsequent statute of California, now embodied in section 2973 of the same article of the Civil Code, it is provided that:

"Mortgages of personal property other than that mentioned in section twenty-nine hundred and fifty-five, and mortgages not made in conformity with the provisions of this article, are nevertheless valid between the parties, their heirs, legatees, and personal representatives, and persons who before parting with value have actual notice thereof."

While, therefore, it is true that none of the personal property covered by the chattel mortgages under which the petitioner claims came within any of the enumerations of section 2955 of the Civil Code, it was authorized to be mortgaged by the subsequent act embodied in section 2973 of the same Code, and was, as has been expressly held by the Supreme Court of the state, good as between the parties thereto, and as to all other persons except creditors of the mortgagor and subsequent purchasers in good faith and for value. *Perkins v. Maier & Zobelein Brewery*, 133 Cal. 497, 498, 65 Pac. 1030, and cases there cited.

It is not contended that there was any actual fraud in the making or taking of these chattel mortgages; on the contrary, it appears that they were executed to secure money loaned by the petitioner in good faith to the mortgagors, and it further appears that the mortgages were in the prescribed form, were accompanied by the prescribed affidavit of the mortgagors and mortgagee, and that they were duly put upon the public records long prior to the adjudication in bankruptcy. Nor is it pretended that any of the creditors of the bankrupt mortgagor ever secured any lien of any character upon any of the property.

In the case of *Lemon v. Wolff et al.*, 121 Cal. 272, 275, 53 Pac. 801, it was held by the Supreme Court of that state that a chattel mortgage which is good as between the parties thereto can only be questioned by creditors of the mortgagor who have acquired a lien upon the mortgaged property, or who seek to levy process thereon, and that a mere creditor at large, without some process for the collection or enforcement of his debt, cannot do so.

It is true that in the case of *Ruggles v. Cannedy*, 127 Cal. 290, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371, decided intermediate the decisions in *Lemon v. Wolff*, and *Perkins v. Maier & Zobelein Brewery*, the Supreme Court of California held that where creditors of an insolvent mortgagor of personal property are prevented from suing by reason of the adjudication of his insolvency under the state insolvency act, and are limited to the proof of their claims against him, such proof is the equivalent of a judgment, and shows sufficient interest of the creditors in the mortgaged property to warrant the assailing of the chattel mortgage as a void act for want of prompt record, and that the assignee in insolvency represents the interest of the creditors, and may recover the property for their benefit; but the present case arises under the United States bankruptcy act.

In *York Manufacturing Company v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, it appeared that the York Manufacturing Company had supplied certain machinery to the Mount Vernon Ice, Coal & Milling Company, afterwards adjudged a bankrupt corporation, under a conditional contract providing, among other things, that the title to and ownership of the machinery should remain in the York Manufacturing Company until the entire purchase price agreed upon should be actually paid in cash, the vendor being given the right to enter the premises of the vendee and remove the property in case of default. Twenty-five per cent. only of the price of the machinery was ever paid. A statute of Ohio, where the case arose, required such a contract to be filed for record, which was not done in that case. There was also a statute of the same state relating to chattel mortgages which declared such a mortgage absolutely void as against creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, should be deposited forthwith as directed in the act. The Supreme Court in the case cited referred to a decision of the Supreme Court of Ohio, in which that court held that the chattel mortgage was not void for lack of filing as between the parties thereto, but that the Ohio statute only avoided the instrument as to those

creditors who, between the time of the execution of the mortgage and the filing thereof, had taken steps to "fasten upon the property for the payment of their debts."

In *York Manufacturing Company v. Cassell*, the court said:

"We have not been referred to any decision of the Supreme Court of Ohio as to the meaning of the statute requiring the filing of contracts of conditional sales, but we concur with the Circuit Court of Appeals in this case, that the statute would render the unfiled contract void as to the same class of creditors mentioned in the chattel mortgage statute. Therefore the contract would be void as to creditors who before its filing had 'fastened upon the property' by some specific lien. As to creditors who had no such lien, being general creditors only, the statute does not avoid the sale, which is good between the parties to the contract."

And the Supreme Court in *York Manufacturing Company v. Cassell* proceeded:

"We come, then, to the question whether the adjudication in bankruptcy was equivalent to a judgment, attachment, or other specific lien upon the machinery. The Circuit Court of Appeals has held herein that the seizure by the court of bankruptcy operated as an attachment and an injunction for the benefit of all persons having interests in the bankrupt's estate. We are of opinion that it did not operate as a lien upon the machinery as against the York Manufacturing Company, the vendor thereof. Under the provisions of the bankrupt act the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. At that time the right, as between the bankrupt and the York Manufacturing Company, was in the latter company to take the machinery on account of default in the payment therefor. The trustee under such circumstances stands simply in the shoes of the bankrupt, and as between them he has no greater right than the bankrupt. This is held in *Hewitt v. Berlin Machine Works*, 194 U. S. 298, 24 Sup. Ct. 690, 48 L. Ed. 986. The same view was taken in *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577. It was there stated that, 'under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt.' See *Yeatman v. Savings Institution*, 95 U. S. 764, 24 L. Ed. 539; *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816; *Hauselt v. Harrison*, 105 U. S. 401, 26 L. Ed. 1075. The same doctrine was reaffirmed in *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956. The law of Ohio says the conditional sale contract was good between the parties, although not filed. In such a case the trustee in bankruptcy takes only the rights of the bankrupt, where there are no specific liens, as already stated."

Upon the authority of this decision of the Supreme Court we think it must be held that the chattel mortgages here in question are valid as against the general creditors of the bankrupt.

We have been referred to no statute of California requiring such conditional contracts as that covering the corn popper to be filed for record, and, as a consequence, none prescribing the effect of such nonfiling; but conceding the validity of the supply company's conditional sale as against the petitioner's mortgage, yet that claimant did not pursue the remedy allowed by law for the recovery of the possession of its property, but, after its sale along with the property of the bankrupt, claimed, and was by the court below allowed, the balance of the contract price of the popper out of the gross proceeds of the property sold en masse, and without regard to the worth of the popper

which, for the reason stated, was impossible of ascertainment. The trustee was under no obligation to carry out the bankrupt's agreement to purchase the popper and pay the balance of the contract price therefor. And if he had desired to do so, in order to acquire title to the popper, such payment could only have been made by an order of the court upon notice to the creditors. Sections 253, 256, 263, Loveland on Bankruptcy (3d. Ed.) and Order 28 of General Orders in Bankruptcy (89 Fed. xi, 32 C. C. A. xxviii).

The judgment is reversed, and the cause remanded to the court below for further proceedings in accordance with the views herein expressed.

S. M. HAMILTON COAL CO. v. NEW YORK & PHILADELPHIA COAL & COKE CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

No. 180.

EVIDENCE—WRITTEN CONTRACT—AMBIGUOUS TERMS—EXPLANATION BY PAROL.

Where, in an action for breach of a contract to deliver a certain number of tons of "our Big Vein Cumberland coal" per month, the parties were not agreed as to the meaning of such phrase, the court erred in confining parol evidence to explain the same to the meaning of the term "Big Vein Cumberland coal," eliminating the word "our," since, the contract being ambiguous, the evidence admitted to explain it should be sufficiently broad to show the real intention of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2129, 2131.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Writ of error to review a judgment of the Circuit Court entered upon the verdict of a jury in favor of the defendant in error, who was the plaintiff below. In the following opinion the parties are designated as in the court below.

Frederick Dallam and Herbert Barry, for plaintiff in error.
Harold W. Hardon, for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This was an action to recover damages for the alleged breach of a written contract dated September 19, 1905, wherein the defendant agreed to sell and deliver to the plaintiff, beginning October 1st of that year, "* * * (1,500) fifteen hundred to (2,000) two thousand tons, buyers option, per month for one year, of our Big Vein Cumberland coal. * * *" For some time after the contract became operative, the defendant delivered and the plaintiff accepted coal of a certain grade under it. A dispute then arose as to the kind of coal designated by the phrase "our Big Vein Cumberland" in the contract, the outcome of which was this litigation.

The meaning of the phrase "our Big Vein Cumberland coal," therefore, presented the question of primary importance upon the trial. The court, however, practically ignored the word "our," and treated the contract as if simply calling for the delivery of "Big Vein Cumber-

land coal," as that term should be explained by extrinsic evidence. Accordingly testimony was offered to establish both the geological and commercial meanings of the term. This tended to show that scientifically Big Vein Cumberland coal is coal from the "upper productive coal measures," and is now taken from the Pittsburgh seam—as it is called—in Pennsylvania. The testimony as to the commercial meaning of the term varied; some witnesses testifying that it merely designates a certain grade of coal. But the defendants, insisting upon including the word "our" in the term, desired to go further with the parol evidence, and offered to show that in their negotiations prior to the execution of the contract the parties had agreed upon the grade of coal to be delivered under the designation "Hamilton's Big Vein Cumberland coal"; and also offered to prove the meaning attached by them to the phrase "our Big Vein Cumberland coal." The trial court rejected the defendant's offer and excluded the evidence.

This action of the court in confining the parol evidence to the meaning of the term "Big Vein Cumberland coal" was erroneous. The phrase used in the complaint is "our Big Vein Cumberland coal," and there was no more reason for omitting the word "our" from it than any other word. The phrase "our Big Vein Cumberland" was ambiguous even after the reception of evidence explaining the meanings of the last three words. It was capable of several applications: (1) It might have been used descriptively as designating the particular coal taken from some mine in the Pittsburgh seam which the defendant dealt in. (2) It might have meant coal of a grade corresponding to that from the Pittsburgh seam, and, perhaps, taken in its immediate vicinity, which the defendants designated in their business and to their trade as "Hamilton's Big Vein Cumberland coal." (3) It might have meant coal which in this particular transaction the parties had agreed should be designated as "our [Hamilton's] Big Vein Cumberland coal." The contract being ambiguous, parol evidence was proper to explain its meaning. And, when such evidence came in, it should have been along sufficiently broad lines to show what was meant by the entire phrase used in the contract to resolve the ambiguity and to show the real intention of the parties. Especially should this have been the case with respect to a contract which itself referred to previous conversations. That parol evidence of prior negotiations is admissible for these purposes is settled by numerous authorities. The following cases are merely illustrative: In *Kilby v. Hinchman-Renton Fire Proofing Co.*, 132 Fed. 957, 961, 66 C. C. A. 67, the Circuit Court of Appeals for the Eighth Circuit said:

" * * * Where, in the application of a contract to its subject-matter, an ambiguity or uncertainty arises which cannot be removed by an examination of the agreement alone, parol evidence of the circumstances under which it was made and of statements made in the negotiations which preceded it may be admitted to resolve the ambiguity, and to prove the real intention of the parties."

In *Wolff v. Wells, Fargo & Co.*, 115 Fed. 32, 35, 52 C. C. A. 626, the Circuit Court of Appeals for the Ninth Circuit said:

" * * * If there is any uncertainty or ambiguity as to the meaning of the words used in the written contract, where it is based upon or refers to a

conversation, parol evidence may be admitted, not to vary the terms of the contract, but to explain the sense in which the language in the writing was used. Such attendant and surrounding circumstances are competent evidence for the purpose of placing the court in the same situation and giving it the same advantage for construing the instrument as were possessed by the parties who executed it. The object or tendency of such evidence is not to contradict or vary the terms of the writing, but is for the purpose of enlightening the court so as to enable it to more fully understand the language employed therein."

In *Western Union Tel. Co. v. American Bell Tel. Co.* (C. C.) 105 Fed. 684, 687, Judge Colt said:

"* * * The case presents a contract which is capable of two interpretations. This being true, it was clearly proper for the master to admit evidence of previous negotiations and surrounding facts and circumstances relating to the subject-matter of the contract, in order to reach an interpretation of the language used in accordance with the understanding of the parties at the time the contract was entered into. That such evidence is admissible where a contract is capable of two interpretations and a doubt exists as to the true meaning is well established."

And in the early case of *Hart v. Hammett*, 18 Vt. 127, it was held:

"When technical words are used in a written agreement, parol evidence is admissible to show their meaning; and, if it thereby appears that the words used may have different applications, parol evidence is admissible to prove what was said by the parties at the time of the execution of the written agreement, for the purpose of showing the sense in which they understood the words."

The provisions of the contract in suit being ambiguous, it was error to exclude the evidence offered by the defendant to explain their meaning.

Judgment reversed, and cause remanded for a new trial.

UNITED STATES v. VILLARI, MITCHELL & CO.

UNITED STATES v. W. L. RATHBUN & CO. (two cases).

(Circuit Court of Appeals, Second Circuit. December 4, 1907.)

Nos. 26, 24, 25 (3,767, 3,762, 3,765).

1. **CUSTOMS DUTIES—FRUIT IN PACKAGES—ALLOWANCE FOR DECAY—"DUTIABLE MERCHANDISE."**

The rule that fruit imported in a rotten and wholly worthless condition does not constitute dutiable merchandise applies as well to fruit in packages as to fruit in bulk; and in the assessment of duty on fruit imported in packages allowance should be made for the decayed portions, even though not separated from the sound, but all being sold together at auction.

2. **SAME—EVIDENCE—ESTIMATION OF DECAY—REPRESENTATIVE PACKAGES.**

In proof of the amount of decay in an importation of fruit in packages, evidence was given as to the percentage of decay in certain sample packages which represented each of the lots in question, had been used as the basis of auction sales, and consisted of at least 10 per cent. of all the packages. *Held*, that the percentage thus shown for the sample packages might be taken as showing the amount of decay in the other packages also.

Appeals from the Circuit Court of the United States for the Southern District of New York.

In the Rathbun Cases there was no opinion below. The decision in the Villari Case is reported in 147 Fed. 766. The Circuit Court reversed a decision by the Board of United States General Appraisers (G. A. 5,865; T. D. 25,843), which had affirmed the assessment of duty by the collector of customs at the port of New York.

The importations in controversy consisted of oranges, lemons, limes, and grape fruit, in boxes; each piece of fruit being wrapped separately in paper. The collector imposed duty on the entire amount imported, without any allowance for decay. The importers contended that such allowance should be made, in accordance with the rule established by the decision of the Supreme Court in *Lawder v. Stone*, 187 U. S. 281, 23 Sup. Ct. 79, 47 L. Ed. 178. It was there held that the decay of fruit should not be considered a damage on account of which duty should be abated only in case of abandonment under the provisions of Customs Administrative Act June 10, 1890, c. 407, § 23, 26 Stat. 140 (U. S. Comp. St. 1901, p. 1930), but that it should be regarded rather as a case of nonimportation by reason of which no duty could properly accrue. In that case the fruit was imported in bulk and the decayed portion was in the form of worthless, unmerchantable slush. The Board of General Appraisers overruled the importers' contentions for the following reasons, as stated in the board's opinion:

"SOMERVILLE, General Appraiser. The witnesses who testified at the hearing before the board do not seem to have examined more than about 10 per cent. of the packages covered by their invoices, and the percentages of the decayed fruit out of the entire quantity of fruit which they did examine have been loosely estimated as running in most cases from about 20 per cent. to 50 per cent. The injury done to the fruit by decay is spoken of as a damage, and there is no pretense that these estimates are more than an approximation, based upon the judgment of the witnesses as to the probable fractional part of the importation actually spoiled or decayed. All the goods appear to have been sold in original packages, and there was no separation of the fruit alleged to be decayed from that which was sound at the time the sale was conducted. In this respect the present case differs widely from that of *Lawder v. Stone*, supra. The court there found that a portion of pineapples had rotted so as to become worthless slush, commercially valueless, condemned under the sanitary regulations of the city of Baltimore, and dumped overboard. In the case now before us it appears that in some instances the fruit brought prices equivalent to the market price of sound fruit, and in other instances somewhat less. On the whole, we cannot see that the testimony in the cases under consideration differs greatly from that introduced in the Case of *Maxfield & Co.*, G. A. 5,779 (T. D. 25,552), where we held that the importer had failed to show with sufficient certainty and by satisfactory evidence the quantity of merchandise, if any, which was so destroyed as to become valueless, and that under the rule laid down by the Supreme Court in the *Lawder Case*, 187 U. S. 281, 23 Sup. Ct. 79, 47 L. Ed. 178, the mere fact that the goods were damaged so as to be merchantable to a less extent than sound fruit would not, in our judgment, constitute a nonimportation. * * * We are, moreover, of opinion that, where a deduction of duty is claimed for an alleged nonimportation of goods, proof as to the amount of decay in one package out of every ten is not sufficient to authorize the board in finding that a like percentage of loss occurred in other cases or packages which were not examined. * * * In our judgment, the present cases fail to come within the principle settled in the *Lawder Case*, supra; and the testimony, moreover, is too vague to justify us in granting any relief in any instance."

On appeal to the Circuit Court additional evidence was taken, establishing the percentage of decay in certain sample packages from each of the lots in question, which packages had been selected as the basis of auction sales and consisted of at least 10 per cent. of the packages in each lot. This evidence, together with that taken by the Board of General Appraisers, showed the facts to be the same as in *Courtin & Golden v. U. S.* (C. C.) 143 Fed. 551, and to resemble the case of *Stone v. Shallus*, 143 Fed. 486, 74 C. C. A. 506, in that the fruit was imported in packages, rather than in bulk, but differing from the latter

case in that there the decayed portions had been culled out, while here they were sold unseparated from the sound in the packages in which imported. The Circuit Court reversed the decision of the Board of General Appraisers, on the authority of the Courtin & Golden Case, *supra*.

D. Frank Lloyd, Asst. U. S. Atty.

Walden & Webster (Howard T. Walden, of counsel), for importers.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The decisions of the Circuit Court are affirmed, upon the opinion of the Circuit Court of Appeals, Fourth Circuit, in *Stone v. Shallus*, 143 Fed. 486, 74 C. C. A. 506.

WARE v. WUNDER BREWING CO. OF SAN FRANCISCO et al.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1908.)

No. 1,434.

APPEAL AND ERROR—REVIEW—FINDINGS OF FACT.

An appellate court on a writ of error cannot weigh the evidence, but must take the facts as found by the court below, unless there is a total want of evidence to sustain the findings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3955-3969.]

In Error to the District Court of the United States for the Northern District of California.

C. N. Riggins and R. H. Cross, for plaintiff in error.

Fabius T. Finch, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

ROSS, Circuit Judge. This action was brought by the trustee of the estate of the bankrupt to set aside an alleged preference. The case is brought here by writ of error.

We cannot agree with the counsel for the plaintiff in error that there was a total want of evidence to support the findings of the trial court. Such being the case, it is well settled that the appellate court cannot weigh the evidence, but must take the facts as found by the court below. *Stanley v. Supervisors*, 121 U. S. 547, 7 Sup. Ct. 1234, 30 L. Ed. 1000; *Pacific Postal Telegraph C. Co. v. Fleischner*, 66 Fed. 902, 14 C. C. A. 166.

The judgment is affirmed.

CONSOLIDATED ENGINE STOP CO. v. LANDERS. FRARY & CLARK.

(Circuit Court of Appeals, Second Circuit. February 11, 1908.)

No. 94.

1. PATENTS—INFRINGEMENT—THROTTLE VALVE.

The Stannard patent, No. 509,334, for an improvement in throttle valves, consisting of an electrically controlled emergency valve to shut off the steam passing to an engine, has as an element of each claim a steam pas-

sageway to permit steam to pass into the chamber at one end of a balanced puppet valve, and is not infringed by the device of the Locke patent, No. 812,279, which has no such steamway nor its equivalent.

2. SAME—CONSTRUCTION OF CLAIMS.

A patentee who has made a particular feature an element of his claims, although it may not have been essential to his invention, cannot claim that it is immaterial or that a device which dispenses with it is an infringement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 376.]

Appeal from the Circuit Court of the United States for the District of Connecticut.

For opinion below, see 151 Fed. 775.

Emerson R. Newell, for appellant.

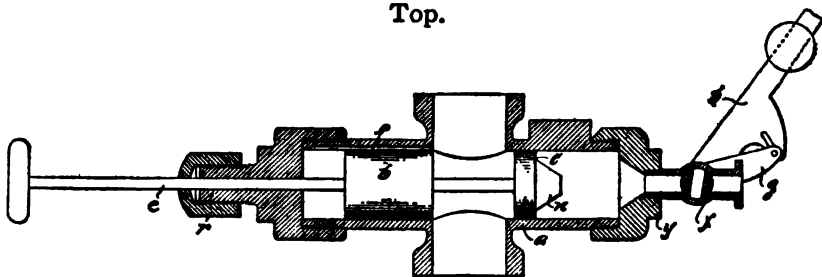
E. S. Beach, for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This is a suit alleging the infringement of patent No. 509,334, granted November 21, 1893, to John E. Standard, for improvements in throttle valves. The defenses are noninfringement and the invalidity of the patent. The former defense will be first considered. If there be no infringement, consideration of the other questions is unnecessary.

The patented device is a throttle valve to shut off the steam passing to an engine, and may be operated by means of an electrical connection from any point in a factory. It is an emergency valve, and is designed to be used whenever, in case of accident or for other reasons, it is desired to stop the engine without the delay of communicating with the engineer. The following drawing taken from the complainant's brief illustrates the construction of the throttle valve:

Top.



The shell or valve body (a) is cross-shaped, having two cylindrical passages intersecting at right angles. The vertical passage is the steamway, and is practically a part of the steam pipe from the boiler to the engine. Fitted to slide in the horizontal passage is the valve or shut-off plug (b), of sufficient size, when in position, to close the steamway. Connected with the shut-off plug by a comparatively small rod, slightly longer than the diameter of the steamway, is the piston or disk (c). On the piston is the cone-shaped valve (n). At the left end of the shut-off plug (b) is the handled rod (e), which passes through the cap (r) on the left end of the horizontal passage. At the right end

of this passage is the cap (y), provided with an outlet to the atmosphere controlled by the plug cock (f). This plug cock is turned by the lever (g), to which is attached the weighted lever (h). The movement of this weighted lever is controlled by an electrical connection. The passageway (p) shown in this drawing is described in the specification and claim, but is not shown in the drawings of the patent. It extends from the steamway to the opening between the cap (r) and the plug (b).

The operation of the device is as follows: When the throttle valve is open and steam is passing freely from the boiler to the engine the parts will be in the position shown in the illustration. The plug cock (f) will be closed. The shut-off plug (b) will be at the left side of the steamway and will not interfere with the passage of steam. The steam will pass through the passageway (p) and fill the space between the plug (b) and the left end of the chamber. The steam in this opening would naturally tend to move the plug to the right and thus close the steamway. So, although the patent is silent about a passageway from the steamway to the opening at the right of the piston (c), it is evident that it is intended either that one should be provided or that the piston should be sufficiently loose to allow the steam to leak through. The pressure of the steam thus filling the opening at the right of the piston (c) would act in opposition to the pressure at the left of the plug (b), which would not move. This balancing of steam pressure is the reason why valves of this character are called "balanced valves."

Now, when an emergency arises and a person at a distant point desires to stop the engine, he makes an electrical connection which actuates the weighted lever (h). This in turn moves the lever (g) and opens the plug cock (f), allowing the steam in the opening at the right of the piston (c) to escape into the atmosphere. The pressure no longer balances. There is nothing to oppose the pressure of the steam at the left of the plug (b), which moves from the position shown in the drawing to the right until it closes the steamway and causes the engine to stop. When it is desired to start the engine again, the plug cock (f) is closed, the shut-off plug (b) is pushed to the left by the handle (e), steam enters on both sides, and the plug is balanced as before.

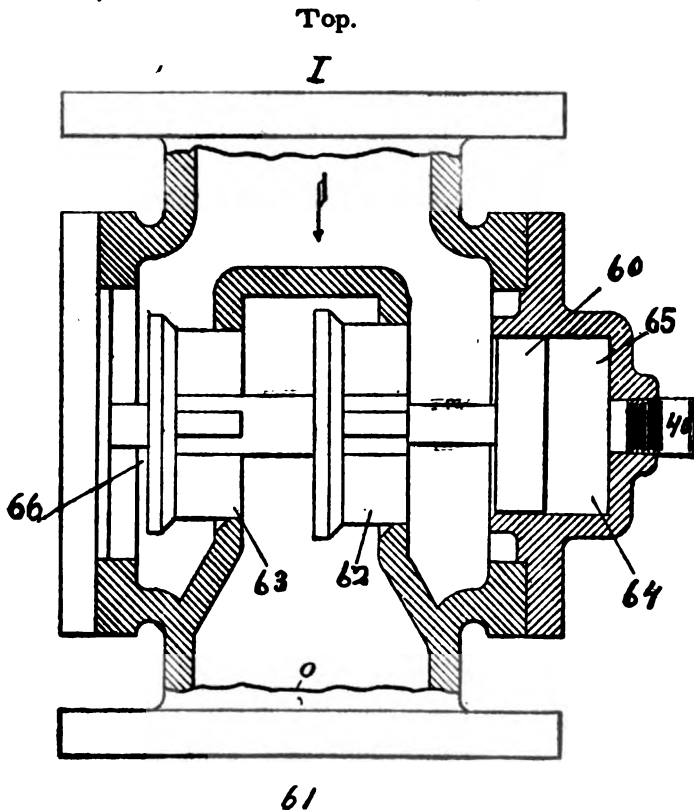
Having considered the construction and operation of the device, it is desirable to note the following claims of the patent which it is claimed the defendant infringes:

"1. The combination of a suitable shell or valve body, provided with an opening for the passage of steam, a shutoff plug (b), having a portion (c) arranged therein, a passageway (p) in the shell to allow the steam to enter the opening between the screw cap (r) and the plug (b), means arranged to open and close the outlet from the chamber formed between the portion (c) and the screw cap (y), whereby the steam upon the opening of said outlet is allowed to operate to carry the body of the plug across the steamway and close the valve, substantially as and for the purposes stated.

"2. The combination of the shell (a), a plug (b) having a disk (c) arranged therein and having an opening for the passage of steam between the parts (b) and (c), a plug cock (f) mounted in one end of the valve body, a steamway (p) formed in the wall of the valve body at the opposite end portion, a lever (g) mounted upon the plug, a lever (h) pivotally mounted adjacent thereto, a weight arranged upon the lever (h), a latch arranged to hold the lever (h) in its raised position, and means to move said latch and release the lever and allow it to fall by gravity and engage the lever (g), thereby turning the plug, substantially as and for the purposes stated."

It will be observed that an essential feature of the invention as stated in the claims and specifications is the passageway (p). It is particularly included in both claims. In the first claim it is described as "a passageway (p) in the shell to allow the steam to enter the opening." In the second claim it is spoken of as "a steamway (p) formed in the wall of the valve body." In the specification it is described as "the opening or channel (p) in the shell." The passageway (p) is thus evidently intended to be a separate and distinct passage in the shell or wall of the valve body, as illustrated in the foregoing drawing taken from the complainant's brief. Certainly a passageway channeled in the shell, if not actually bored through it, is required by the claims. And, the patentee, having made the passageway (p) a separate element of his claims, no other throttle valve infringes, unless it too possesses such a passageway or its equivalent.

The defendant's device is called an "automatic engine stop" and is manufactured under patent No. 812,279, issued February 13, 1906, to Nathaniel C. Locke. The following drawing from the patent, showing the main valve, illustrates the device so far as is necessary for the purposes of this case:



I indicates the steam inlet from the boiler, and O the outlet to the engine. 62 and 63 show a double puppet valve which controls the passage of the steam through the steamway. This carries the piston (60) which is loose in the cylindrical portion (64) of the casing. 65 is a chamber at the right end of the piston. 40 is a pipe leading to what is called the "fluid pressure motor" and the "relief valve," not shown in the drawing. It is unnecessary to describe the fluid pressure motor and the relief valve, further than to say that they are devices by which, when operated through an electrical connection, the steam is allowed to flow out into the atmosphere and the pressure in the pipe (40) and the chamber (65) is reduced.

The operation of the device is as follows: When the main valve is open the steam enters through the inlet (I), floods the whole chamber, and passes through the open puppet valves to the engine. In filling the chamber it necessarily fills the space (66) at the left of the puppet valve, and also flows past the loose piston (60) into the chamber (65), and thence through the pipe (40) into the fluid pressure motor. The chamber being filled with steam, the pressure in all directions is the same, the puppet valves and piston are balanced, and the steam flows freely to the engine. When the relief valve is opened the steam in the fluid pressure motor escapes, the pressure in its chamber, in the pipe, and in the chamber (65) is diminished, the piston is unbalanced, and the pressure of the steam on the left end of the puppet valves forces them to the right, seats them, and shuts off the steam from the engine.

It thus appears that the defendant's device is a balanced emergency valve of the same general character as the complainant's. In determining whether it infringes, we will apply the test already led up to: Does it possess the passageway (p) of the patent in suit or its equivalent? Now a comparison of the two devices shows nothing corresponding to this separate passageway in the defendant's construction. The puppet valves are so located in the main steamway that they are balanced by the steam flooding it. They are closed when pressure is removed from one end by the direct pressure of the steam in the main steamway. There is no separate passageway to the left end of the puppet valve, and no necessity for any. The body or shell of the defendant's device is so constructed that the steam in the main steamway furnishes all the pressures required for the different operations of the valves and pistons. The Stannard four-branch construction, on the other hand, involves a separate chamber at the left of the shut-off plug and, consequently, a separate passageway to it.

But the complainant contends that the principle that a single device may be the equivalent of two or more elements of a claim should apply in this case; that the defendant's main steamway fulfills the functions of both the main steamway and the separate passageway of the patent in suit. This contention is not well founded. While the defendant's steamway does fulfill the function of the complainant's steamway, it does not convey a separate supply of steam to the end of the puppet valve, and consequently it does not fulfill the function of the passageway (p). It is true that in the defendant's device this addition-

al supply of steam is not required; but that does not change the nature of what the defendant's steamway actually does. The operation of the defendant's device and its general nature is very similar to that of the complainant's. It employs the double puppet construction, instead of a single shut-off plug and the relief valve, and its connections are much more complicated. Had the claims of the Stannard patent contained less elements, it might have been difficult to avoid the charge of infringement. Especially, had the patentee been willing to let them stand without the requirement of the passageway (p), there would have been ground for claiming that the whole chamber of his throttle valve was the main steamway—the steam leaking to the left behind the shut-off plug and to the right in front of the piston—and thus corresponding to the defendant's steamway. It will be remembered that he did not provide for a passageway to the right, although it was as necessary that steam should enter there as to the left. But, while the requirement of an additional passageway may have been unnecessary, the patentee chose to make it an element of his claims. The defendant's device does not possess it, or its equivalent. Consequently, while the defendant's construction may accomplish the same purpose as that of the complainant's, it does not infringe.

The language of the Supreme Court of the United States in *Wright v. Yuengling*, 155 U. S. 52, 15 Sup. Ct. 3, 39 L. Ed. 64, well applies to this case:

"Now, while this semicircular connecting piece may be an immaterial feature of the Wright invention, and the purpose for which it is employed accomplished, though less perfectly, by the extension of the guiding cylinder in the manner indicated in defendant's device, yet the patentee, having described it in the specification and declared it to be an essential feature of his invention, and having made it an element of these two claims, is not now at liberty to say that it is immaterial, or that a device which dispenses with it is an infringement, though it accomplishes the same purpose in perhaps an equally effective manner."

For these reasons, we hold that infringement has not been shown, and the decree of the Circuit Court is affirmed, with costs.

BRADY BRASS CO. v. AJAX METAL CO.

(Circuit Court of Appeals, Third Circuit. February 21, 1908.)

No. 67.

1. PATENTS—INVENTION—CHANGING PROPORTIONS IN ALLOY.

A mere difference in the proportions of the constituents of an alloy, however useful the result may be, does not entitle the originator to the monopoly of a patent, where such result was reached gradually by continued experimentation by the patentees and by others, all leading toward the same proportions, and the final product differs from those of the prior art only in degree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 19.]

2. SAME—ALLOY FOR JOURNAL BEARINGS.

The Hendrickson & Clamer patent, No. 655,402, for an alloy for anti-friction bearings "consisting of less than seven per cent. of tin and more than twenty per cent. of lead and the balance of copper," is void for lack of invention in view of the prior art.

Appeal from the Circuit Court of the United States for the District of New Jersey.

For opinion below, see 155 Fed. 409.

Morgan J. O'Brien, for appellant.

A. B. Stoughton, for appellee.

Before GRAY, Circuit Judge, and McPHERSON and CROSS, District Judges.

GRAY, Circuit Judge. This is an appeal from an interlocutory decree of the Circuit Court for the District of New Jersey, in a suit charging infringement of letters patent No. 655,402, for an alloy for antifriction bearings. The decree sustains the validity of the patent, and finds infringement. The specifications and claim are, as follows:

"One object of the present invention is to fill a recognized want and provide an alloy for journal bearings which shall hold up within itself more lead than was heretofore possible without the use of nickel, which is claimed in our applications serially numbered 737,304 and 737,305. It is generally known by those skilled in the art that the lead in a copper, tin, and lead alloy is only mechanically held, while the copper and tin are not a merely mechanically-mixed alloy nor a simple solution of the one in the other, but in certain proportions they are a chemically-constituted compound, and if an excess of either one or the other constituents is present there will remain one or more not chemically-combined ingredients outside of the crystallized chemically-combined constituents. The elements tin and copper when brought together in the molten state combine to form several well-defined compounds, such as SnCu_2 , SnCu_3 , SnCu , according to the amount of tin present. Any excess of tin above that required for the formation of these compounds will mix with the copper to form the so-called 'eutectic' alloy. This part of the alloy has a much lower melting-point than any of the chemically-combined crystallized portions and acts as the cementing material. The first of the compounds solidifies in the mass at a temperature between $1,700^\circ$ and $1,800^\circ$, and the eutectic alloy being rich in tin and having a formula of seventy-three parts copper and twenty-seven parts tin does not solidify until the mass has cooled to about 930° Fahrenheit. We have discovered that a much higher percentage of lead, which is desirable, can be added to such alloy containing less than seven per cent. of tin than can be added to such alloy containing more than seven per cent. of tin, because the alloy containing less than seven per cent. of tin when poured, for example, into green-sand molds contains very little or none of the eutectic alloy. Consequently the whole mass will solidify at a comparatively-elevated temperature and in so doing will hold up the lead, so that a comparatively-large proportion of it, as more than twenty per cent., may be introduced without separation.

"To make our improved alloy, the copper is heated and melted until it is thoroughly liquid. The tin and lead are then added in the proportions of under seven per cent., by weight, of tin and not less than twenty per cent., by weight, of lead. The alloy is then cast in suitable molds, which may or may not be of green sand.

"We are aware of the fact that our alloy may be built up by the use of brass scrap which, as is well known, may contain, in addition to copper, antimony, zinc, iron, arsenic, phosphorus and bismuth and any and all soft metals in varying proportions.

"It will be obvious to those skilled in the art to which our invention appertains, that modifications may be made in details without departing from the spirit thereof. Hence we do not limit ourselves to the precise mode of procedure hereinabove set forth; but, having thus described the nature and objects of our invention, what we claim as new, and desire to secure by letters patent, is, a bearing consisting of less than seven per cent. of tin and more than twenty per cent. of lead and the balance of copper, substantially as described."

The patent is therefore for a product, and not for a process. A copper, tin and lead alloy for journal bearings is, as admitted by the patentee, old in the art, and journals made of such an alloy had been used long prior to the date of the patent. There is no claim for any particular method of combining the constituents of this alloy, and the specification only states the ordinary foundry practice well known and recognized by those skilled in the art. The discovery, as alleged, is "that a much higher percentage of lead can be added to such alloy containing less than seven per cent. of tin than can be added to such alloy containing more than seven per cent. of tin, because the alloy containing less than seven per cent. of tin, when poured, for example, into green-sand molds, contains very little or none of the eutectic alloy." In the making and use of this copper-tin-lead alloy, it had long been known, as stated in the specifications of the patent in suit, that, while the copper and tin unite intimately together, so as to approach almost a chemical union, the lead is held mechanically in the interstices of the copper-tin alloy. The lead, being soft and plastic, acts as the lubricant, which gives the chief value to the alloy as a journal bearing material. As said by the experts, the copper and tin, when united, form a matrix for the holding of the lead, the small interstices acting, as it were, as frames into which the lead disposes itself.

It is not necessary for us to inquire just how the tin added to the copper promotes the efficiency of the alloy for the purpose intended. The patent itself speaks of the whole mass of copper and tin solidifying at a comparatively elevated temperature, and that in so doing, it will "hold" the lead, which fuses and solidifies at a much lower temperature. It would appear, also, from the discussions by the experts, that the copper alone, while giving strength and toughness, has not sufficient hardness, and this hardness is increased by the amalgamation with it of small quantities of tin. Whatever may be the true metallurgical function of the tin in this alloy, it had been recognized long before the date of the patent in suit, that a proportion of tin relatively smaller than that of the copper, or even the lead, was necessary to the efficiency of the product. Lead being the more plastic constituent and forming, so to speak, the lubricant in the alloy, the problem presented in the prior art was to produce the alloy with a maximum of lead. It was found that, when tin was used in undue proportion, there is produced, besides the tin-copper alloy solidifying at a high temperature, another and nonhomogeneous alloy, which only solidifies at a much lower temperature and tends to segregate some of the molten lead, which liquidates at the bottom of the casting, and to prevent its proper distribution through the mass. This is the eutectic alloy mentioned in the specifications of the patent in suit. To obtain as much as possible of the desirable lead constituent in the alloy, it was necessary to reduce the tin. These matters were all understood in the trade long before the application for the patent in suit, and efforts were being made to solve the problem.

Apparently, it was thought that the limits within which the proportion of tin could be safely reduced with beneficial results, were narrow, as a certain amount of tin was necessary to hold the lead al-

loyed with the copper, and to give the copper-tin alloy the necessary hardness. Nevertheless, it was well understood that, as the proportion of tin was decreased, a larger proportion of lead could be homogeneously distributed through the alloy. In February and March of 1892, Dr. Dudley, a distinguished metallurgist and chemist employed by the Pennsylvania Railroad Company, who devoted much time and study to the composition of journal bearing alloys, and whose high reputation is recognized by counsel on both sides, published an article in the Journal of the Franklin Institute, on "Bearing Metal Alloys." In this article, Dr. Dudley discusses to some extent the history of the art of "Bearing Metal Alloys," and especially of the copper-tin-lead alloy, as used in railroad car journals. As to this, he says:

"The value of lead in a copper-tin alloy for bearing metal, being apparently so well established, it became a question of how much lead could be gotten into the alloy without running into difficulty."

As he is here speaking of the art prior to 1892, we may remark in passing that there can, of course, be no claim for discovery of the adaptability of a copper-tin-lead alloy for use as a bearing metal at the date of the application for the patent in suit, to wit, March 7, 1900. Further on in this article, Dr. Dudley says:

"It should be stated here, that as the amount of tin is diminished, and the amount of lead is increased, the tendency of the metal to yield more readily under pressure increases, so that it becomes essential to guard against possible dangers of having a metal which would yield too readily under the load. After considerable preliminary work, bearings were cast and a wearing test made, the results of which are as follows, the new metal being called alloy 'B':

"Alloy 'B' v. Phosphor-Bronze.

	Composition Alloy B. Per Cent.	Composition Phosphor-Bronze. Per Cent.
Copper	77.00	79.70
Tin	8.00	10.00
Lead	15.00	9.50
Phosphorus	none	0.80"

After commenting on the successful manufacture and use of journals made of alloy "B" as above described, he proceeds to remark that:

"It is not at all certain, however, that a still further modification in the diminution of tin and increase of lead, would not give even better results. Some experiments have been made towards still further diminishing the tin, and increasing the lead, but it is found that a certain amount of tin is necessary to hold the lead alloyed with the copper, and apparently the limit of the diminution of tin and increase of lead is not a great ways from the composition of alloy 'B.'"

Dr. Dudley, in a paper published in the Railroad and Engineering Journal, in February, 1892, again says:

"All we can say is, that all the experiments made show that, both in regard to beating and in regard to loss of metal by wear, no other bearing metal that we have experimented with gives as good results as the Bx. B. metal. It is entirely possible that a still further diminution of tin and increase of lead might give better results."

Prof. John W. Langley, an expert witness called on behalf of the defendant, 63 years old, a graduate of Harvard University, and who states that he has been all his adult life engaged in scientific and technical teaching, or in metallurgical manufacture, after testifying as to the list of copper-tin-lead alloys known to the trade in 1892, as stated by Dr. Dudley, testifies as follows:

"The above shows a progressive increase in the lead, and a partial uniformity in the decrease in the tin, both changes being progressive proximations toward the composition of copper 73, tin 7, and lead 20, which is that of the patent in suit, and would show that this latter is a mere change in proportions towards which the state of the art was already drifting, and therefore did not involve an act of invention, or introduce any changes other than those already in progress in the normal development of the art."

We do not think this conclusion of Prof. Langley is successfully controverted by any evidence disclosed by the record. The product for which claim is made in the patent in suit, was clearly the result of experimentation on the line pointed out by Dr. Dudley eight years before. It is hard to imagine, even, how it could have been otherwise obtained. Dr. Dudley understood, and doubtless others did, that there might be a still further reduction of tin without destroying its necessary function in the alloy, which would thereby permit a larger proportion of lead to be used. In fact, there is, we think, satisfactory evidence that such an alloy was successfully made by the Brady Metal Company, during the period between 1892 and the date of the application for the patent in suit, in which the proportions of tin and lead were within the limits prescribed in the claim of the patent. We are not concerned now with the criticism made upon this particular manufacture, as evidence of a prior public use. We only deal with it as an admitted fact, showing that the experimentation and the results were in line of Dr. Dudley's prediction of 1892. It was a practical advance in the art, which experience and continued experimentation would seem to have made inevitable.

Aside entirely from any consideration of the alleged anticipation, the alloy of the patent in suit differs from those that preceded it, and notably from that of Dr. Dudley's Exhibit "B" alloy, only in degree. That this is so, we think is abundantly supported by the evidence already adverted to, and by the weight of the testimony taken as a whole. Dr. Dudley, notwithstanding his contribution to the art, and his having at one time expressed his opinion that the alloy of the patent in suit had probably been anticipated, and was not entitled to the monopoly that had been granted to it, afterwards changed his mind and, with rare modesty, attributed to the patentees a merit which he might as well have claimed for himself. He was therefore called as a witness by the complainant. Upon cross-examination, however, he testified, as follows:

"XQ. 23. At the time of writing that article (of February 1892), you recognized, did you not, that it was advisable to slightly decrease the amount of tin and slightly increase the amount of lead in the Exhibit B metal?

"A. I should say yes, a more valuable bearing metal would be obtained by such changes.

"XQ. 24. Can you point out any difference, except a difference of degree, between the Exhibit B metal, and a bearing metal composed of less than 7 per cent. tin, more than 20 per cent. lead, and the balance copper?"

"A. I should say the valuable properties of the latter metal would be greater than these of the Exhibit B metal, all our experiments indicating that a diminution of tin and increase in lead in bearing metals gave a more valuable alloy.

"XQ. 25. Are you able to point out any difference, except a difference in degree, in the chemical, physical or mechanical properties of these two alloys?"

"A. If by degree, you mean the same characteristics, I should think the alloy containing less than 7 per cent. of tin and more than 20 per cent. of lead, the balance, substantially copper, would have the same characteristics, chemical, physical and mechanical in different degrees as the Exhibit B metal."

Dr. Chandler, one of the complainant's expert witnesses, says upon cross-examination:

"I myself do not know why this alloy I last referred to (meaning the alloy of the patent in suit) is so decidedly better than the other alloy of your question, except because it contains more lead and less tin."

Dr. Richards, an expert witness for defendant, says:

"The two alloys possess the same essential characteristics, and differ only in the degree to which those characteristics are developed. I agree entirely on this question with complainant's witness, Dr. Dudley. * * *

"I know of no such critical difference being observed in the properties of these bearing metals in question when the tin is reduced below 7 per cent. and the lead is increased above 20; the experience of those who have made and used these alloys, is that as the tin is reduced from 8 per cent. down and the lead is increased from 15 per cent. up, the alloy becomes by degree a better bearing metal."

• He had previously testified as follows:

"As far as I know myself and can learn from the testimony of those who have used these metals for bearings, the metal made with less than 7 per cent. tin and over 20 per cent. lead is, when well made, superior in anti-friction quality to the Exhibit B metal which contains 8 per cent. of tin and 15 per cent. of lead; but the difference is one of gradual improvement as the tin decreases and the lead increases a better anti-friction metal is obtained, without there being any break or change per saltum in the anti-friction qualities of the alloy. It is a question of gradual reduction of the tin, gradual increase of the lead, giving gradually a better alloy, with probably some increased difficulty in obtaining the alloy homogeneous."

We do not think the force of this testimony is at all affected by that of Prof. Sauveur, who was called in rebuttal and presented a theory of a "critical point" in the composition of these alloys, which was first discovered and explained by the patentees of the patent in suit. A careful reading of his testimony has not thrown any new light upon the question here under consideration. To give the scientific or metallurgical reasons why 7 per cent. or less of tin permits the use of 20 per cent. or more of lead, in an alloy of copper, tin, and lead, has no bearing upon the mode in which the usefulness of those proportions was ascertained. The empiricism by which the practicability and usefulness of an alloy so constituted is determined, is the foundation for the scientific explanation given by this scientific witness, as well as by the specification of the patent in suit. It is a theory after the fact and explanatory of the fact. There is no evidence to show that there

is an absolute and sudden change at this precise so-called "critical point" of 7 per cent. of tin and more than 20 per cent. of lead. On the contrary, the weight of the testimony is all to the effect that the change in conditions is gradual in approaching this point. In other words, there is a gradual bettering of the result as the decrease from the 8 per cent. of tin in Dr. Dudley's experiment proceeds to the 7 per cent. of the patent in suit. There is no "critical point," on one side of which there is an absolutely bad product and on the other side an absolutely good product. Dr. Dudley might as well have called his 8 per cent. of tin a "critical point" and claimed a monopoly of the whole field below that figure. In the words of Dr. Richards, already quoted:

"The difference is one of gradual improvement; as the tin decreases and the lead increases, a better antifriction metal is obtained, without there being any break or change per saltum in the antifriction qualities of the alloy."

It is interesting to note that Dr. Sauveur himself testifies that this so-called "critical point" in copper-tin alloys was known at least three years prior to the application for the patent in suit. He refers to a publication of the proceedings of the Institution of Mechanical Engineers (in England), of 1897, in which is shown a diagram which indicates the existence of a "critical point" corresponding to nine per cent. of tin. This means, of course, 9 per cent. simply of the alloy of copper and tin, which is equivalent to 7 per cent. of the whole copper-tin-lead amalgam, and he adds that this constitution of copper-tin alloys has been detected "by all students who have conducted the necessary experiments."

A mere difference in the proportions of the constituents of an alloy, however useful the result may be, does not entitle the originator to the monopoly of a patent, in the absence of other circumstances than those here disclosed.

Being of the opinion that, for the reasons stated, the patent in suit is invalid, it is unnecessary to consider the other grounds of defense, though we may be permitted to say, that the prior public use set up in the answer of the defendant, seems to us to have been sustained by the testimony.

The decree of the court below is therefore reversed.

PORTLAND GOLD MINING CO. v. HERMANN.

(Circuit Court of Appeals, Eighth Circuit. January 13, 1903.)

No. 2,539.

1. PATENTS—ACTION FOR INFRINGEMENT—PLEADING.

The petition in an action at law for infringement of a patent *held* not insufficient as counting on the recovery of profits instead of damages.

2. SAME—INFRINGEMENT—COMBINATION OF OLD ELEMENTS.

A patent for a combination of well-known mechanical appliances is limited to the combined apparatus as specified, and no great liberality in applying the doctrine of mechanical equivalents can be indulged in its favor, and no one is an infringer unless he uses all of the elements claimed in substantially the same mode of operation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 88, Patents, §§ 882-389.]

3. SAME—APPARATUS FOR SCREENING, WASHING AND ASSORTING ORES.

The Hermann patent, No. 719,942, for apparatus for screening, washing, and assorting ore, claim 4, construed, and *held* not infringed.

In Error to the Circuit Court of the United States for the District of Colorado.

Horace N. Hawkins and A. J. O'Brien (Edmund F. Richardson and W. J. Chinn, on the brief), for plaintiff in error.

William O'Brien, for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The defendant in error (hereinafter designated the plaintiff) sued the plaintiff in error (hereinafter designated the defendant), a mining corporation, for damages for the infringement of letters patent, No. 719,942, issued February 3, 1903, entitled "Apparatus for Screening, Washing, and Assorting Ores." On trial to a jury the issues were found for the plaintiff on the fourth claim of the patent, and the damages were assessed at \$1.

The first insistence of defendant is that the petition counts on damages for profits, which are not recoverable in an action at law, as declared by this court in the recent case of *Brown v. Lanyon*, 148 Fed. 838, 78 C. C. A. 528. The only basis for the contention, put forth for the first time on this writ of error, that the petition is for an accounting of profits, is the concluding paragraph of the petition that:

"The defendant * * * has continued and persisted in continuing * * * to use said machine and improvement so patented, to the damage to the plaintiff in the sum of fifty thousand dollars. That the profit to the defendant from the said use of said machine and the value to it of the use thereof has been not less than the sum of fifty thousand dollars. Wherefore, the plaintiff prays judgment against the defendant for the said sum of fifty thousand dollars, together with the costs."

The argument is that as damages for the use are alleged to be \$50,000, and the profits of the defendant therefor are \$50,000, the prayer for judgment covers the profits as well as the damages for the invasion. It is quite apparent, however, that the double statement

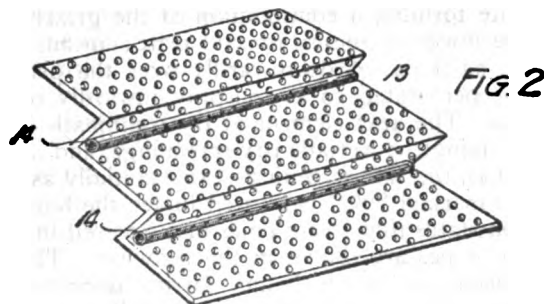
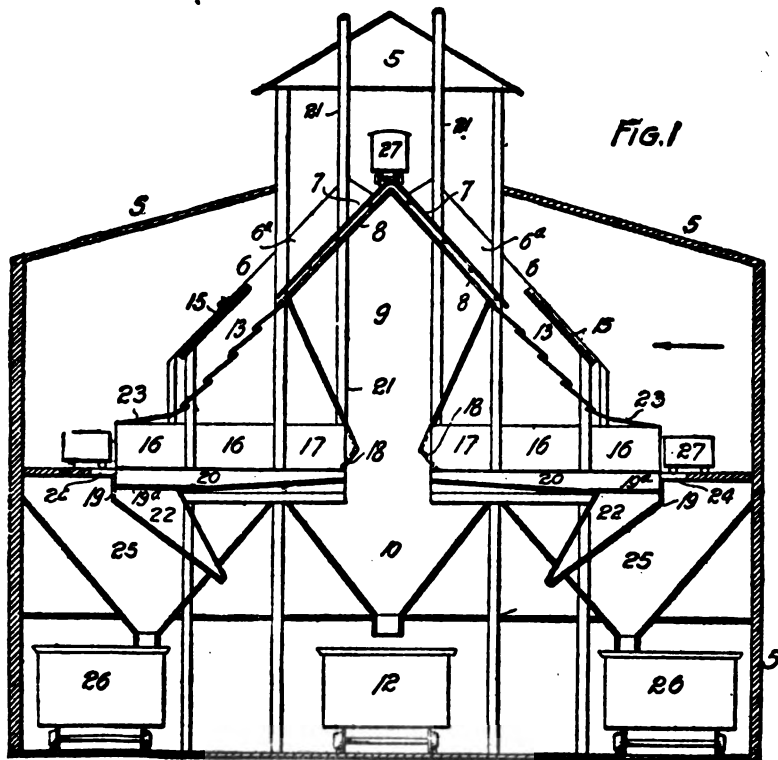
of the \$50,000 sued for resulted rather from the pleader confounding the damages in such action with the claim for profits as synonymous. The case presented throughout the averring portion of the petition is for damages at law arising from the infringement of the plaintiff's exclusive right to the use of his patented device. Relief can be administered in lawsuits only in accordance with the facts set out in the pleading, regardless of the prayer. As the profits are based upon the existence of established royalties, involving matters of accounting cognizable in equity, the bill should be framed accordingly, containing the essential averments authorizing an inquiry for the ascertainment of profits. There are no facts alleged in the petition as a basis for the ascertainment of profits. While at one time in the progress of the trial plaintiff's counsel sought to raise, by questioning a witness, an issue respecting royalties, it was cut off by the court on objection. As the patent was comparatively new when this suit was brought, there was no established business as a basis for other than nominal damages.

Turning to the question of infringement, the claim of the plaintiff rests upon a combination patent—the combining of anterior, independent devices in such new form of arrangement as to possess the quality of novelty and usefulness. The statute itself provides that things to be patented must be invented things, as well as new and useful things. *Thompson v. Boisselier*, 114 U. S. 11, 5 Sup. Ct. 1042, 29 L. Ed. 76; *Gardner v. Herz*, 118 U. S. 191, 6 Sup. Ct. 1027, 30 L. Ed. 158.

The material specifications for this patent are substantially as follows: The invention relates to improvements in apparatus for screening and washing ore preparatory to sorting, including means for separating the dry from the wet screenings, together with apparatus for drying the latter. That the ore when taken from the mine is coated with fine material adhering thereto during the operation of mining and hoisting, which contains values, adhering to the worthless rock as well as to the rich ore. To avoid the waste of the valuable material thus adhering to the worthless rock and to remove the coating of fine material from the ore in order that it may be intelligently sorted, is the object of the screening and washing operation described in the specification.

The drawing accompanying the application is here presented.

It is an orehouse, with two inclined chutes at the top, the extremities of which unite to form an apex at the track upon which the loaded ore cars are run from the mine; the chutes being so arranged that the ore may be discharged from the cars on opposite sides. The upper portion of each chute, upon which the ore is first discharged, consists of a grizzly, composed of flat bars, the space between the bars increasing in width from the top downwardly. Underneath these bars is located a screen in the usual manner. The fine material which passes through the screen is in a dry state and falls into a bin underneath, thence into a hopper, and finally into a car below. Below the screen, and forming a continuation of the inclined chute, is a perforated plate, plain or stepped, the latter being preferred since it causes



the ore to roll over a number of times on its way down, better exposing it to the action of the water. This construction permits of locating a perforated pipe below each step, but protected from the falling ore. These pipes discharge jets of water on the ore as it falls, and facilitates the operation of washing the ore clean for the purpose stated. Above the stepped perforated plate and mounted on the sides of the chute are perforated water pipes, arranged in any suitable manner to discharge jets of water on the ore as it passes downwardly over the perforated plate. The fine material washed from the ore passes through

the perforated plate into settling tanks, from which it may be removed to a drying tank, adjacent to the bin and communicating therewith by an opening normally closed by a hinged door which may be opened for the purpose of throwing the dry ore into the hopper. Furnaces (19) may be constructed underneath the tank (16) for the purpose of drying the ore. From the fire boxes of these furnaces hot air flues pass underneath the tanks (16 and 17), their inner extremities communicating with upright pipes (21), forming stacks for the escape of the products of combustion. Beneath this fire box is located an ash-chute (22). Steam pipes or any other suitable drying apparatus may be employed. At the lower extremity of the perforated plate (13) are located the ore assorting tables (23). In practice, a person stands on each side of the tables and sorts the ore, dropping it into a hole in the floor. Hence it passes to a hopper and finally into cars. The worthless rock passes from these tables into cars.

At the trial, either by the action of the plaintiff or the ruling of the court, the cause was submitted to the jury alone upon the fourth claim of the patent, which is as follows:

"4. In apparatus of the class described, the combination with a suitable supporting structure, of a grizzly located at the top, an inclined perforated plate forming a continuation of the grizzly, an ore assorting table at the lower extremity of the said plate, means for spraying water upon the ore as it passes downwardly over the perforated plate to the table, suitable bins below for receiving the dry and wet screenings, and means for drying the latter, substantially as described."

Reduced to its essence, this claim is a combination with a suitable supporting structure of a grizzly located at the top, an inclined perforated plate forming a continuation of the grizzly, that is, on which the grizzly discharges. The claim, it will be noticed, does not mention a screen underneath the grizzly; but under the grizzly is a perforated plate forming a continuation of the grizzly; an ore-assorting table at the lower extremity of said plate; means for spraying water on the ore as it passes downwardly over the plate to the table, the pipes being perforated so as to spray inwardly over the material as it passes on. The next element of the combination is suitable bins below for receiving the wet and dry screenings, and means for drying the latter—that is, the wet screenings—substantially as described. A kind of furnace, marked "20," is located under the bins (16 and 17). The specification states that steam pipes may be used in this drying process, although no pipes are shown in the drawing. They, however, would be mere mechanical equivalents. In his testimony the plaintiff disclaimed any invention respecting the grizzlies employed in his device. He said "it is as old as the hills." This appliance for an allied purpose was clearly anticipated by the Thomas patent, No. 109,969, granted December 6, 1870; as in the patent No. 38,569, granted May 19, 1863.

The second element is a screen underneath the grizzly, inclined in the same direction—that is to say, a grizzly discharging ore over its lower end onto a screen further down the slope—and is substantially found in patent No. 639,710, granted to Cherry, December 26, 1899. What is called the "wet grizzly," having a spraying apparatus over

it discharging a spray upon the ore as it goes down, has its mechanical equivalent, in substantial operation and effect, in the Bacon patent, No. 375,673, granted February 9, 1886, used for washing phosphate rock. This patent shows a series of parallel inclined bars, in construction the same in effect as a grizzly, on which the phosphate rock was thrown for the purpose of washing while moving down the incline. The spraying apparatus consists of pipes arranged from the sides of the screen and also across so that the water discharges on four sides on the screen and rock as the latter moves down the inclined bars, substantially in the same way as it is discharged in the plaintiff's patent. About the only difference is the material acted upon, one being ore rock and the other phosphate rock; but the function is the same, and the principle is the same. With some modification, but in substantial form, the elements of the wet screen are found in the Donner patent, No. 366,820, granted July 19, 1887. The only difference is that in the Donner machine the screen and spray are arranged in series, one above another, to more perfectly perform the washing function.

The next element of this claim is "an ore-assorting table at the lower extremity of the said plate"—that is, where the ore empties or falls after the spraying process.

The last element is "suitable bins below for receiving the dry and wet screenings, and means for drying the latter, substantially as described."

In its final analysis the testimony of the plaintiff shows that his chief, if not his only, claim to exclusive use rests upon "means for spraying water upon the ore as it passes downwardly over the perforated plate to the table,"—that is to the assorting table. He states in respect of this improvement, in his application and specification, that it is "to avoid waste of the valuable material adhering to the worthless rock and to remove the coating of fine material from the ore in order that it may be intelligently sorted, is the object of the screening and washing operation" described; whereby he makes a valuable saving to the mine operator. No invention can be predicated independently of this washing apparatus as such. The publication of August 18, 1889, entitled "The Colliery Guardian and Journal of the Coal and Iron Trades," on file in the Patent Office at Washington, presents an apparatus for the mechanical separation of valuable ores, which is the mechanical equivalent of the plaintiff's device in this respect. This is an apparatus used in Sweden long anterior to the use in the Cripple Creek district. It presents chutes inclining both ways downwardly for the cars to dump the rock, placed upon inclined screens of different perforations, different fineness; there are pipes and screens located above them across the screens, and the rock dumped upon this inclined screen moved downward and is washed by the spraying. The slimes go into the bin, and they are discharged into some receptacle underneath, substantially in the same manner as in the plaintiff's device. There was also the Watkins patent, granted July 16, 1901, on an application filed August 27, 1900, No. 678,819. This patent discloses a series of parallel inclined bars for receiving the ore moving down over the inclined bars. Underneath the series of parallel bars in the

nature of a grizzly were screens inclined downwardly in substantially the same direction as the bars are inclined, and they are below the screen. The patentee in his specification in that case said: "I provide on the front of the hopper a U-shaped keeper for support of a hose, that may be used for delivering water upon the material on the riddle;" the cross-bar and U-shaped holder in which the hose may be made to rest while it discharges water over the riddle—that is, he calls the bars a riddle. This unquestionably is a wet screen and grizzly with means for discharging water over the bars or grizzly, and washing the ore as it comes down. It is entitled:

"An apparatus for treating sand and other placer materials as well as artificially pulverized ore, and separating therefrom the gold or other precious metals contained therein. It is particularly adapted for treating such material in large quantity and with great rapidity."

The patentee says, after he designates the parallel inclined bars as riddle, it is sometimes called a grizzly in the ore-producing Western states.

The ordeal through which the plaintiff's application for a patent passed, as disclosed by the file wrapper and contents in the Patent Office, discloses how exceedingly narrow is the footing on which this patent rests. The application was made in December, 1901. The fourth claim as therein expressed was as follows:

"In means for screening and washing ore, the combination of an inclined chute having a perforated bottom, and side pieces, and perforated water pipes mounted on the side pieces and arranged to spray water upon the ore as it passes down the chute, substantially as described."

This claim was rejected in February, 1902. The Examiner of Patents stated:

"Claim 4 is misstated, as the sides of the chute are not perforated. However, the claim is rejected upon either Bacon or Donner, cited, as there would be no invention in the mere transposition of the spray-pipes from the main frame to the chute-frame."

In March, 1902, the claimant amended his fourth claim as follows:

"In means for screening and washing ore, the combination of an inclined chute having side pieces, and a perforated bottom, perforated water pipes mounted on the side pieces and arranged to spray water upon the ore as it passes down the chute, and an ore-assorting table at the lower extremity of the chute, substantially as described."

This was again rejected in May, 1902, the Examiner stating:

"Claim 4 is rejected on Bacon, cited, as involving nothing more than an arbitrary arrangement of the water pipes having no functional significance."

In June, 1902, the applicant again amended this claim as follows:

"In means for screening and washing ore, the combination of a grizzly, a screen of suitable mesh located underneath the grizzly and inclined in the same direction as the latter, an inclined trough or chute located below the screen and forming a continuation thereof, suitable means located above the perforated plate for discharging water upon the ore as it passes downward thereon, and suitable receptacles located below the screen and the perforated plate for receiving the dry and wet screenings, substantially as described."

In August, 1902, the Examiner replied that the first claim was utterly destitute of patentable novelty in view of Bacon and Watkins, of record, and it was therefore rejected.

"There is no invention in aggregating Bacon's spraying devices with Watkins' separator. * * * The terms 'inclined trough,' line 4, claim 4, is not understood, there being no inclined trough shown or described. However, the claim is rejected in view of Bacon and Watkins, above cited, it being for the mere aggregation of Bacon's spraying mechanism with Watkins' washer and separator."

The claimant responded to this in September, 1902, in which he insisted that his amended claims were believed to be allowable, calling attention to the fact that in the patents of record:

"No provision is made for keeping a portion of the fine material as it leaves the ore or rock in a dry state. It will be understood that when the ore is discharged upon the grizzly, a portion of the finer material which adheres to it may be removed in a dry state without the assistance of water. Applicant's construction makes provision for keeping this portion separated from the wet portion, whereby the expense of drying a certain portion of the screenings is avoided."

In view of our concurrence on the question as to whether the apparatus employed by the defendant constitutes an infringement of the plaintiff's patented combination device, we pass, without expressing an opinion upon the validity of the patent, to the consideration of the question of infringement.

The defendant employed in its structure a single inclined chute or grizzly "as old as the hills" at the top of the structure into which the ore as it comes from the mine in cars is dumped. In passing over this stereotyped grizzly the finer loose particles of ore pass through the bars of the grizzly into the screen beneath, through which the valuable dusty particles are sifted to the bin or floor below, where it is collected and sacked, without further process, for shipment. This was an old process and an old result. The ore rock passes off the dry grizzly, first onto the assorting tables, suitably arranged at the lower outlet of the grizzly, where it is taken in hand by sorters, who, according to the evidence, were from 14 to 28 in number, and by manipulation and hammering the richer ore is separated, and thrown into chutes, passing to the bin beneath, from which it is shipped. This part of the ore thus manually separated at the assorting tables never passes through the washing apparatus. The remaining rock is by the hands of the sorters thrown into the chute carrying it through the wet grizzly, where it is sprayed by application of the water, which may be the mechanical equivalent of the apparatus so employed by the plaintiff. The slimes thus washed off pass down through the screen into the bins beneath, from which they are carried by wheelbarrows to the drying bins some 20 or 30 feet distant. The rock thus washed does not pass onto any assorting tables for assortment, but it passes to the ground beneath, from which it is carried by a revolving belt up an elevator to hand cars and thence to the dump.

There is a sharp conflict in the testimony as to whether the defendant copied from the first prints made by the plaintiff of his device, or whether the plaintiff did not get his plan from the blue print gotten

out by the defendant's employés. But as this was a question for the jury we need not discuss the proofs. The evidence shows that the defendant used for only about three weeks the inclined perforated plate claimed by the plaintiff, as it proved to be troublesome in buckling up and soon wore out. It substituted therefor grizzly bars. The assorting tables as employed by the defendant had long been in use by it for such purpose. The first marked difference in the defendant's device from that of the plaintiff is both in the position and office of the assorting tables. In the plaintiff's specification the ore-assorting table is at "the lower extremity of the said plate," that is at the end of the wet grizzly, so that the ore rock passed continuously and automatically from the top of the ore chute over the dry grizzly onto the inclined perforated plate, through the washer, to the assorting table, where the worthless rock passed on through the chute to the dumping car. As stated in the specification of plaintiff's patent, the purpose of having the ore-assorting table in the position stated was that after the washing process "the ore may be intelligently sorted," whereas in the defendant's device the ore-assorting table was at the end of the dry grizzly, where its continuous descent was arrested after the loose material was shaken therefrom in the falling process and passed into the dry bins, and the ore rock, before any washing process, was taken in hand by sorters, manipulated, broken with hammers, the valuable ore thus separated and passed into the dry bins, and only the remaining rock passed through the washing apparatus.

Another difference in the arrangement and process, as specified in claim 4, is the means for drying the wet screenings, stated in claim 4 to be, "the means for drying the latter, substantially as described." The description as given in the preceding specification and accompanying diagram is:

"Furnaces (19) may be constructed underneath the tank (16)—that is, the tank where the wet screenings fell—for the purpose of drying the ore. From the fire-boxes of these furnaces hot air flues (20) pass underneath the tanks (16 and 17), their inner extremities communicating with upright pipes (21), forming stacks for the escape of the products of combustion. Beneath each fire-box (19a) is located a downwardly-inclined ash-chute (22). It is evident that steam-pipes or any other suitable drying apparatus may be employed."

Notwithstanding the technical quibbling of plaintiff's counsel that this specification does not necessarily limit the drying furnace in the place below the screens so as to connect automatically or immediately, it must be conceded that the descriptive words "substantially as described" mean the furnace or its mechanical equivalent shown by Figs. 19 and 20 in the drawing. It does not refer to drying appliances located anywhere, at any place, or any distance. If so, as pertinently suggested by the expert witness Gen. Speer, it might be made to mean drying by the sun or the wind, which would hardly constitute a mechanical appliance. Its reasonable import is artificial drying, by heat, and confined to the thing represented in the specification as a furnace, or by steam pipes located under the bin for receiving the screenings. In the defendant's device the wet slimes were carried in wheelbarrows to the drying bins, from 20 to 30 paces distant, to the receptacle where they were deposited.

In a combination device consisting in congeries of well-known mechanical appliances, no liberality of construction is accorded to it to create a monopoly; but it is limited to the descriptive elements in the combination as expressed in the specifications; and no great liberality of the doctrine of mechanical equivalents can be indulged in its favor. As the applicant for such combination of old devices chooses his own expressions in presenting it, and is required to enumerate the elements of his claim, he is limited to the combined apparatus as specified. And no one is an infringer of a combination claim unless he uses the elements thereof, and in substantially the same mode of co-operation. In *Cimiotti Unhairing Company v. American Fur Refining Company*, 198 U. S. 399, 410, 25 Sup. Ct. 697, 702 (49 L. Ed. 1100), the court said:

"In making his claim the inventor is at liberty to choose his own form of expression, and while the courts may construe the same in view of the specifications and the state of the art, they may not add to or detract from the claim. And it is equally true that, as the inventor is required to enumerate the elements of his claim, no one is an infringer of a combination claim unless he uses all the elements thereof."

Again the court said, page 414 of 198 U. S., page 702 of 25 Sup. Ct. (49 L. Ed. 1100):

"The other elements of the eighth claim are to be used in connection with the apparatus shown in the Sutton patent, substantially as described. If the device of the respondent's shows a substantially different mode of operation, even though the result of the operation of the machine remains the same, infringement is avoided."

A combination is not infringed unless all its elements as they are claimed are used, whether they are essential or not. *Royer v. Schultz Belting Company* (C. C.) 28 Fed. 850; *Snow v. Lake Shore & M. S. Railway Company* (C. C.) 18 Fed. 602. The governing principles applicable to a mere combination patent, like the plaintiff's, without any invention as to any one of its elemental parts, are very aptly stated by Robinson on Patents, vol. 1, p. 228:

"A combination is a union of elemental means in a mode of co-operation; and, as such, it necessarily performs functions into which all its elements enter as operative agents, and produces results which depend upon the presence and action of every one of the elements combined. * * * The identity of a combination depends upon that of its elemental means and that of the co-operative law under which its elements are united; any substantial change in either means of law destroying its identity and resulting in the final segregation of the elements or in a new and wholly different combination. * * * A patented combination is the combination described and claimed in the patent; i. e., it is composed of the described elements coacting under the described co-operative law, whether or not such description correctly enumerates the true elements or sets forth the real mode of their co-operation."

In paragraph 922 he sums up the rule as follows:

"A combination is a group of instruments or operations united under a co-operative law. Its identity depends upon the presence in the combination of each one of these elements or its equivalent, and upon their co-operation in this specific manner to produce the ultimate result. Hence any change in the number of its elements, or in their essential character, or in their mode of co-operation, is a departure from the substance of the combination, and constitutes a different invention. A patented combination is the combination de-

scribed and claimed in the patent which protects it. Of whatever elements it may actually be composed and whatever may be the method of their union as the inventor conceived and practices his invention, the elements specified in the patent, and the co-operative law there described, are those which characterize the patented combination and form the subject of the exclusive privileges of the patentee. The infringement of a combination patent, therefore, consists in the manufacture, use, or sale of any combination in which precisely the same elements or their equivalents are united under the same co-operative law. To make or use or sell a combination in which the same elements are differently combined, or a combination which comprises only a portion of these elements, though the discarded elements are practically useless, and though the combination thus created was suggested by the former, is not an infringement."

The application of these recognized principles demonstrates that the defendant's apparatus was no infringement of the combination apparatus for which the plaintiff obtained his patent right. The ore as it is emptied from the delivery cars at the top of the chute onto the dry grizzly, in the defendant's apparatus, does not descend continuously and automatically over the dry grizzly onto the wet grizzly through the washing apparatus and onto the ore-assorting tables at the bottom of the wet grizzly. The descent by gravity in the defendant's apparatus is arrested at the end of the dry grizzly, where it passes out onto the assorting tables, and the sorting by hand takes place before any application of water to the ore, and only a part of the rock left after the manual separation of the richer parts at the ore assorting tables passes onto the wet grizzly to be washed. There are no ore assorting tables at the lower extremity of the washer plate, and no assorting, in fact, is done there. This differentiation brings the case clearly within the ruling in *American Chocolate Machinery Company v. Helmstetter*, 142 Fed. 978, 74 C. C. A. 240. The Holmes patent in that case was for a machine for coating confectionery, claim 1 covering "the combination with the drop dipping mechanism, of a jarring device for removing surplus coating material from the drops." It was held that this combination was not infringed by a machine in which the dipping and jarring devices are merely aggregated, the jarring operation being performed after the dipping has been completed, and the tray containing the drops removed to another frame. The court laid down the following rule:

"To constitute a combination it is essential that there should be some joint operation performed by its elements, producing a result due to their joint and co-operating action, while in an aggregation there is a mere adding together of separate contributions, each operating independently of the other."

It was held that the defendant's machine was merely an aggregation of two devices, not acting together automatically, but there was an interposition by handling after the dipping process was gone through with, and the jarring process was independent of that. The court said:

"There is no mechanical or functional mutuality of operation. It is not a combination because there is no co-operation between the coating and jarring mechanisms, because the two devices do not unitedly perform their functions, and because they are not necessarily combined in one machine, and do not act together to secure the final result."

Quoting from *Beecher Manufacturing Company v. Atwater Manufacturing Company*, 114 U. S. 523, 5 Sup. Ct. 1007, 29 L. Ed. 232:

"Each pair was used by itself, and might be so used at any distance of time or place from the other; and if the two were used at the same place and in immediate succession of time, the result of the action of each was separate and distinct, and was in no way influenced or affected by the action of the other. This was no combination that would sustain a patent."

The principle of this case was recognized in this circuit in the case of *Dunlap v. Willbrandt Surgical Manufacturing Company*, 151 Fed. 223, 80 C. C. A. 575. The patent in that case covered an atomizer. The principal feature of the claim in question was that the tube which entered the bottle was made in three separate parts, to facilitate cleansing. One of the parts was a hollow coupling uniting the other two. It was held that it was not entitled to a broad construction, but was limited by the prior art and the language of the specification; that each of the three parts of the tube described was an essential element of the claim, and it was not infringed by a structure in which the tube was made in two parts directly joined together. The court said:

"In the defendants' device two of the complainant's elements are lacking, namely, the hollow coupling and the side opening in the hollow coupling registering with a similar opening in the lower tube member. The complainant calls his device a 'two-part spraying tube with a hollow coupling,' but it is really composed of three. * * * From the standpoint of the patent, the division of the tube into three separate parts is not a mere unnecessary detail of construction that may be dispensed with by the complainant. It is put forward as an important and emphasized feature, and is called for by the declared purpose of his structure. * * * Of course, there are cases in which, in determining whether a subsequent device infringes, it is unimportant whether it is made in two pieces instead of three, or whether a member is mechanically attached to the remainder of the structure or is made integral with it. * * * They are, however, inapplicable to a case in which the very divisibility into parts or in which the particular method of attachment constitutes the law of the structure or is declared or appears to be of the essence of the supposed invention."

The court further said:

"A patentee is entitled to every function his device will perform, though he was ignorant of it when he procured his patent. But he secures no patent on the function, and a discovery of a new one in a patented device does not operate to enlarge or broaden the letter of his claim. It is the claim which measures the rights of the patentee, and that which is not claimed is, so far as the particular patent is concerned, dedicated to the public. There is nothing in the patent here which entitles the complainant to any novel or particular arrangement of the air and liquid passages; and, if it can be said that the claim covers a new arrangement of the discharge openings as distinguished from the air and liquid passages, it must be answered that it was expressly claimed in connection with a hollow coupling which he made indispensable and which is not found in defendant's structure, and that the very narrow character of the complainant's advance over the prior art does not authorize the broad construction for which he contends."

In *Mallon v. Gregg & Company*, 137 Fed. 68, 79, 69 C. C. A. 48, this court, speaking of the fact that the fourth claim there alleged to have been infringed disclosed that the combination of boxes pivotally supported on a shaft, stretcher-rods having a longitudinally-adjustable

connection with said pivotal boxes, and cross-bars carried by chains and provided with rake-teeth, said that the machine of the defendant had neither cross-bars provided with rake-teeth upon its endless chain, nor stretcher-rods longitudinally adjustable in pivotal boxes; and that "since at least one element of each of the combinations secured by the claims upon which this suit is founded is wanting in the machines of the defendants, they cannot be held to infringe these claims. * * *

The absence from a device that is alleged to infringe a patented combination of a single mechanical element of that combination is fatal to the claim of infringement."

It must be admitted that the Portland structure and device could not be patented. The application for a patent therefor would have encountered the same obstacles that the evidence in this case shows Hermann had to contend with before he got his claim through the Patent Office. On account of the position of the assorting table, rendering the operation of the dry grizzly entirely independent, and the operation of the wet grizzly entirely independent of both, the co-operative unity is entirely wanting in the combination device of the defendant, and therefore could not have been patented. The necessary corollary is that the one device is not an infringement of the other.

Impressed, as plaintiff's counsel throughout the hearing of this case was, with the position and office of the assorting table in the defendant's apparatus, so entirely different from that of the plaintiff's, he sought to escape from the dilemma by most inconsistent and indefensible positions. The trial court in its charge to the jury felt compelled to say that the defendant's assorting table could not be found, as in the fourth claim of the plaintiff's patent, at the lower extremity of said plate, but left it to the jury to say whether or not it was a mere transposition of position, being mere mechanical equivalents. This was not even sought to be defended by plaintiff's counsel in argument; but his first contention was that the revolving belt at the bottom of defendant's structure, which conveyed the worthless rock up through the elevator to the dumping car, was itself an assorting apparatus. This contention was unsupported by any tangible evidence. The evidence is that the rock rejected at the assorting tables in the early operations passed through the chute to where the dumping car stood, which carried it off to the dump pile. The dump pile becoming so high as not to permit the cars to be so operated, they were run on top of the dump and a belt apparatus and elevator were constructed for the sole purpose of lifting the refuse rock to where the car stood. This belt operated on an inclined plane, from an elevation of from 3 to 7 feet high, where it connected with the elevator. It revolved at the rate of about 100 revolutions per minute. The elevator shaft through which the rock was conveyed was perhaps 100 feet high. The evidence further shows that its structure of leather was wholly unsuited to the function of an assorting table. As such, it would not admit of hammering of the rock, and the revolution was so rapid as to absolutely prevent such selection as an assorting table is designed to accomplish. It was inclined with a covering, without light to permit of such use by the men stationed along it. The contention of plaintiff is predicated largely of the fact that men would be stationed along the elevator shaft, on

the lookout, and when they discovered what they conceived to be a piece of rock containing valuable ore would snatch it off and throw it to one side. With equal propriety could it be said that if after the rock was dumped from the elevator into the dumping cars a piece of rock supposed to contain valuable ore should be taken out before it was carried to the dump, the dumping car was the equivalent of the assorting table described in the plaintiff's patent.

As a dernier ressort, suggestion was made by one of plaintiff's counsel that the mere spout or plate at the end of the chute through which the rock fell from the wet grizzly might be regarded as an assorting table. This is not even plausible.

The request by defendant for an instructed verdict should have been given. The judgment of the Circuit Court is therefore reversed, and the cause remanded with directions to grant a new trial, and for further proceedings in conformity with this opinion.

CRIER v. INNES et al.

(Circuit Court, D. Vermont. January 30, 1908.)

1. PATENTS—INVENTION—DESIGNS.

The mere assembling of old parts to make a structure of a new design, although new lines and curves and a harmonious and novel whole are produced, does not involve invention so as to render the design patentable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 33.]

2. SAME—MONUMENT.

The Young design patent, No. 27,115, for a design for a sarcophagus monument, is void for lack of invention, the separate parts of the monument shown all being old in the art.

In Equity. On final hearing.

Frank C. Curtis, for complainant.

John W. Gordon, for defendants.

MARTIN, District Judge. The complainant alleges an infringement of a design patent, No. 27,115, issued to William H. Young, of Troy, N. Y., under date of May 25, 1897, for a design of a sarcophagus monument; that said patent was duly issued and thereafter assigned to the complainant with all claims for damages and penalties for infringements of the same; that said letters patent have been duly adjudged valid by the Circuit Court of the Northern District of New York and the Circuit Court of Appeals for the Second Circuit in the case of *Young v. Daley*, 120 Fed. 1023; that the defendant Innes and Marr's intestate, Cruickshank, of Barre, Vt., were in partnership under the firm name of Innes & Cruickshank, and that they knowingly infringed said patent between the date of its issue and the date of said Cruickshank's death by constructing and selling monuments embodying the patented design; that since said Cruickshank's death the defendants Innes and Marr, administrator as aforesaid, have continued and threatened to continue such infringement, and praying for an injunction and an award of the statutory penalty

of \$250, etc. The answer in substance denies Young's invention as an original design for monuments; denies that the same is useful; disclaims knowledge of said letters patent, and denies their validity; avers that every element of the design in question was in common use before said letters patent; and challenges every allegation in the complainant's bill of complaint. Issue was joined, and a large amount of evidence taken.

The patented design represents a monument with a lower and upper base, and upon the upper base rests a die which is surmounted by a cap. The general form of these members is rectangular with two elongated sides. The vertical sides of the bases and die exhibit uncut rock. One or both of the long vertical sides of the die are ornamented with a hammered or polished tablature in the form of a central arch extending nearly to the top of the side, leaving above the tablature a projecting tablet of rockwork extending across the upper side of the die comparatively narrow at the middle of the side and gradually increasing in width toward each end. Upon the face of the tablature may be placed an arched tablet having its upper and lower border-lines parallel with the border-line of the arch of the tablature. The leading feature of the design consists in "the ornamental configuration of the die," and the letters patent conclude as follows:

"I do not wish to be limited to a plane surface for the arched tablet, as the same may be cut to form special designs with my general design. The arched tablet may be either intaglio or rilievo. What I claim is new, and desire to secure by letters patent, is the design for a monument herein shown and described."

The general configuration of this patented design is old. It is simply the sarcophagus style. The evidence shows that the two bases of uncut rockwork were in use many years before this patent was obtained. The use of a die with an arch over the tablature, ornamented with spandrels of different designs, some of skilled carving, some of plane hammered surface, and some of uncut rock, is old in the construction of sarcophagus, obelisk, and cottage monuments, and as to sarcophagus monuments, rectangular designs are old in use. Sarcophagus caps of monuments of the same rock-shaped configuration as that of this patented design were in use many years preceding these letters patent. Just such an overhanging arch of rock-faced spandrels extending across the top, as is in this patented design, is not found in any of the exhibits of the old designs, but the same idea is found in Exhibits 60 and 83, if not to say others; and whether the patented design is an improvement upon the old art is more a matter of taste than of inventive genius. By putting the die of defendant's Exhibits 69 on the two bases of defendant's Exhibit 59, and capping it with the cap of defendant's Exhibit 25 or 26, or applying to the defendant's design 68 the uncut rockwork of defendant's Exhibit 25, we would have a monument so nearly resembling this patented design that, if this patent is sustained, it would be an infringement; to the ordinary observer it would look the same, and that is the test of infringement, and the four monuments made by the defendants would be deemed an infringement.

A person who prefers a sarcophagus monument to any other style and has a special fancy for uncut rockwork, visiting a cemetery in which there has been placed the Stewart monument, Defendant's Exhibit 85, and a monument constructed from the design of defendant's Exhibits 68 and 25, and concludes to use the two bases of 85, the die of 68, by changing the spandrels over the tablature from carving to uncut rockwork, and using the cap of 25, would have a monument in general appearance like this patent, and should he prevail upon some stone cutter to make a monument to suit such a taste, he would quite likely get that stone cutter into chancery for having infringed this patent; yet nothing would have been done except to assemble old parts. No one of those elements contributes to the completed result any new feature except to meet the taste of the person making the selection, and therein applies the doctrine in *Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749:

"No one of them adds to the combination anything more than its separate independent effect; no one of them gives any additional efficiency to the others or changes in any way the mode or result of its action. In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other; to draw an illustration from another branch of the law, they must be joint tenants of the domain of invention, seized each of every part per mi et per tout, and not mere tenants in common with separate interests and estates."

It was said by Judge Aldrich in *Perry v. Hoskins* (C. C.) 111 Fed. 1002, relative to a design monument:

"All the features in detail must be treated as old, for the stone cutter's art, as known and practiced from a very early period, has covered all conceivable shapes and forms in monuments and statuary, and the combination does not, as it seems to me, amount to a new and original design."

The lines of a draftsman and the chisel work of a sculptor of this day and generation are practically an imitation of old lines and old works. I somewhat question whether Congress, by its legislation on patents, intended to include monuments as works of manufacture, but assuming that such was its intent, there was but a small field open to the genius of invention in monumental designs.

It is claimed by this assignee of the patent in question that the ornamentation of the uncut rockwork overhanging the tablature on the die is a special feature and a novelty. Evidently, from the comments and decision of the learned and experienced judge who tried the Daley Case, the patentee established that fact from the evidence in that case, but it does not so appear in the case that is before me. The same idea is found in the die of several of the defendant's exhibits, the only difference being in the shape and proportions of the die and the good taste manifested in the general configuration of the whole monument. If a mere change in shape and proportions is to be construed as a patentable novelty, then the defendants have not infringed, for the monuments of their construction, on which the complainant bases this action, differ from the patented design in both shape and size; but in the design this special feature of the die, as set out in the letters patent, is not the basis of the patent. The patent is a design of a complete monument, and, from the evidence in this case, it appears that it

is composed entirely of ideas that are old. The only new thing about the complainant's design that I am able to discover, from all the evidence in the case, is its shape and form as the result of the assembling of old parts and old ideas.

In *Thompson v. Boisselier*, 114 U. S. 1, 5 Sup. Ct. 1042, 29 L. Ed. 76, the court holds that, while Congress has power to promote the progress of science in useful arts by securing to inventors the exclusive right of their respective discoveries, yet—

"the beneficiary must be an inventor, and he must have made a discovery. The statute has always carried out this idea. * * * So, it is not enough that a thing shall be new in the sense that in the shape and form in which it is produced it shall not have been before known, and that it shall be useful, but it must, under the Constitution and the statute, amount to an invention or discovery." See, also, *Hill v. Wooster*, 132 U. S. 693, 10 Sup. Ct. 223, 33 L. Ed. 502.

It is claimed that if a design presents a different impression upon the eye from anything which preceded it, and "proves to be pleasing, attractive, and popular, if it creates a demand for the goods of its originator, even though it be simple and does not show a wide departure from other designs, its use would be protected." That is, in substance, the language of Judge Strong, speaking for the court in *Gorham Mfg. Co. v. White*, 14 Wall. 511, 20 L. Ed. 731. This expression is found in that opinion:

"The law manifestly contemplates that giving certain new and original appearances to a manufactured article may enhance its salable value, may enlarge the demand for it, and may be a meritorious service to the public. It therefore proposes to secure for a limited time to the ingenious producer of those appearances the advantages flowing from them. Manifestly, the mode in which those appearances are produced has very little, if anything, to do with giving increased salableness to the article. It is the appearance itself which attracts attention, and calls out favor or dislike. It is the appearance itself, therefore, no matter by what agency caused, that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense."

But it will be observed that in *Smith v. Whitman Saddle Co.*, 148 U. S. 674, 13 Sup. Ct. 768, 37 L. Ed. 606, the Supreme Court, speaking through Chief Justice Fuller, evidently purposely quotes the language of Mr. Justice Strong in *Gorham Mfg. Co. v. White*, *supra*, and then adds:

"But, as remarked by Mr. Justice Brown, then District Judge for the Eastern District of Michigan, in *Northrop v. Adams*, 12 O. G. 430, 2 Bann. & Ard. 567, Fed. Cas. No. 10,323, which was a bill for the infringement of a design patent for a cheese safe, the law applicable to design patents 'does not materially differ from that in cases of mechanical patents, and all the regulations and provisions which apply to the obtaining or protection of patents for inventions and discoveries * * * shall apply to patents for designs. * * * To entitle a party to the benefit of the act in either case there must be originality and the exercise of the inventive faculty. In the one there must be novelty and utility; in the other originality and beauty. Mere mechanical skill is insufficient. There must be something akin to genius—an effort of the brain as well as the hand. The adaptation of old devices or forms to new purposes, however convenient, useful, or beautiful they may be in the new role, is not invention.' * * * The shape produced must be the result of industry, effort, genius, or expense, and new and original as applied to articles of manufacture. *Foster v. Crossin* (O. C.) 44 Fed. 62. The exercise

of the inventive or originaive faculty is required, and a person cannot be permitted to select an existing form and simply put it to a new use any more than he can be permitted to take a patent for the mere double use of a machine. If, however, the selection and adaptation of an existing form is more than the exercise of the imitative faculty, and the result is, in effect, a new creation, the design may be patentable."

Again, the learned Chief Justice quotes the judge who first decided the case then in hand as follows:

"A mechanic may take the legs of one stove and the cap of another and the door of another and make a new design which has no element of invention; but it does not follow that the result of the thought of a mechanic who has fused together two diverse shapes which were made upon different principles, so that new lines and curves and a harmonious and novel whole are produced which possesses a new grace, and which has a utility resultant from the new shape, exhibits no invention.' And he held that this was effected by the patentee, and that the shape that he produced was therefore patentable, but we cannot concur in this view."

Apply that principle to the case at bar. We have before us a design of a monument, the bases, die, and cap, like the legs, top, and other parts of the stove, old in use, yet it makes a new design, so that "new lines and curves and a harmonious and novel whole are produced which possesses a new grace, and which has a utility resultant from the new shape." A design made up in this manner was held by the lower court in *Smith v. Whitman Saddle Co.*, supra, to be valid and to be protected under the law, yet the Supreme Court reversed it. It is self-evident that the Supreme Court, in that case, intended to change the trend of the federal court in sustaining such patented designs as rest upon the assembling of old parts by "new lines and curves and thus a harmonious and novel whole is produced which possesses new grace," but without the genius of invention. In my opinion, the case at bar is just this kind of a patented design. A draftsman may so change the old art as to develop æsthetic beauty which may rise to the standard of invention, but to my mind this patent is the assembling of different elements of the old art, and so changing the configuration of a monument that it simply may or may not impress the fancy of a purchaser, but it is not the genius of invention. If the assembling of the old parts of other monuments into the Lockwood monument results in æsthetic beauty, it is by following the Lockwood monument in exact proportions, and the Lockwood monument in the matter of proportions does not follow the patented design; neither does any one of the four claimed infringing monuments made by the defendants. In fact, neither of those monuments follows the proportions of the patented design or of the Lockwood monument; hence this case is wholly unlike the cases cited by the complainant, viz.: *General Gaslight Co. v. Matchless Mfg. Co.* (C. C.) 129 Fed. 137; *Untermeyer v. Freund* (C. C.) 37 Fed. 342; *Matthews Co. v. American Co.* (C. C.) 103 Fed. 639.

Substituting rock-faced spandrels found in obelisk monuments for carved spandrels of sarcophagus monuments could not be sustained as a patented design under the law of *Smith v. Nichols*, 21 Wall. 112, 22 L. Ed. 566. Justice Swayne, speaking for the Supreme Court, therein said:

"A mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent. These rules apply alike, whether what preceded was covered by a patent or rested only in public knowledge and use. In neither case can there be an invasion of such domain and an appropriation of anything found there. In one case everything belongs to the prior patentee; in the other, to the public at large."

In view of all the evidence in this case as to the state of the prior art, I am unable to find in this design invention. It is the skill of the draftsman.

It is contended by the complainant that the doctrine of *stare decisis* should be applied in this case, and the *Daley Case* is cited. The assignments of error before the Circuit Court of Appeals in that case presented different questions from those that are before me in this case, and, although the same patent was there involved, the evidence and the questions raised differed, and therefore I hold that that doctrine does not apply.

The pleadings raise an issue of fact as to whether defendant Marr, as administrator, since the death of Cruickshank, has been interested in the manufacture of the monuments in question. The complainant claims that the defendants have made four monuments that infringed. I find, from the evidence, that those monuments were constructed before the death of Cruickshank, and that neither Innes, his partner, Cruickshank, nor Marr, the administrator of Cruickshank, knew of the existence of this patent, or that they were making monuments the design of which was covered by letters patent.

For the reasons above set forth, I think the bill should be dismissed, and it is so ordered. Decision as to costs reserved.

**AMERICAN STEEL & WIRE CO. OF NEW JERSEY v. DENNING WIRE
& FENCE CO.**

(Circuit Court, N. D. Iowa, Cedar Rapids Division. March 2, 1908.)

No. 33.

1. PATENTS—SUBJECTS OF PATENTS—FUNCTION OF MACHINE.

The mere function or operation of a machine or other device as distinguished from the machine or device itself is not patentable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 5-7.]

2. SAME—SCOPE.

A patent cannot cover generally any and every means or method for producing a given result.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 247-250½.]

3. SAME—SUBJECTS OF PATENTS—PRINCIPLE OF OPERATION OF MACHINE.

While the principle of a machine or device and the mode of its operation are required to be set out in the specification of a patent therefor, they cannot be made the subject of a patent, but only the machine or device itself is patentable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 5.]

4. SAME—"FUNCTION OF MACHINES."

The phrase "functions of a machine," as used in the patent law, defined as that power or property of the machine of acting in the specific manner designed or intended by its construction; in other words, that which the machine is designed to do, as distinguished from the machine itself and from the product of its action on something external to itself.

5. SAME—CONSTRUCTION OF CLAIMS—RULES GOVERNING.

A patent is a contract, and the rules for the construction of contracts generally control in its interpretation, and when its terms are plain, and the intention of the parties clearly manifest therefrom, they must prevail, but if its expressions are ambiguous or its validity or any claim is doubtful, that construction will be given which will sustain rather than destroy the patent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 229-240.]

6. SAME—SUBJECTS OF PATENTS—NEW COMBINATION OF OLD ELEMENTS.

A new combination of old elements or devices, whereby a new and useful product is produced or an old product is attained in a more efficient and economical way, may be protected by patent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 48.]

7. SAME—ANTICIPATION—MACHINE FOR MAKING WIRE FENCE.

The Bates patent, No. 577,639, for a machine for making fence of the woven wire or mesh type, is not invalid on the ground that its claims are for a mode of operation or principle or function of a machine, but is for the machine itself, designed to produce a certain described fabric, nor are the claims so broad as to include any and every machine for making this same fabric, nor was it anticipated by prior machines for making barbed wire or mesh fence fabric, but is for a new and novel combination, and discloses invention. Also *held* infringed.

8. SAME—"MECHANICAL EQUIVALENT."

The term "mechanical equivalent," as used in the law of patents, means that each of the ingredients comprising the invention covers every other ingredient which, in the same arrangement of the parts, will perform the same function, if that was well known as a proper substitute for the one described in the specification at the time of the patent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 24.

For other definitions, see Words and Phrases, vol. 5, p. 4461.]

In Equity. On final hearing.

Suit for alleged infringement of claims 1 to 11, inclusive, and 19, 27, and 35 of letters patent, No. 577,639, issued to Albert J. Bates, February 23, 1897, for a machine for making wire fence, which patent is now owned by the complainant. Defense: That the several claims of the patent alleged to have been infringed are invalid (1) because they are for the functions only of certain mechanism, and are so broad as to include all devices or mechanisms for making a woven wire fence; (2) are but multiplications of the same device used in the barbed wire fence machines; (3) are lacking in patentable novelty, and involve only mechanical skill in the arrangement and use of prior well-known and patented devices; and (4) noninfringement.

Thos. W. Bakewell, Paul Bakewell, Chas. McVeagh, and Jas. H. Preston, for complainant.

Thos. A. Banning, Banning & Banning, and Grimm, Trewin & Moffitt, for defendant.

REED, District Judge. Congress has enacted, in substance, that any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and use-

ful improvements thereof, not known or used by others before his invention or discovery, may, upon compliance with the law, obtain a patent therefor; that before he shall receive such patent he shall make written application for the same, and file therewith in the Patent Office a written description of the invention, and of the manner of making and using it, in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions, and shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention; that, when the nature of the case admits of drawings, the applicant shall furnish the same, which shall be filed in the Patent Office as a part of the specifications, and a copy of the specifications shall be annexed to the patent, if issued, as a part thereof. Rev. St. U. S. § 4883 et seq. (U. S. Comp. St. 1901, p. 3381). The granting of the patent is presumptive evidence of its validity, and of the novelty of the invention. *Smith v. Goodyear Co.*, 93 U. S. 486-498, 23 L. Ed. 952; *Cantrell v. Wallick*, 117 U. S. 689-695, 6 Sup. Ct. 970, 29 L. Ed. 1017. The grounds of the alleged invalidity of the several claims of this patent may be stated and considered in the order in which they are presented in the brief of defendant's counsel.

The first ground so presented, and it applies to all the claims involved, is "that they are functional; that the mechanism is described by the work that it does; that the claims are not limited to any particular or specific mechanism, but are worded broad enough to include all kinds of devices and mechanisms for doing the work and performing the functions specified." This in reality specifies two distinct and separate grounds, upon each of which the validity of these claims is challenged, viz., (1) that the claim is only for the functions of certain mechanism, and not for the mechanisms or combinations thereof; and (2) that if they are for a combination of the mechanisms mentioned then they are so broad as to include every and any kind of mechanism or combinations thereof for making wire fence, and cannot therefore be upheld. Elaborate and forceful arguments, with many citations of authorities are presented by counsel of the respective parties in support of and against these and the other grounds urged against the validity of these claims of this patent. Only brief reference to some of them can be made without unduly extending the opinion.

That the mere function or operations of a machine, or other device, as distinguished from the machine or device itself are not the subject of a patent is well settled. *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683; *Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650, 660, 661; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537-557, 18 Sup. Ct. 707, 42 L. Ed. 1136; *National Hollow B. B. Co. v. Interchangeable B. B. Co.*, 106 Fed. 693-708, 45 C. C. A. 544. And a patent covering generally, any and every means or method for producing a given result cannot be upheld. *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601; *LeRoy v. Tatham*, 14 How. 156, 14 L. Ed. 367; *The Telephone Cases*,

126 U. S. 531-534, 8 Sup. Ct. 778, 31 L. Ed. 863. Whether or not a given case falls within the general rules thus stated depends of course upon its own facts. The first question then is, what are the functions of a machine or other device, that are not the subject of a patent? In *Corning v. Burden*, 15 How. 252, 14 L. Ed. 683, Mr. Justice Grier, in stating the distinction between a process and a machine said:

"The term 'machine' includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result. But where the result or effect is produced by chemical action, by the operation or application of some element or power of nature, of one substance to another, such modes, methods, or operations are called processes. A new process is usually the result of a discovery, a machine, of invention. * * * But the term 'process' is often used in a more vague sense in which it cannot be the subject of a patent. Thus we say that a board is undergoing the process of being planed, grain of being ground, iron of being hammered or rolled. Here the term is used subjectively or passively as applied to the material operated on, and not to the method or mode of producing that operation, which is by mechanical means, or the use of a machine, as distinguished from a process. In this use of the term it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine. But it is well settled that a man cannot have a patent for the function or abstract effect of a machine, but only for the machine which produces it."

In *LeRoy v. Tatham*, 14 How. 156, 14 L. Ed. 367, the claim of the patent involved was as follows:

"What we claim as our invention is the combination of the following parts, to wit, the core and bridge or guide piece, the camber, and the die, when used to form pipes of metal under heat and pressure in the manner set forth, or in any other manner substantially the same."

The Circuit Court charged that this patent was not one for the combination of the different parts of the machinery described; but was one for bringing a newly discovered principle into practical application, by which a useful article of manufacture is produced, and wrought pipe made as distinguished from cast pipe. Held, that this was a wrong construction of the patent, as it was for the combination of machinery only; and whether or not the alleged newly developed property of lead used in the formation of pipes might have been patented if claimed as described, without the intervention of machinery, was not in the case. In the course of the opinion it is said:

"The word 'principle' is used by elementary writers on patent subjects, and sometimes in adjudications of courts, with such a want of precision in its application as to mislead. It is admitted that a principle is not patentable. A principle, in the abstract, is a fundamental truth; an original cause; a motive; these cannot be patented, as no one can claim in either of them an exclusive right. Nor can an exclusive right exist to a new power, should one be discovered in addition to those already known. Through the agency of machinery a new steam power may be said to have been generated. But no one can appropriate this power exclusively to himself, under the patent laws. The same may be said of electricity, and of any other power in nature, which is alike open to all, and may be applied to useful purposes by the use of machinery. In all such cases, the processes used to extract, modify and concentrate the natural agencies constitute the invention. The elements of the power exist; the invention is not in discovering them, but in applying them to useful objects. Whether the machinery used be novel, or consist of a

new combination of parts known, the right of the inventor is secured against all who use the same mechanical power, or one that shall be substantially the same. A patent is not good for an effect, or the result of a certain process, as that would prohibit all other persons from making the same thing by any means whatsoever."

Burr v. Duryee, 1 Wall. 531, 17 L. Ed. 650, 660, 661, was a suit for an alleged infringement of the original and reissued letters patent for an improvement in machinery for making hat bodies. The original patent was held valid, but not to have been infringed by defendant's. The specification of the reissued patent describes the machine much as it was described in the original, and continues, "The said mode of operation invented * * * is embodied in the following description"; and the claim is modified to conform to the description. Pages 567-576 of 1 Wall. (17 L. Ed. 650, 660, 661). The reissued letters patent was held void. In the course of the opinion Mr. Justice Grier, at page 570 of 1 Wall. (17 L. Ed. 650, 660, 661), says:

"The law requires that the specification should set forth the principle and the several modes in which the patentee has contemplated the application of that principle, or character, by which it may be distinguished from other inventions, and shall particularly point out the part, improvement, or combination which he claims as his own invention or discovery. We find here no authority to grant a patent for a principle or mode of operation, or an idea, or any other abstraction. A machine is a concrete thing consisting of parts, or of certain devices and combination of devices. The principle of a machine is properly defined to be its mode of operation, or that peculiar combination of devices which distinguish it from other machines. A machine is not a principle or an idea. The use of ill-defined abstract phraseology is the frequent source of error. * * * Because the law requires a patentee to explain the mode of operation of his peculiar machine, which distinguishes it from others, it does not authorize a patent for a 'mode of operation' as exhibited in a machine. * * * The specification of this reissued patent, instead of describing, first, the machine and the several devices, which exhibit its peculiar mode of operation in order to produce the desired effect, and stating what the patentee claims as his peculiar invention, commences by describing 'a mode of operation' as the thing intended to be patented, and uses these words, 'The said mode of operation, * * * is embodied in the following description of the mode of application.' The claim is for the mode of operation, substantially as herein described. We have no leisure for a further development of this novel form of patent, or how, by the use of general and abstract terms, the specification is made so elastic that it may be construed to claim only the machine, or so expanded as to include all previous or future inventions for the same purpose. * * * In this case we have an attempt to convert an improved machine into an abstraction, a principle or mode of operation, or a still more vague and indefinite entity often resorted to in argument—an idea."

In *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537-557, 18 Sup. Ct. 707, 716 (42 L. Ed. 1136), Mr. Justice Brown, after reviewing the prior decisions, said:

"Where the process is simply the function or operative effect of a machine, the cases are conclusive against its patentability; but where it is one which, though ordinarily and most successfully performed by machinery, may also be performed by simple manipulation, such, for instance, as the folding of paper in a peculiar way for the manufacture of paper bags, or a new method of weaving a hammock, there are cases to the effect that such a process is patentable. * * * But this case does not call for an expression of our opinion upon this point, nor even upon the question of whether the function

of admitting air directly from the train-pipe to the brake-cylinder be not patentable (as held by the Court of Appeals), since there is no claim made for this in this patent, and the whole theory of the specification and claims is based upon the novelty of the mechanism."

It is then held that the claim is not infringed by defendant's patent. In *National Hollow B. B. Co. v. Interchangeable B. B. Co.*, 106 Fed. 693-708, 45 C. C. A. 544, the specifications upon which claims 1, 2, and 7, of the second Hiens patent there involved rest, describe the means of producing the so-called camber, or the compression member of the brake beam, as "the turning of the nuts upon the ends of the tension rod, or member of the beam, thereby causing the compression member to arch or curve, and thus produce the desired adjustable elasticity or resilience in the beam." In speaking of this the court at page 708 of 106 Fed., page 559 of 45 C. C. A., says:

"The camber or resilience in the beam is one of the products or functions of the air brake beam of the first patent; not, indeed, the ultimate function which that beam was created to perform—the function of stopping cars—but nevertheless a function of that device, because it may be produced by the use of that combination by simply turning the nuts upon the ends of its tension rods. Now, the function or result of the operation of a machine or combination is not patentable, and, therefore the camber in the beam (its spring or resilience) could not be monopolized by means of a patent. The means—the mechanical device—by which that camber was produced, and that alone, was capable of protection by such a franchise."

There, the attempt was to monopolize the function or operation of a device acting upon, or within, itself, and not a device or machine designed to act upon something external to itself. Other cases are to the same effect; and the rule deducible from the authorities is that, while the principle of a machine or device and the mode of its operation are required to be set forth in the specifications, these are not the subject of a patent, but only the machine or device itself may be patented. True, in some of them it is said that the result of the operations of a machine is not the subject-matter of a patent; but the word "result" is obviously so used to express the thought that the effect or result of the operations of a machine may not be exclusively appropriated to prevent others from accomplishing the same results by substantially different means. *Le Roy v. Tatham*, 14 How. 156-174, 14 L. Ed. 367; *O'Reilly v. Morse*, 15 How. 62-119, 14 L. Ed. 601; *Mitchell v. Tilghman*, 19 Wall. 392, 22 L. Ed. 125; *Robinson on Patents*, § 147. To say broadly that the effect or result of the operations of a machine may not be patented is at least inaccurate, for if the result of such operations upon some object, apart from the machine itself, is to produce a new and useful article of manufacture not before known, that product may be the subject of a patent apart from the machine which produces it. The most usual signification of the word "function" is "the fulfillment or discharge of a set duty or requirement; exercise of a faculty; that power of acting in a specific way which appertains to a thing by virtue of its special constitution." *Century Dictionary*. An exact definition of the phrase "functions of a machine," that will apply in all cases arising under the patent law, may not be readily formulated; nor is it advisable that it should be

attempted, for it is impossible to foresee the combinations of elements that may be made to produce new results. *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537-557, 18 Sup. Ct. 707, 42 L. Ed. 1136. But for the present purposes it may be said to be that power, or property of the machine, of acting in the specific manner designed or intended by its construction; in other words, that which the machine is designed to do, as distinguished from the machine itself, and from the product of its action upon something external to itself.

Are these several claims of this patent in question, for the "functions of a machine," as so understood, or are they for a machine that is endowed with certain functions? This is to be determined from the language of the several claims, considered in connection with the specifications and drawing which are a part thereof. The specifications are as follows:

"Be it known that I, Albert J. Bates, * * * have invented certain new and useful improvements in wire-fence machines, of which the following is a full, clear, and exact description such as will enable others skilled in the art to which it appertains to make and use the same:

"The invention relates to the manufacture of woven-wire fences; and the general object in view is to make by machinery, at one operation, in continuous lengths, a complete fencing or fence fabric, consisting of a plurality of longitudinal strand-wires having transverse stay-wires or braces spanning the spaces between the strand-wires, and secured thereto, so as to connect them together, and strengthen and support them.

"This style of fencing is not new, and it has already been proposed to make the same by machinery at one continuous operation, but in doing so the transverse stay-wires corresponding to the spaces between the strand-wires have been divided into sets or groups, the individual wires of which correspond only to alternate spaces between the strand-wires, and these sets or groups have been fed in and secured to the strand-wires alternately, so that in the completed fencing the stay-wires are not continuous across the fabric, but are so located and arranged that at any given point of the fencing only alternate spaces between the strand-wires are crossed, the other spaces not being crossed by the stay-wires, and the longitudinal wires not being connected at all at that point.

"It is the particular object of the present invention to provide a machine that will make this kind of fencing so that in the completed fabric all the longitudinal wires or as many as may be desired will be connected together by transverse stay-wires that are practically continuous and in line with one another, and this I accomplish by feeding all the stay-wires in simultaneously and in line with one another crosswise of the strand-wires, and securing them to the strand-wires and to one another, thereby producing a fencing of superior strength, rigidity, and effectiveness and of a greatly improved appearance; and the invention consists in a machine organized and having its elements combined as hereinafter claimed and as contained in the machine herein illustrated and described as the best embodiment of the invention at this time known to me."

Accompanying the specifications and forming a part thereof are 24 drawings representing different parts of the machine. These parts, and their combinations with each other to form the completed machine, the manner in which they are designed to act together and upon the wire fed into the machine to produce a completed fence fabric are described with much detail, and illustrated by appropriate references to the different drawings. After so describing the several parts, the construction of the machine, and the manner of its operation, the specifications continue:

"In the following claims I do not wish to be understood as limiting myself as to the details of construction of the individual elements going to make up the several parts or combinations of the machine herein illustrated and described, as I regard the invention as of a character to admit of variations of these details within considerable limits without departing from its spirit or scope. For example, the details of the collars, the cutters, the feeding and take-up mechanisms, and other parts may be differently constructed so long as the organization, relative arrangement, and combinations are preserved, and the framing of the machine, the gearing, etc., are features that admit of a wide range of modification within the skill of the designer and machine-constructor. Having thus described the invention, what I claim, and desire to secure, is:

"1. In a wire-fence machine, the combination of mechanism for intermittently feeding a plurality of longitudinal strand-wires, mechanism for intermittently feeding a plurality of stay-wires simultaneously and transversely of the strand-wires, mechanism for cutting off suitable length of the stay-wires to span the space between the strand-wires and mechanism for simultaneously coiling the adjacent ends of the lengths of the stay-wires around the strand-wires."

The other claims vary somewhat in their phraseology; and some are repetitions to some extent of others; but each is for a combination "in a wire-fence machine" of mechanisms designed to act together and upon wire fed into the machine so as to guide it through the same and to different parts thereof, cutting, intercoiling, and transforming it into a completed fence fabric as it passes through and emerges from the machine. A patent is a contract between the government and the patentee, whereby the latter is granted the exclusive right to make, use, and vend his invention for a specified time, after which, such right is to inure to the benefit of the public. *Seymour v. Osborne*, 11 Wall, 516-533, 20 L. Ed. 33. And the rule for the construction of contracts generally control in its interpretation, and when its terms are plain, and the intention of the parties clearly manifest therefrom they must prevail. If its expressions are ambiguous, or its validity or any claim thereof is doubtful, that construction will be given to it which will uphold, rather than that which will strike down and destroy, the patent. *National Hollow B. B. Co. v. Interchangeable B. B. Co.*, 106 Fed. 693-701, 45 C. C. A. 544; *Jewell Filter Co. v. Jackson*, 140 Fed. 340-343, 72 C. C. A. 304.

The specifications are a part of the patent (Rev. St. § 4884); and the claims will be considered in connection with such parts of the specifications as are applicable thereto in determining their meaning. With these principles in mind, what is the meaning of these several claims? The patentee says:

"Having thus described the invention, what I claim and desire to secure is: In a wire-fence machine, the combination of (1) mechanism for intermittently feeding a plurality of strand-wires; (2) mechanism for intermittently feeding a plurality of stay-wires simultaneously and transversely of the strand-wires; (3) mechanism for cutting off suitable lengths of the stay-wires to span the spaces between the strand-wires; and (4) mechanism for simultaneously coiling the adjacent ends of the lengths of the stay-wires around the strand-wires."

The others are in substantially the same form. Standing alone the claims are plainly for a combination of four groups of mechanisms into a "wire-fence machine," but the machine itself, and its principle and mode of operation are not, and cannot be, accurately described

without the aid of drawings or a model; and an attempt to do so would be unavailing. The specifications, however, and the drawings which are a part thereof, particularly describe, and plainly show, a machine the principles and mode of operation of which, and the several elements composing the same, are exactly described and clearly set forth with much detail; and the plain meaning of the language of the several claims in connection with the specifications applicable to each is a distinct claim for a machine, that when built and operated in the manner described and pointed out will produce a wire-fence fabric; and is not a claim for a "mode of operation," a "principle," or a function of a machine or any part thereof, apart from the machine itself.

Are the several claims so broad as to include any and every kind of a machine for making a woven wire-fence fabric, such as is described? This question has been carefully considered, and it must suffice to say that they are not. The specifications clearly describe the several component parts, and their combination to form a new machine; and the claims are only for the combination of the mechanisms, or their substantial equivalents, within the scope of the organization as described, to do the work that this machine is designed to do. It will be observed that none of the claims contain the words "substantially as described," or words of similar import; and it is urged that this omission, in connection with the paragraph immediately preceding the claims, shows the intention of the patentee to make the claims so broad as to include all other means of making a woven wire fence. Many authorities are cited to show the purpose of the use of such words in the claims. They are doubtless used to limit the claims to substantially the descriptions set forth; or, if the description should be lacking in perspicuity, they may permit such latitude in construction as will conform the part substantially to that described. If necessary to save the patent, these words will be construed into the claim. *Hobbs v. Beach*, 180 U. S. 383-400, 21 Sup. Ct. 409, 45 L. Ed. 586. But it is said that this will not be done when it appears that their omission is intentional, and for the express purpose of making the claim so broad as to include every other device or means for accomplishing the same result. But the specifications upon which these several claims rest are so explicit that neither the use, nor the omission, of these words can affect the meaning of these claims. The conclusion, therefore, is that the first ground urged against the validity of the claims is not tenable.

The second ground is that the devices and mechanisms called for in each claim are only the devices and mechanisms of the old barbed wire fence machines in plural instead of singular relation, and are mere multiplication of such devices which involve no invention, but only mechanical knowledge and skill in arranging such mechanisms. Many machines for barbing wire were in use at the time of the issuance of the Bates patent, and the patents for a number of them have been offered in evidence by the defendant. All of them are, as their names indicate and their construction show, machines for placing barbs upon fence wire. The wire so barbed is a single strand, or two strands twisted together, as one in the form of a cable, and the barbs are coil-

ed around the strand, or intercoiled with it when it consists of more than one wire, to hold the barbs in place. In most, if not all of these machines, the main strand of wire is fed forward from a spool of wire into, and is drawn through, a tube, and the wire for the barb is fed in a like manner through a tube transversely to the main strand and fastened to or coiled around the main wire in different ways, then cut and pointed, to form the barb, and thus make a completed strand of barbed wire. Cuts of such wires and the manner of making them are shown and described in the cases of the Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154. Many and perhaps all of the devices and mechanisms used for making the barbed wire may be used in making the woven wire, or meshed wire fence fabric, shown in the patents of Bates and of the defendant in this suit. As evidencing the presence in the barbing wire machines of the sets of mechanisms which the Bates patent calls for, defendant refers to the Putman reissued patent, No. 9,485, of November 30, 1880, and the Baker patent, No. 249,735 of November 22, 1881, as sufficiently illustrating the general features of the mechanisms in use in the barbing-wire machines, and quotes from the Putman patent the first and second claims thereof. The second embraces both, and is as follows:

"2. In a machine for making barb fence wire by a continuous operation, the combination, with mechanism constructed and arranged to automatically feed forward the main wire at stated intervals, and mechanism constructed and arranged to automatically feed forward the cross or barb-wire across the main wire at stated intervals, of mechanism for coiling the barb-wire about the main wire, and mechanism for cutting off the barb-wire, and for fastening the coil barb-wire to the main wire, in connection with guides for the wire substantially as described."

It is true that this calls for groups of mechanisms for automatically feeding the main and cross wires, and for guiding, coiling, and cutting the same as the claims of the Bates patent do; but it by no means follows that the combinations are the same. If this proves anything, it is only that such mechanisms were old and well known at the time of these earlier patents, and that their combinations into the various barbing wire machines were patentable inventions. Bates does not claim to have invented originally, any of these mechanisms, and claims only to have arranged and invented a new combination of them different from any before known for making a product entirely different from that which they made, or could make, viz., a completed wire-fence fabric; just as Putman and Baker and others combined them into machines for barbing separate strands of wire. It requires no citation of authorities to show that a new combination of old elements or devices, whereby a new and useful product is produced, or an old product is attained in a more efficient and economical way, may be as securely protected by patent as a new machine or other device, or a new composition of matter. *Seymour v. Osborne*, 11 Wall. 516-542, 543, 20 L. Ed. 33; *Hailes v. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241; *National Hollow B. B. Co. v. Interchangeable B. B. Co.*, 106 Fed. 693-707, 45 C. C. A. 544. The distinction between a fence wire and a wire fence is as broad as the distinction between a fence board and a completed board fence; and a machine for placing the barbs upon a wire may be as different from one for mak-

ing a completed wire-fence fabric, as the strand of wire is different from the completed wire fence, or the board is different from the completed board fence, or, in fact, from any structure into which the wire or the timber may be erected. A comparison of the specifications of the Putman and other barbing wire machine patents with those of the Bates patent shows that the combinations of the old mechanisms into the barbing wire machines are as different from those of the Bates machine as a single strand of barbed wire, of whatever kind, is different from the woven-wire, or meshed wire, fence fabric that Bates describes, and which his machine is designed to, and does, produce. In none of the barbing wire machines is a combination of mechanisms shown for the purpose for which Bates combined them, nor do they, nor can they, perform the same functions that the Bates combination performs. It is true that they feed the strand-wires forward, and the wire for the barbs across the main wire and coil it around or intercoil it with the main wire; but there is no combination of mechanism for feeding the barb wire across an intervening space between several strand-wires distant from each other, and binding and sustaining them in that position, unless it be the Ayers and Decker machine of 1876, not patented, which will be referred to later. For instance, the Root patent, No. 237,129, of February 21, 1881, is for an improved machine for winding barbed fence wire, and relates to a new method of applying barbs to a strand composed of two wires around which the barb is wound. The strands are fed through two tubes which converge to form a single strand composed of two wires side by side, in close proximity; and the barbs are wound around one and then around both. It relates simply to the method of applying the barbs and is differentiated only from the Ayers & Decker patent, No. 235,331, of December 14, 1880, in the method of applying the barb, which is for the same purpose, and interwinds the barb with the two wires twisted to form a cable strand.

It is undoubtedly true that merely bringing together old elements found in older machines in the same, or a kindred art, to effect the same result is not patentable invention. But the converse is equally true, that if a new combination or organization of old elements is such that the combination produces a new mode of operation, and a new product or beneficial result, this is patentable invention, though all of the constituents of the new combination were well known and in common use before that combination was made. The new result, however, must be the product of the joint and co-operating action of all of the old elements as combined in the new machine, and not merely the aggregate of different results each the separate product of one of the constituent elements. *Hailes v. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241; *Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749.

In showing the existing state of the art at the time of the Bates patent, defendant produced and put in evidence two cuts, and a model of a machine used in 1876, 1877, and 1878 by Ayers & Decker of Bushnell, Ill., for barbing wire. That such a machine was used by them in those years, and until they were restrained from using it at the suit of Washburn, Moen & Co., in the Circuit Court of the United States for the District of Illinois in 1878, is not disputed. The cuts

above referred to are reproduced from exhibits used in evidence in that suit, and the model is one prepared by the defendant for use upon this hearing from the testimony in this case relative to its construction. The cuts and model show the method of barbing a single wire; and, by the addition of like devices, show the method of barbing two and three strands at a distance from, and parallel to, each other. In the case of the two and three parallel strands, the barb or cross-wires were cut the requisite length by hand and placed across the intervening space between the strand-wires, and were then wound around the strand-wires to sustain them in their relative positions and the ends of the cross wires turned outwards to form the barbs. There is much testimony in regard to this machine, and especially the kind of fence made with it, and the method of wrapping the cross wires around the strand-wires. That a three strand barbed wire fence was made is not doubted, but whether the cross wires were laid in line with each other across the strands and their meeting ends intercoiled with a single coiler containing two lugs or fingers, or were alternated in zig-zag or staggered form, is in much dispute. Much of the testimony upon this question relates to matters occurring nearly 30 years before the witnesses gave their testimony, most of whom had but little interest in the matter at the time, and would not be likely to charge their memories therewith. Without reviewing the testimony it must suffice to say that it is of that character which fails to convince beyond reasonable doubt that Ayers & Decker made a three strand wire fence with the cross or stay wires in alignment. The Barbed Wire Patent, 143 U. S. 275-284, 12 Sup. Ct. 443, 36 L. Ed. 154.

In June 1876, Mr. Decker, of the firm of Ayers & Decker, made application for a patent upon his mesh fencing, and he described it as one in which the stay-wires were arranged in zig-zag or staggered form only. This is persuasive evidence that that was the only style of fence that he or his firm then manufactured. But if it were conceded that the Ayers & Decker machine was made and used in the manner contended by the defendant, it is so radically different from the Bates machine that the conclusion is that it does not anticipate that machine. The product of this machine was simply the aggregate of the separate products of each of the elements used to feed forward the separate strand-wires parallel to and at a distance from each other, when the cross wires were then laid by hand across the strand-wires and fastened to hold them in position and form the barbs. Old elements were used and operated separately for feeding forward the several strand-wires, and the cross wires were then placed in position by hand to produce the two and three strand-wire fence, while Bates combined the old elements so that they acted jointly, and in co-operation with each other to feed forward the three strand and cross wires simultaneously, cut and coil the cross wires and then completed the fence fabric. It would serve no useful purpose to refer in detail to others of the many barbing wire machine patents offered in evidence by the defendant, and point out the difference between each and the Bates patent. A careful examination of each of them leads to the conclusion that none of them anticipates the Bates patent, and that none is intended to perform the same function, or does or could in fact per-

form the same, or produce the same product that the Bates machine is designed to, and does in fact, produce.

The third ground is that the several claims are but simple changes in the prior patents of square mesh fence making machines, especially of the Edenborn patent, which changes involve no invention, but only mechanical skill in view of the old barbing wire fence machine. This is but a repetition of the second ground modified to apply to the patents of the square mesh fence machines, especially the Edenborn patent, No. 558,787, of April 21, 1876. In argument, the patent of Page & Lamb, No. 414,844, of November 12, 1889, and of Land, No. 455,406, of July 7, 1891, are referred to as sufficiently illustrating these machines, and embodying all of the claims of the Bates patent involved in this suit, combined in substantially the same form. The features that distinguish the first two patents from that of Bates are that in both of them the desired number of strand or longitudinal wires are fed forward a predetermined distance and stopped; a single wire is then fed across the strand-wires continuously, and wound around each while they are at rest until all of the strands are wound; the cross wire is then cut, and the completed fabric moved forward the requisite distance for the next cross wire, and the operation of winding the cross wire around the strand-wires is repeated. Instead of using a single continuous cross wire Bates combined mechanisms for feeding several cross wires in line across the intervening spaces between the strand-wires, simultaneously with the feeding of the strand-wires and for cutting the cross wires of sufficient length to cover such spans, then stopping both strand and cross wires while the coiling fingers engage and coil the ends of the cross wires around the strand-wires, when the completed fabric is then fed forward and the operation repeated. It is obvious that this requires different mechanisms, and an entirely different mode of operation from that for feeding a single continuous wire across the strand-wires while they are at rest, and winding it around those strands; and that the operation of the Bates machine is much more rapid than that of the others, permits of the use of stronger and more efficient stay-wires, and winds them more securely upon the strand-wires. The Edenborn patent also feeds forward the several strand-wires, stops them, and then feeds the stay-wires across them while the strand-wires are at rest, but in alternate, or zig-zag or staggered form, and not in a continuous line. Edenborn himself was a skilled mechanic of large experience in the manufacture of wire fence material, and applied for his patent only a short time before Bates applied for the patent in suit. The estimate that Edenborn placed upon his own patent as compared with that of Bates is shown by the payment of his company to Bates by his direction of the sum of \$80,000 for the patent in suit, and that of the fence that it is designed to manufacture. This at least, is persuasive evidence that Edenborn did not then regard the Bates machine patent as an infringement of his, or that it was simply the result of the knowledge and skill of the mechanic in arranging the old elements.

It requires the combination and joint co-operation of devices for feeding forward simultaneously at least three strand-wires and two stay-wires transversely to them, for guiding the stay-wires across the

spaces between the strand-wires, and for cutting, coiling, and intercoiling the ends of the stay-wires around the strand-wires to complete the Bates machine and illustrate its principle and mode of operation. The width of the fence fabric it is desired to produce may then be increased to any desired extent by adding one each of these several devices in the same relation to each other as in the original combination, and one stay-wire for each strand-wire that it is desired to add to the fence. The addition of such other devices may be only the work or skill of the constructor of the machine, but a combination of devices for feeding simultaneously the strand and cross wires, guides for the stay-wires across the spaces between the strand-wires, and for cutting the stay-wires and coiling and intercoiling them around the strand-wires, is not shown in any of the prior patents or machines used for barbing wire or making mesh wire fence. That the machine is one of great utility and went into immediate use, and practically supplanted all prior machines for making mesh-wire fencing, cannot be doubted under the evidence upon that question.

Finally, it is urged that defendant does not infringe the complainant's patent in any particular. It may be admitted that the several claims in question of the Bates patent must be limited to the devices or means described in the specifications, or to their substantial equivalents. *Lake Shore & M. S. Ry. Co. v. National Car Brake Shoe Co.*, 110 U. S. 229-237, 4 Sup. Ct. 33, 28 L. Ed. 129; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 557, 18 Sup. Ct. 707, 42 L. Ed. 1136; *National Hollow B. B. Co. v. Interchangeable B. B. Co.*, 106 Fed. 693-710, 45 C. C. A. 544.

The term "mechanical equivalent," as used in the law of patents, means that each of the ingredients comprising the invention covers every other ingredient which, in the same arrangement of the parts, will perform the same function, if that was well known as a proper substitute for the one described in the specifications at the time of the patent. *Imhaeuser v. Buerk*, 101 U. S. 647-656, 25 L. Ed. 945; *National Hollow B. B. Co. v. Interchangeable B. B. Co.*, 106 Fed. 693-710, 45 C. C. A. 544. The defendant in his first patent, No. 772,405, of October 14, 1904, describes his invention as one that "relates to the manufacture of wire fence in which the main longitudinal strands of wire are connected at regular intervals by cross wires, or the 'stay-wires,' as they are usually called," and says:

"* * * The machine is designed to manufacture the type of fence partially illustrated in Fig. 8 in which the longitudinal strands * * * are connected by stay-wires extending from strand to strand and closely wound about the strands. At the outer strands this is a simple coil, but at the intermediate strands the connection is in the form of a peculiar knot, the form of which is due to the fact that, prior to coiling, the stay-wires are fed across the ends of the collers both on the same side of the strand-wires. The knot so formed takes a very firm grip on the strand-wire and, irrespective of the crimp taken in it, tends to hold the stays securely in position. The machine is arranged to feed, cut off, and coil simultaneously as many stay-wires as there are spaces between strand-wires in the fence to be made. It also feeds forward the finished fence, crimps the main strands at each stay-wire intersection, and rolls the completed fence-web on a reel."

Reference is then made to the drawing for a detailed description of the machine. The fence described is exactly that described in the Bates

patent, with the exception of the knot in the coil of the stay-wires around the intermediate strand-wires. Having thus described the invention, the claims are:

"1. In a wire-fence machine, the combination of mechanism for intermittently feeding a plurality of longitudinal strand-wires, mechanism for simultaneously and intermittently feeding a plurality of stay-wires transversely and so as to cross each other in pairs both lying on the same side of the strand-wires, a cut off for the several stay-wires, and coilers to knot them around the strand-wires."

The second and third are substantially the same, and the others, 15 in number, describe the mechanisms or devices which are combined to form the machine.

For convenience of comparison the first claim of the Bates patent is here repeated:

"1. In a wire-fence machine, the combination of mechanism for intermittently feeding a plurality of longitudinal strand-wires, mechanism for intermittently feeding a plurality of stay-wires simultaneously and transversely of the strand-wires, mechanism for cutting off suitable lengths of the stay-wires to span the spaces between the strand-wires, and mechanism for simultaneously coiling the adjacent ends of the lengths of the stay-wires around the strand-wires."

The only difference between these claims is, that in the defendant's machine the stay-wires are fed in upon the same side of the strand-wires, and the coilers are to knot the adjacent ends of the stay-wires around the intermediate strand-wires, while in the Bates machine the stay-wires are fed in upon opposite sides of the strand-wires, and there is no knot in the coils. True, the combinations need not necessarily be the same; but a comparison of the specification and of the models of the two machines exhibited upon the hearing show beyond any doubt that the combinations in the two machines are the same, and that the devices for feeding the strand and cross-wires and for coiling the ends of the stay-wires around the strand-wires are identical, except that which forms the knot mentioned in the defendant's claims, and that only one of the stay-wires is fed in on the opposite side of one of the outer strands. The only difference, therefore, in the devices of the two machines and in their modes of operation is in those for cutting the stay-wires, and for releasing them from the grooves into which they are guided and held in position while their ends are cut and coiled or knotted around the strand-wires. A reference to the drawings and models of the two machines is necessary to a correct understanding of these devices.

The doctrine of mechanical equivalents applies to a patent for a combination of old elements as well as to a patent for any other invention; but whether or not one device is the equivalent of another is usually a question of fact, which it is sometimes difficult to determine. In *Gill v. Wells*, 22 Wall. 1-29 (22 L. Ed. 699), it is said:

"Questions of the kind usually arise in comparing the machine of the defendant in a suit for infringement with that of the plaintiff, and the rule is that if the defendant omits entirely one of the ingredients of the plaintiff's combination without substituting any other, he does not infringe, and if he substitutes another in the place of the one omitted which is new or which performs a substantially different function, or even if it is old but was not known at the date of the plaintiff's patent as a proper substitute for the omitted ingredient, he does not infringe. By an equivalent in such a case it

is meant that the ingredient substituted for the one withdrawn performs the same function as the other, and that it was well known at the date of the patent securing the invention as a proper substitute for the one omitted in the patented combination. Hence it follows that a party who merely substitutes another old ingredient for one of the ingredients of a patented combination is an infringer if the substitute performs the same function as the ingredient for which it was substituted, and was well known at the date of the patent as a proper substitute for the omitted ingredient."

It will be observed that the only difference between the cutting devices of the Bates and defendant's machine is that in the Bates machine the movable cutter bar is drawn towards the stationary bar by the two eccentric levers at each end thereof, cutting the stay-wires as the blades of the cutters pass each other, while in the defendant's machine the movable bar is pivoted at one end to a cross-bar, and the other end is drawn towards the stationary bar by means of a lever at that end, the cutters passing closely upon the sides of the cut-off plates cutting the stay-wires after they have passed through the openings in those plates. There is no substantial difference in the method of operating the movable cutter bar of each machine. The swinging movement of the bar pivoted at one end, by the lever at the other end, is the substantial equivalent of the movement of the other by the eccentrics at each end, and each performs exactly the same function, viz., the passing of the cutter blades upon the movable and stationary bars to sever the stay-wires. The feeding of the stay-wires through the cut-off plates, so called, in defendant's machine is identical with that of the Bates machine, in which the stay-wires are fed through perforations in the cutter blades upon the stationary bar. The same is true of the guides in each machine for conducting the stay-wires across the spaces between the strand-wires. The guiding plates of defendant's machine are the exact equivalents of the spring-hinged plates of the Bates machine, the only difference being that in defendant's machine there is but one groove upon the inner surface of one of the plates, and that may be in either, or there may be a groove in each plate, while in the Bates machine there is a groove in each of the plates, or one in either will perform the same function. In the defendant's machine the movable plates are moved to and from the stationary plate by means of a lever actuated by a cam and springs, while in the Bates machine a spring-hinge upon the plates presses the movable plate upon, and holds it to, the stationary plate. No element of the Bates machine therefore is omitted from that of the defendant, without substituting an equivalent therefor.

There is one difference, however, in the operations of these devices in the two machines for opening the guides. In the Bates machine the movable plates open and close on their hinges, as a door opens and closes upon its hinges, by the pressure of the stay-wires upon them in the forward movement of the fence fabric after it is completed, while in defendant's machine the movable plates are moved away from the stationary plates by levers, which open the guides and release the stay-wires after the fence fabric has been completed. The movement of the fence alone does not perform this function in defendant's machine, for if the plates were not opened by means of the levers the movement of the fence fabric may wreck the plates. It is true that this movement of the levers is actuated by the tension of springs, and

thus the plates are separated, while in the Bates machine the direct action of the springs closes or brings the plates together to form the guides; while in the defendant's machine it separates the plates and opens the guides through the intermediary of the levers. It was well known, however, at the time of the Bates patent, that springs, levers, and weights were used to produce pressure, and that one was a substitute for the others for this purpose. Bates utilized the pressure of the fence fabric in its movement forward to separate the guide plates and release the stay-wires from their confinement. The defendant applies the pressure produced by the tension of the springs in the operation of the machine for the same purpose, and in substantially the same way, and by substantially the same means. *Morely Machine Co. v. Lancaster*, 129 U. S. 263-289, 9 Sup. Ct. 299, 32 L. Ed. 715; *Hobbs v. Beach*, 180 U. S. 383-399, 401, 21 Sup. Ct. 409, 45 L. Ed. 586; *Machine Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935. In the last-named case it is said:

"The correct rule being that, in determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result. Nor is it safe to give much heed to the fact that the corresponding device in two machines organized to accomplish the same result is different in shape or form the one from the other, as it is necessary in every investigation to look at the mode of operation or the way the device works, and at the result, as well as at the means by which the result is attained."

The authorities concur in holding that the substitution of an equivalent of a thing in the sense of the patent law is the same as the thing itself; so that if two devices do the same work in substantially the same way and accomplish substantially the same result, they are the same even though different in name, form, and shape. With this principle in mind, it seems clear that both the cutting device and that for opening the guides, used by the defendant, are the substantial equivalents of those of the Bates machine for the same purpose. The knotting feature of defendant's coiling device may differentiate it to that extent from the Bates device. But this is an immaterial difference only, as it in no way changes the functions of the machine as a whole, and accomplishes no result substantially different from that of the Bates machine. *Morley v. Lancaster*; *Hobbs v. Beach*, above. If defendant desires to use that feature of its coiler alone it may do so, but it cannot escape infringement by building it upon the Bates coiler without complainant's consent. *Cantrell v. Wallick*, 117 U. S. 689-694, 6 Sup. Ct. 970, 29 L. Ed. 1017; *Hobbs v. Beach*, above.

Defendant's second patent is for a machine to manufacture a wire fence, the longitudinal strands of which are composed of two or more strands twisted in the form of a cable and plain cross or stay wires connecting them at regular intervals. It is not claimed by the defendant that this is a material difference from the first machine, and upon the argument at the bar it was distinctly stated by its counsel that

nothing was claimed for this feature of the machine. It need not therefore be considered.

Other reasons are urged in behalf of defendant why its machine does not infringe that of Bates, but they seem to be fully answered in *National B. B. Co. v. Interchangeable B. B. Co.*, 106 Fed. 693, 45 C. C. A. 544. The conclusion, therefore, is that the complainant is entitled to a decree as prayed, and one may be prepared accordingly.

It is so ordered.

AMERICAN STEEL & WIRE CO. OF NEW JERSEY v. DENNING WIRE & FENCE CO.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. March 3, 1908.)

No. 34.

1. PATENTS—VALIDITY—MODE OF MAKING PATENTED ARTICLE.

The validity of a patent for a product or structure is not affected by the process or means by which it is made, or whether it is made by hand or by machinery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 170.]

2. SAME—INVENTION—WOVEN-WIRE FENCING.

The Bates patent No. 561,193 for woven-wire fencing having parallel strand-wires and a series of single plain stay-wires connecting the strand-wires together by being coiled at their end portions around the strand-wires and intercolled at their meeting ends and in one form having the spaces between both the strand-wires and the stay-wires graduated so as to form graduated meshes. In view of the prior art is void for lack of invention.

In Equity. On final hearing.

Suit for an alleged infringement of claims 1 and 3 of letters patent, No. 561,193, issued to Albert J. Bates June 2, 1896, from whom complainant derives title, for improvements in woven-wire fence. The application was filed January 6, 1896. The defenses are (1) that the patent is lacking in patentable novelty and involves only mechanical skill; (2) that it is anticipated by prior patents and use of other well-known wire fences; and (3) noninfringement.

Thos. W. Bakewell, Paul Bakewell, Chas. McVeagh, and Jas. H. Preston, for complainant.

Thos. A. Banning, Banning & Banning, and Grimm, Trewin & Moffit, for defendant.

REED, District Judge. The claims of the patent alleged to have been infringed by defendant are:

"1. The herein-described woven-wire fencing comprising the several plain parallel strand-wires S, and the plurality of single plain stay-wires D, arranged connecting said strand-wires together by being coiled, at their end portions, about said strand-wires and intercolled at their meeting ends, substantially as set forth."

"3. The herein-described woven-wire fencing, comprising the series of parallel strand-wires arranged in graduated order, and the plurality of single graduated stay-wires arranged connecting said strand-wires together by being coiled, at their end portions, about said strand-wires, and intercolled at their meeting ends; whereby fencing is made having graduated meshes substantially as set forth."

Those of defendant's patent are:

"1. A woven-wire fence fabric comprising running wires and stay-wires, connecting them together, the said stay-wires having their meeting ends coiled together, and said coiled meeting ends of said stay-wires being coiled around said running wires, substantially as described.

"2. A woven-wire fence fabric comprising running wires and stay-wires connecting them together, the said stay-wires having their meeting ends first coiled together and finally coiled around the running wires, substantially as described."

Others of the defendant's claims are substantially the same.

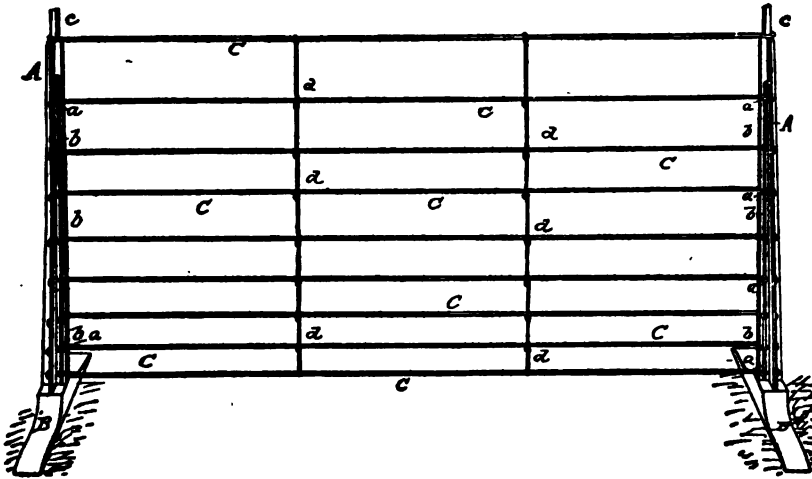
The issuance of the patent to Bates is presumptive evidence of its validity and of the novelty of the invention. To overcome this the defendant pleads and offers in evidence 16 prior patents beginning with that to M. P. Coons, No. 5,863, October 17, 1848, and contends that each of them anticipates the Bates patent. The validity of the patent itself must be determined apart, and separate, from the mode or means by which the fence is made. If the fence was already known, the making of it with a new machine more rapidly, or cheaper, and better than it had been made before would not make the fence new. If it was new, and of the requisite novelty to sustain a patent, the fact that it was made by hand would not invalidate the patent. It is therefore of no importance whether the article is made by hand or by machinery. As a patentable novelty it must stand upon its own merits. The Wood Paper Patent, 23 Wall. 566-593, 23 L. Ed. 31; *Cochrane v. Badische*, 111 U. S. 293-311, 4 Sup. Ct. 455, 28 L. Ed. 433.

The third claim of the Bates patent is different from the first only in the "graduated order" of the strand and stay-wires; that is, arranged at different distances from each other whereby fencing is made having graduated meshes, substantially as set forth. Is such arrangement of sufficient novelty to sustain a patent? If it is, was Bates the first to design such an arrangement in the construction of wire fences? In the construction of fences to restrain animals it is a matter of common knowledge that those to restrain full grown cattle and horses are frequently not built close to the ground, while those for restraining swine, sheep, or smaller animals must be so built; and when both large and small animals are to be restrained by the same fence, it is built to the ground, with the lower strands and cross strands near together, while the upper strands are wider apart. Such an arrangement does not seem to call for the exercise of the inventive faculty, but is one that would suggest itself to any intelligent person who was about to build a fence for such purpose. Merely adjusting the distances between the posts or stays, and boards of a lumber fence built to restrain animals of different kinds and sizes surely would not be invention; and the fact that wire instead of lumber is used as material for a part of the fence would not make it so. But if it can be said to be an act of invention to arrange the strands and stays of a wire fence at different distances from each other, certainly Bates was not the first to design or construct such a fence. That style of fence is as old as the fences that are built of such material. The specifications and claims of the Coons patent of 1848 are not in the record, but a cut of

the fence covered by the patent is, and that shows the horizontal wires arranged at different distances from each other, the lower strands extending to the ground and close together, while the upper strands are farther apart, or in "graduated order" as Bates described it.

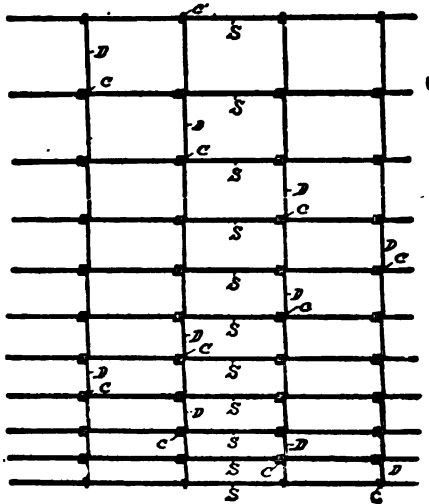
The following are cuts of the Coons and Bates fences:

COONS' PATENT (1848).



BATES' PATENT (1896).

Fig. 1



In Wire's patent of 1870 the specifications recite that the strand and stay-wires may be placed at suitable distances apart, and the lowermost wires nearer together in order to prevent hogs from getting through the fence. A cut of the fence shows it constructed in that way.

In Garst's patent of 1894, the specifications say:

"Where the fence wires are placed wide apart, the stays may be made in two or more parts having interlocking links at their joints. In this manner two short stays are used for the wires which are placed near together and may be joined and used as a single stay for wires which are twice the distance apart."

A cut of the fence shows it to be so constructed.

In the Hayes patent, applied for November 14, 1894, the cut of the fence shows the horizontal wires closer at the bottom than at the middle or upper part of the fence, and the specifications are:

"The said horizontal wires may be arranged in any number desired, or closely together, or far apart, at the option of the manufacturer, according to the height of the fence desired. * * * The vertical stay-wires consist of suitable lengths of wire that will serve to connect the line-wires vertically and hold the same rigidly spaced apart, while at the same time, * * * forming the panels of the fencing between the posts to which the line-wires are secured."

Types of fence built prior to 1896 under the Hollinger patents of 1892 and 1894 are in evidence, and show that the strand-wires are arranged in "graduated order" varying in distance of three inches and upwards from each other. The fact that wire fences were so built and used in many places in this country long prior to the Bates patent is not a matter of doubt under the evidence. Others of the patents show the strand and stay-wires arranged at different distances from each other, but those mentioned are sufficient to show that this style of wire fence was constructed many years before Bates designed his fence. In none of the patents is the "graduated order" of the wires claimed as a part of the invention or patent; but if it be invention to so arrange them, the specifications of these prior patents particularly describe such arrangement. Whether it is the coiling and intercoiling of the stay-wires around the strands, or a fence having "graduated meshes" or both, that is claimed by Bates, may be of some doubt. A liberal interpretation of the claim would be that it is for both. The graduated meshes, however, are clearly shown in prior patents and fences, and the claim for that feature cannot be sustained. This claim of the patent, therefore, if it be not lacking in patentable novelty, was fully described and clearly illustrated in prior patents, and was a feature of many fences built and used long before Bates applied for his patent.

The patent must be sustained, therefore, if at all, upon the first claim. The distinguishing feature of that claim is:

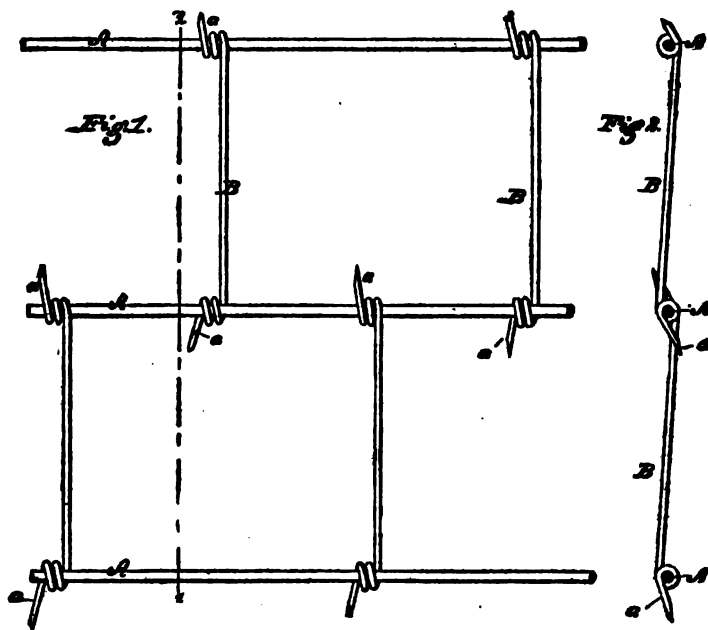
"A plurality of single graduated stay-wires arranged connecting the strand-wires together by being coiled at their end portions, about the strand-wires, and intercolled at their meeting ends."

It is contended by defendant that the claim does not require that the stay-wires shall be in line across the strand-wires, and that their arrangement in zig-zag or staggered form would answer the requirements of the claim. This contention cannot be upheld. The language of the claim and of the specifications must be given its ordinary meaning or significance, and when the claim calls for the "intercoiling of the meeting ends of the stay-wires," that, of necessity, requires them to be substantially in line with each other. Further than this the drawings, which are a part of the patent, show the stay-wires to be in line and at right angles to the strand-wires. Continuous stay-wires in line across the fence, or of sufficient length only to span the spaces between the horizontal wires extending across the fence in line with each other and at right angles with the horizontal wires, and coiled around the strands were not new when Bates applied for his patent. Such stay-wires so arranged and coiled are shown in the patent to Coons in 1848; to Wire in 1870; to Lindley in 1888 and 1890; to Fraley in 1890; to Yates in 1891; to Hollinger in 1892; to Mooreland in 1893; to Garst and to Albright in 1894; to French in 1895; and to Hayes, patent applied for in 1894, and issued in May, 1896. Bates is conclusively presumed to have known of all of these patents, and of the style of wire fence described therein, when he designed his fence. *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 493, 494, 20 Sup. Ct. 708, 44 L. Ed. 856. He therefore invented nothing new in arranging the vertical or stay-wires in line with each other to extend across the horizontal wires, and in coiling or winding them around the outer strands of the fence.

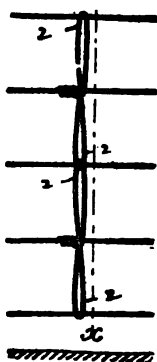
The question remains, is the intercoil of the meeting ends of the stay-wire around the intermediate strand-wires sufficient to sustain a patent? How the intercoil is to be made is not shown by Bates, save by the drawings, and they show the meeting ends alternating with each other when wound around the strands. The winding or intercoiling of the meeting ends of vertical or stay-wires around the horizontal wires is shown in the patents to Lindley, and to Fraley in 1890; to Mooreland in 1893; to Garst and to Albright in 1894; and to Hayes, whose patent was applied for in 1894. In some of these the way in which the wind or intercoil is made is not the same as that in the Bates fence. But in two of them at least—Mooreland and Albright—it is difficult, if not impossible, to distinguish between their intercoils and that of Bates. There is testimony on behalf of defendant that Ayers & Decker of Bushnell, Ill., made at that place as early as 1876 or 1877 a three strand-wire fence with two stays spanning the spaces between the strands, coiled around the outer strands, and intercoiled around the intermediate strands, substantially as Bates coils and intercoils his stay-wires. But complainant's testimony contradicts this, and shows that the stays were arranged in staggered form only. The testimony as a whole does not show beyond reasonable doubt that a fence was built by them at that time in the manner claimed by defendant. The Barbed Wire Patent, 143 U. S. 275, 284, 12 Sup. Ct. 443, 36 L. Ed. 154. The question will therefore be determined upon the assumption that such a fence was not then built.

The following cuts show the Decker fence of 1877, and the manner in which Mooreland, Albright, and Bates intercoil the meeting ends of the stay-wires around the strand-wires in their respective fences:

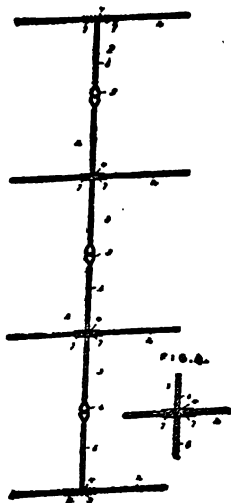
DECKER'S PATENT (1877).



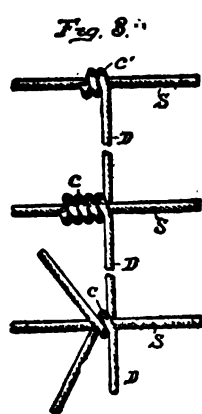
MOORELAND (1893).



ALBRIGHT (1894).



BATES (1896).



With these and the drawings of all the other patents before him, did Mr. Bates design anything new when he intercoiled the adjacent or meeting ends of the stay-wires around the horizontal wires of his fence? When he concluded to construct a fence with the vertical or stay-wires in line, these patents plainly indicated to him how that could be done. By cutting the cross or stay-wires in Mooreland's fence at the places indicated by Fig. 2, in the cut, and coiling the outer ends around the strands, the exact coil and intercoil illustrated by the Bates patent are shown. By loosening the coils upon the Decker fence of 1877, and moving the stay-wires together, retightening the outer coils, and intercoiling their meeting ends around the intermediate strands, the exact method of coiling and intercoiling illustrated in the Bates patent is also shown. Would the doing of any of these acts involve the exercise of the inventive faculty, or would it be anything more than would have suggested itself to any ordinary mechanic who had before him all of the patents above mentioned, and desired to construct a wire fence with the several stay-wires in line across it, and coiled and intercoiled around the strand-wires? This question is answered by the Supreme Court in *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856, upon a state of facts tending to show a patentable invention, fully as strong if not stronger than those in this case. At page 493 of 177 U. S., page 712 of 20 Sup. Ct. (44 L. Ed. 856) it is said:

"If the new use be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use. The line between invention and mechanical skill is often an exceedingly difficult one to draw; but in view of the state of the art as heretofore shown, we cannot say that the application of this old device to a use which was only new in the particular machine to which it was applied, was anything more than would have been suggested to an intelligent mechanic, who had before him the patents to which we have called attention. While it is entirely true that the fact that this change had not occurred to any mechanic familiar with windmills is evidence of something more than mechanical skill in the person who did discover it, it is probable that no one of these was fully aware of the state of the art and the prior devices; but, as before stated, in determining the question of invention, we must presume the patentee was fully informed of everything which preceded him, whether such were the actual fact or not."

It is urged that Bates used a single plain wire for his stays, while Albright, Mooreland, and some others used two wires separately, or twisted into one, and that he therefore designed a stay-wire that would require but little more than half of the material that they required for the same purpose. But Coons, in 1848; Wire, in 1870; Decker, in 1876; Lindley, in 1888; Fraley, in 1890; Yates, in 1891; and Garst, in 1894—used a single wire for their stays. To untwist the Albright stays, and substitute for the twisted wires a single wire somewhat larger, is no more invention than to remove a part of the Mooreland stay, or to loosen the stay-wires of the Decker fence and move them together, or to dispense with one of the horizontal strands and readjust the others to make the fence the same height as before.

Section 4886 of the Revised Statutes (U. S. Comp. St. 1901, p. 3382) only authorized a patent for a device or article which was not known or used by others in this country, and not patented before the inven-

tion for which the patent is claimed, and if the alleged invention was so known, used, or patented a patent for it cannot rightly issue. Every feature of the Bates fence is conclusively shown by the evidence in this case to have been known and to have been used in substantially the same way that he describes and constructs his fence long before he applied for his patent. The conclusion, therefore, is that his patent is void, and that the bill should be dismissed at complainant's costs; and it is so ordered.

UNITED STATES v. BOSS.

(District Court, D. Utah. September 24, 1906.)

No. 903.

1 INDIANS—INTRODUCING LIQUORS INTO INDIAN COUNTRY—POLICE POWER OF UNITED STATES.

Act Jan. 30, 1897, c. 109, 29 Stat. 506, prohibiting the introduction of intoxicating liquors into the Indian country, is a police regulation; and if it is to apply within a state it must be because of the status of the Indians for whose protection it was enacted, or of the locus of the forbidden act as being on a reservation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indians, § 61.]

2. SAME—EXTINGUISHMENT OF RESERVATION—ALLOTMENT OF LANDS IN SEVERALTY—"INDIAN COUNTRY."

Since the allotment of lands in severalty to all of the Indians on the Uintah Indian reservation in Utah, subject to the provisions of Act Feb. 8, 1887, c. 119, 24 Stat. 888, and the restoration of the remainder of the lands of the reservation to the public domain, no part of such lands is "Indian country," within the meaning of Act Jan. 30, 1897, c. 109, 29 Stat. 506; and a prosecution cannot be maintained thereunder for introducing liquor thereon, even on a portion which was subsequently reserved by executive order for agency and school purposes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indians, § 61.]

For other definitions, see Words and Phrases, vol. 4, pp. 3545, 3549.]

On Demurrer to Indictment.

Joseph Lippman, for the United States.

T. W. O'Donnell and M. M. Kaighn, for defendant.

MARSHALL, District Judge. The indictment is found under Act Jan. 30, 1897, c. 109, 29 Stat. 506, and charges that the defendant, on September 20, 1905, willfully and knowingly introduced spirituous, ardent, and intoxicating liquors into the Indian country, to wit, into and upon certain lands specifically described in the indictment, and stated to be a part of the Uintah agency and Uintah school reserve. To this indictment the defendant has demurred, the point of the demurrer being that before September 20, 1905, a portion of the land within the Uintah reservation had been allotted in severalty to each of the Indians. The remainder, including the land described in the indictment, had become a part of the public domain, and the act of January 30, 1897, was no longer applicable.

The legislation of the Congress of the United States and the historical and geographical facts of general interest with respect to this res-

ervation must be judicially noticed. The reservation was created by proclamation of the President dated October 3, 1861, and was afterwards recognized by numerous acts of Congress. On May 27, 1902, an act of Congress was passed (32 Stat. 245, c. 888) which directed an allotment of land in severalty to each member of the tribe occupying the reservation, that this allotment should be made prior to October 1, 1903, and that the unallotted land should on that date be restored to the public domain. On June 19, 1902, Congress directed that these allotments should be made in conformity to the provisions of Act Feb. 8, 1887, c. 119, 24 Stat. 388, and be subject to all the restrictions and carry all the privileges incident to allotments made under said act. Subsequently various statutes were enacted which extended until September 1, 1905, the time for opening the unallotted lands to public entry, and by Act March 3, 1905, c. 1479, 33 Stat. 1070, the President was authorized to reserve of the unallotted lands, and prior to the opening thereof for settlement and entry, such portions as he might consider necessary for an addition to the Uintah forest reserve and for reservoir sites or other lands necessary to conserve and protect the water supply of the Indians or for general agricultural development. On July 11, 1905, the Secretary of the Interior directed that the lands specifically described in the indictment be reserved for school and agency purposes under the name of "Uintah Agency and Uintah School Reserve." On July 14, 1905, the President issued his proclamation to the effect that the unallotted land would be open for entry and settlement on August 25, 1905.

The act of February 8, 1887, before cited, authorized the allotment of land in severalty to Indians on the several reservations whenever, in the opinion of the President, any reservation, or part thereof, would be advantageous for agriculture and grazing purposes, and in section 6 provided:

"That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, and every Indian in Indian Territory, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The effect of this provision was to make every Indian to whom an allotment of land had been made in conformity with the provisions of that act a citizen of the United States, and of necessity a citizen of the state in which he resided and subject to the laws thereof. *Matter of Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848. The statute of January 30, 1897, is a police regulation. If it is to apply within a

state, it must be because of the status of the Indians for whose protection it was enacted, or of the locus of the forbidden act as being on a reservation.

The Supreme Court of the United States determined in the case above cited that the dependent status of the Indian ceased by virtue of the act of February 8, 1887, on the allotment of land in severalty to him, and that thereafter his former condition of tutelage afforded no basis for police regulation by the national government within the boundaries of a state. In the case of *Draper v. United States*, 164 U. S. 240, 17 Sup. Ct. 107, 41 L. Ed. 419, it was held by the same court that the fact that a crime was committed on an Indian reservation did not warrant prosecution therefor by the United States when the criminal act was within the police power of the state. These decisions seem determinative here. The precise question presented was passed on by the Circuit Court of Appeals of the Ninth Circuit in *Ex parte Dick*, 141 Fed. 5, 72 C. C. A. 667. In that case, the defendant, having been convicted by the United States District Court of Idaho under an indictment charging him with introducing intoxicating liquors into the Indian country, to wit, upon the Nez Perce reservation, presented his petition for a writ of habeas corpus direct to the Circuit Court of Appeals. There, as here, to each Indian within the reservation, land had been allotted in severalty, and there by the treaty providing for the relinquishment of the Indian title to the unallotted lands it was stipulated:

"It is further agreed that the lands by this agreement ceded, those retained, and those allotted to the said Nez Perce Indians, shall be subject, for a period of twenty-five years, to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians."

It was held by the Court of Appeals that the District Court of Idaho did not have jurisdiction of the offenses charged in the indictment. The opinion of the court is so satisfactory as to render unnecessary further discussion here. It is true that on appeal to the Supreme Court of the United States the judgment of the Court of Appeals in *Ex parte Dick* was reversed (*Whitney v. Dick*, 202 U. S. 132, 26 Sup. Ct. 584, 50 L. Ed. 963), but on the sole ground that the defendant's remedy was by appeal, and not by petition in the appellate court for a writ of habeas corpus. The decision of the Supreme Court left untouched the opinion of the Circuit Court of Appeals on the main question.

It follows that the demurrer must be sustained, and the indictment dismissed.

LUKIC v. SOUTHERN PAC. CO.

(Circuit Court, D. Utah. January 27, 1908.)

No. 774.

1. MASTER AND SERVANT—INJURY TO SERVANTS—"FELLOW SERVANTS."

The exception to the general rule of the master's liability in case of injury to an employé through the negligence of a fellow servant is based on the doctrine of assumption of risk, which extends to the risk of injury from negligence of other servants of the same master whose service is so related to his own that negligence on their part in the natural and expected course of events may injure him, notwithstanding a complete performance by the master of his nonassignable duties, and his assumption is as broad as his reasonable anticipation of danger. Under such rule a laborer engaged in the construction of a roadbed of a railroad and a brakeman on a construction train hauling gravel for such roadbed are "fellow servants."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 493-514.

For other definitions, see Words and Phrases, vol. 8, pp. 2716-2730; vol. 8, p. 7662.

Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

2. SAME—UTAH STATUTE—"FELLOW SERVANTS."

Such general rule is not changed by Rev. St. Utah 1898, § 1343, defining "fellow servants" as "all persons who are engaged in the service of such employer, and who, while so engaged, are in the same grade of service and working together at the same time and place to a common purpose, neither of such persons being intrusted by such employer with any superintendency or control over his fellow employes," except in relation to the matter of superintendency; the statute not requiring, by the provision that they must be "working together," that the servants should be doing the same kind of work, or engaged in aiding each other in the same detail of labor, but only that they shall be working to a common purpose and sufficiently near each other to arouse in the one a reasonable appreciation of probable danger from the neglect of the other.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2716-2730; vol. 8, p. 7662.]

At Law. On motion for new trial.

C. L. Olson, J. W. Burton, and J. W. Woten, for plaintiff.

P. L. Williams and Jno. G. Willis, for defendant.

MARSHALL, District Judge. The petition for a new trial presents but one question. The court directed a verdict for the defendant on the ground that the plaintiff, a laborer engaged in the construction of the roadbed, was the fellow servant of a negligent brakeman of a construction train hauling gravel for such roadbed. This is claimed to have been error in the light of the Utah statute, which defines "fellow servants," and which reads:

"1343. Who are Fellow Servants.—All persons who are engaged in the service of such employer, and who, while so engaged, are in the same grade of service and working together at the same time and place to a common purpose, neither of such persons, being entrusted by such employer with any superintendency or control over his fellow employes, are fellow servants with each other: provided, that nothing herein contained shall be so construed as to make the employes of such employer fellow servants with other employes en-

gaged in any other department of service of such employer. Employees who do not come within the provisions of this section shall not be considered fellow servants."

It is contended that by this statute Utah has adopted the idea of consociation as the test of fellow service, and that no two servants are to be considered fellow servants unless at the time of the injury their labors are so related that the injured person had an opportunity by precept and example to influence the negligent person, or at least to ascertain a habit of negligence and to report it to the common employer. This test is not capable of reasonable application, and should only be applied if the statute clearly so provides. It is not capable of reasonable application, for, if applied literally, a new workman would have no fellow servants until his employment had continued for the uncertain time necessary to enable him to exert an influence on his fellow workmen, or learn their habits as to care; and this has never been claimed. It is conceived that a blind man might have fellow servants, even if his misfortune precluded him from observing their methods of work. The true view is the fellow servant exception to the general rule of the master's liability is based on the doctrine of assumption of risk. The servant realizes when he accepts the service that he is liable to injury by the negligence of other servants of the same master, whose service is so related to his own that negligence on their part in the natural and expected course of events may injure him, notwithstanding a complete performance by the master of his nonassignable duties. This anticipated risk the servant assumes, and his assumption is as broad as his reasonable anticipation of danger. When the services of two servants are so widely separated, so wanting in contact, that some unusual event must occur to direct the results of the negligence of the one to the other, the two are said to belong to separate departments. In the case of *Northern Pacific R. Co. v. Hamblly*, 154 U. S. 349, 357, 14 Sup. Ct. 983, 984, 38 L. Ed. 1009, it was said:

"As the laborer upon a railroad track, either in switching trains or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability. If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow service should not apply. In this view it is not difficult to reconcile the numerous cases which hold that persons whose duty it is to keep railroad cars in good order and repair are not engaged in a common employment with those who run or operate them."

And so in the case of *Randall v. Baltimore & Ohio R. Co.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003, it was held that a brakeman working a switch for his train on one track in a railroad yard was a fellow servant of an engineer of another train on an adjacent track. It was pointed out that they were employed and paid by the same master and that the duties of the two brought them to work at the same time and place for the common purpose of moving trains, so that

the negligence of one in doing his work might injure the other. In *Northern Pacific R. Co. v. Charless*, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999, a day laborer on a section was held to be a fellow servant with the crew of a freight train; and in *Martin v. Atchison, Topeka & Sante Fé*, 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051, a similar laborer with the crew of a work train.

Now, what change has the statute made? It has, it is true, ingrafted the discredited superior servant limitation; but that is not pertinent here. Beyond this, it provides that to be fellow servants the two servants must be working together at the same time and place and to a common purpose. What is meant by "together"? The Illinois doctrine of consociation does not require that the servants should be doing the same kind of work, or be engaged in aiding each other in the same detail of labor. By "together" is meant physical nearness at the time of the injury, coupled with the common purpose of the labors of the two servants; the nearness required being only that which should arouse in the one a reasonable appreciation of probable danger from the neglect of the other. I do not believe that the statute should be otherwise construed.

But it is argued that this statute has been construed by the Supreme Court of this state in *Dryburg v. Mining & Milling Co.*, 18 Utah, 410, 55 Pac. 367, in accordance with the plaintiff's contention. The rule is then invoked that the construction of a state statute by the highest court of the state is binding on this court. As to transactions occurring after such construction, the rule is as contended for; but I am unable to ascertain that in the case referred to the court adopted the claimed construction. Undoubtedly the Chief Justice, in delivering the opinion of the court, argued for it; but Judge Miner, while concurring in the judgment, expressly dissented from this construction of the fellow servant act, and Judge Bartch, the only remaining judge, dissented in toto. It may be difficult to ascertain the point on which the judges agreed who reversed the case; but it is clear that it was not on the construction of the fellow servant act.

It follows that the petition for a new trial must be denied.

In re SPITZER.

(Circuit Court, N. D. Illinois, E. D. March 18, 1908.)

No. 12.

ALIENS—NATURALIZATION—DECLARATION OF INTENTION BY MINOR.

Rev. St. § 2167 [U. S. Comp. St. 1901, p. 1332], which provided that an alien who had resided in the United States 3 years before reaching the age of 21, and continued to reside therein, might, after reaching such age and after having resided within the United States for 5 years, be admitted to citizenship without having made the previous declaration of intention required by section 2165, was in effect a declaration by Congress that no step, looking to naturalization, should be taken by a minor, and a declaration of intention made by a minor alien while such statute was in force is of no effect.

Application for Naturalization.

Edwin W. Sims, U. S. Atty., and David D. Caldwell, Asst. U. S. Atty.

LANDIS, District Judge. Samuel Spitzer, a subject of the King of Hungary, has applied to the court to be admitted to citizenship. It appears that he was born in Hungary in 1882; that he came to the United States in 1899, and has continued there to reside; that in 1900, when he was 18 years of age, he made a declaration of his intention to become a citizen. The point is urged by counsel for the government that this declaration was not authorized by the naturalization law in force when the declaration was made, and, therefore, that Spitzer may not now be lawfully admitted to citizenship.

In considering questions arising under these laws, it is to be borne in mind that no foreign born person, the child of alien parents, has a natural right of either sojourn, residence, or citizenship in the United States. The giving or withholding of either of these rights is an attribute of sovereignty. Under our system, the right of an alien to sojourn or reside in the territory of the United States may be granted by treaty, but it is for Congress alone, in the exercise of its sovereign power as conferred by the Constitution, "to establish a uniform rule of naturalization." Therefore an alien may be admitted to citizenship here only by compliance with those conditions prescribed by Congress in the exercise of this sovereign power. Anything relied upon by an applicant for admission to citizenship must have been done in accordance with congressional enactment, and, inasmuch as Spitzer's petition for admission is based upon his declaration of intention made when he was 18 years of age, the court is now called upon to determine what effect, if any, is to be given to such declaration made by a minor alien prior to the enactment of the present law in 1906.

There were two sections of the old law in force when this declaration was made, which appear to furnish an answer to this question. The first one of these sections is as follows:

"An alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

"First. He shall declare on oath before a Circuit or District Court of the United States, or a District or Supreme Court of the territories, or a court of record of any of the states having common law jurisdiction, and a seal and clerk, two years, at least, prior to his admission, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. * * * " Sec. 2165, Rev. St. [U. S. Comp. St. 1901, p. 1329].

It will be observed this section is general in its terms, and, in the absence of a congressional enactment excepting minor aliens from its operation, would authorize an alien to make a declaration of intention during his minority. However, in my opinion, section 2167 of the Revised Statutes [U. S. Comp. St. 1901, p. 1332], in force when Spitzer's declaration was made, contains such express exception. That section is as follows:

"Any alien, being under the age of twenty-one years, who has resided in the United States three years next preceding his arriving at that age, and who has continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he has resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of section twenty-one hundred and sixty-five; but such alien shall make the declaration required therein at the time of his admission; and shall further declare, on oath, and prove to the satisfaction of the court, that, for two years next preceding, it has been his bona fide intention to become a citizen of the United States, and he shall in all other respects comply with the laws in regard to naturalization."

By the use of this language, Congress seems to have declared its will that no step, looking to the acquisition of citizenship in the United States, shall be taken by a person of alien birth prior to the attainment of his majority, on the theory that the abdication by an individual of allegiance to one sovereign and the undertaking of allegiance to another are acts of such grave solemnity that they should be performed only by persons of mature judgment. While this consideration appears not to have controlled the action of the Congress that enacted the present law, yet the Congress that adopted the sections now under consideration, and by which Spitzer's declaration of intention must be tested, was no less supreme in its control of the subject than was the Congress which enacted the law of 1906, which authorizes the declaration of intention to be made by a minor. Inasmuch as this authorization, however, had no retroactive effect, Spitzer's declaration made during his minority, while the old law was in force, must be held to have been without effect. His present application for admission to citizenship must therefore be denied.

LYNCH v. BRONSON et al.

(District Court, D. Connecticut. March 23, 1908.)

No. 1,568.

1. BANKRUPTCY—COURT—JURISDICTION.

Bankr. Act July 1, 1898, c. 541, § 2, subd. 7, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3421), confers on courts of bankruptcy jurisdiction to cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as otherwise provided in such act. By the amendatory act of 1903, section 23, subd. "b," of the original act was amended so as to read: "(b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might be brought or prosecuted, if the proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendants," except suits for the recovery of property under section 60, subd. "b," and section 67, subd. "e" (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431] as amended by Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798 [U. S. Comp. St. 1907, p. 1028]), the latter of which invalidates all conveyances, transfers, and assignments of property by a bankrupt within four months prior to the filing of a bankruptcy petition with intent to hinder, delay, and defraud his creditors. *Held*, that a court of bankruptcy under such provisions had concurrent jurisdiction with the state court, without the con-

sent of the proposed defendants, of a suit by the bankrupt's trustee, to recover the value of property purchased by the bankrupt, and transferred to defendant corporation, for the purpose of defrauding the sellers of such property to the bankrupt.

[Ed. Note.—Jurisdiction of federal courts in suits relating to bankruptcy, see note to 11 C. C. A. 313.]

2. SAME—CREDITORS—FILING CLAIMS—EFFECT.

Creditors of a bankrupt, by filing their claims for the price of goods alleged to have been wrongfully transferred by the bankrupt to defendant corporation, waived their right to dispute the passing of the title in the goods to the bankrupt prior to bankruptcy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 550.]

On Plea to the Jurisdiction.

The following are the facts alleged in the complaint, showing the nature of the controversy:

On May 13, 1905, William N. Jennings, of New Haven, was adjudicated a bankrupt on his own petition, and on May 25th the plaintiff was appointed trustee of his estate. The complaint alleged that on December 1, 1904, and up to the time of his adjudication, Jennings was well known to defendants the Bronson & Platt Co. to be insolvent, and that on or about December 15, 1904, Bronson and Platt, acting for the defendant corporation, intending to secure for it merchandise thereafter to be purchased from various persons, firms, and corporations by Jennings, without paying the value thereof, and to enable Jennings to cheat and defraud, agreed to assist Jennings with certain funds, and in other ways, whereby he might establish a credit and purchase goods on credit, with the fraudulent understanding that the goods so purchased should be turned over to the Bronson & Platt Co. at cost or less than cost, and with the further expectation of withdrawing the sum so advanced to Jennings as soon as his credit could be established; that pursuant to such conspiracy defendant advanced to Jennings \$2,500, to enable him to purchase goods from certain creditors on credit, to the value of \$20,000, and pursuant to such conspiracy induced Jennings to repay \$2,500 so loaned, and \$100 in addition thereto, as bonus, also to deliver to defendant the goods so purchased at cost or less than cost, to Jennings, plus transportation and handling; that defendant sold the goods and converted the proceeds to its own use, and refused to pay any part of the value thereof to plaintiff as trustee, by reason whereof Jennings' creditors had been deprived of the value of the goods so fraudulently acquired by him, and the proceeds thereof, to their damage in the sum of \$15,000. To this complaint defendants pleaded in abatement that the bankruptcy court had no jurisdiction, either of the person or subject-matter.

Hobart L. Hotchkiss, Lynch & Lynch, and Frederick F. Eisemann, for plaintiff.

Slade, Slade & Slade and P. W. Chase, for defendants.

PLATT, District Judge. The facts set forth in this complaint upon which the defendants dispute our jurisdiction present a serious situation. There is plainly a controversy in relation to the estate of a bankrupt, and subdivision 7 of section 2 would confer jurisdiction if it were not for the limiting words, "except as herein otherwise provided." Act July 1, 1898, c. 541, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3421). It is settled law that the exception points to section 23, where the matter of the jurisdiction of the federal and state courts is taken up. It was decided by the Supreme Court in *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, that such a state of facts as we find herein, even if construed favorably to the plaintiff, would not have

conferred jurisdiction upon this court, unless the defendants consented thereto. To avoid the force of that ruling, and to promote the orderly and speedy settlement of bankrupt estates, the Congress in 1903 amended subdivision "b" of section 23 by adding:

"Except suits for the recovery of property under section 60, subdivision 'b,' and section 67, subdivision 'e.'" (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431] as amended by Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798 [U. S. Comp. St. Supp. 1907, p. 1028]).

The amendment without doubt gives to this court concurrent jurisdiction with the state courts, without the consent of the proposed defendant of any suit which sets forth such facts as will bring it under either of the excepted subdivisions. It is not covered by section 60, subd. "b" (30 Stat. 562, c. 541 [U. S. Comp. St. 1901, p. 3445]). There is no suspicion of a preference to be found in the facts. The language of section 67e (30 Stat. 564, c. 541 [U. S. Comp. St. 1901, p. 3449]) seems to be enough, unless we start with the admitted premise that a trustee must confine his endeavors to gather in the estate of the bankrupt to property over which the bankrupt had obtained title prior to bankruptcy and had disposed of in fraud of the act. The first thought which comes to one as he approaches this inquiry is whether it is right for the federal court to stick in the bark, indulging in refinements and niceties of strict legal definitions. The purpose of the bankruptcy act is to promote equity and fair dealing. In the sense of the act I think that the property for which in this suit recovery is sought was under the domination and control of the bankrupt shortly prior to bankruptcy, and that he transferred it to the defendants, who paid him therefor an inadequate price, well knowing that he was insolvent, and did not intend to pay his debts with the money which they gave him. If the trustee cannot bring a suit somewhere upon such a state of facts, no remedy for the wrong stated exists.

The objection that the bankrupt never gained a title to the property in dispute by reason of the mutual fraud would be pressed in the state court against the trustee as a full defense, and might be more forcible there than here, because the forum selected might not have the equitable powers which Congress has wisely conferred upon us. The parties who were in the first instance deprived of their property by the scheme have come to our court, and, by filing their claims as creditors, have invoked our protection. That action would be used against them, if they individually sought aid in a state court. Can it be possible that the trustee, who is an officer of the court, must be driven away when he comes to us and tells of a grievous wrong done to certain parties who have chosen him as their protector and expect him to obtain relief for that wrong? If it be so, the bankruptcy act is impotent at a vital and crucial point. I, for one, am not willing to admit it. This is the broad view of the matter. A technical examination leads to the same conclusion.

As already suggested, the parties chiefly interested have offered themselves to this court as creditors of the estate. By filing their claims against the bankrupt they have waived their right to dispute the passing of the title in their goods to him prior to bankruptcy. They have done more than that. They have, by affirmative action, ratified

the original purchase, sale and delivery of those goods, as constituting a valid title thereto in the bankrupt. The only remedy remaining open is for the trustee, whom they have helped to elect and who is subrogated to their rights, to find their property if he can, and if, as is the case here, he cannot find it, to seek damages from the parties to whom it was unlawfully transferred, which, if collected, will inure to the benefit of the injured parties who have sought our aid.

Let the plea to the jurisdiction be overruled.

MORRIS v. SMALL et al.

(Circuit Court, D. Massachusetts. January 24, 1908.)

No. 364.

BANKRUPTCY—SUIT BY TRUSTEE TO RECOVER PREFERENCE—DEFENSES.

The decree of the Massachusetts land court, granting registration of title to land under Mass. Rev. Laws, c. 128, does not bar a suit in equity by a trustee in bankruptcy to enforce a reconveyance of the land, alleged to have been conveyed by the bankrupt as a preference, against a defendant who was not a bona fide purchaser in good faith in reliance on the registered title.

In Equity. On plea.

J. C. Johnston, for complainant.

Dana B. Gove & Sons, for defendants George B. D. Small and Effie Small.

LOWELL, Circuit Judge. This is a bill in equity brought by Morris, trustee in bankruptcy of Floyd, seeking a conveyance of land from Small and Ring. The bill alleges that, within four months before his bankruptcy, Floyd mortgaged the real estate in question to Small; that no present value was paid by Small for the conveyance, and that the consideration therefor was an unsecured debt from Floyd to Small; that Floyd was then insolvent; that Small had cause to believe that he was insolvent, and that the conveyance constituted a preference within the purview of the bankrupt act, and was in fraud of creditors; that after bankruptcy, and without consideration, Small conveyed his rights to Hagar, who foreclosed under the power of sale contained in the mortgage, and bought in the title in Small's behalf; that Hagar thereafter conveyed to Ring, who paid a part of the price in good faith; that Small brought a bill in equity against Hagar and Ring, and that a decree was entered therein directing Ring to reconvey to Small upon an accounting. The bill before this court prays that Small be decreed to hold the premises in trust for Morris, and to convey them to the latter. To this bill Small pleaded in bar that his title was derived from Hagar, in whose favor the land court of Massachusetts had rendered a decree declaring Hagar entitled to the real estate. The plea further alleged that Morris had "due and sufficient notice of the proceedings in said land court," as would appear from that court's record. Upon this hearing the court has to determine the sufficiency of the plea.

The defendant Small contended in argument that Morris' rights,

whatever they may have been, are barred by the decree of the land court rendered according to the statute establishing registration of title in land. Mass. Rev. Laws, c. 128. But that act was not intended to cut off rights like those which the trustee here seeks to enforce. By section 1, the proceedings thereunder are declared to be proceedings in rem, while this bill in equity is a suit in personam. It does not directly affect the title to the land, but seeks to compel a conveyance from the holder of the legal title. Section 54 of the land registration act provides that, "In all cases of registration which are procured by fraud, the owner may pursue all his legal and equitable remedies against the parties to such fraud, without prejudice however to the rights of any innocent holder for value of a certificate of title." This is what the complainant is doing here. Section 69 provides that registration shall not avail to relieve the land from "liability to be recovered by an assignee in insolvency under the provisions of law relative to preferences." While this language does not expressly protect the rights of a trustee in bankruptcy, yet it can hardly operate to bar him by way of the maxim "*expressio unius est exclusio alterius*." Perhaps the trustee's rights are preserved by section 38, cl. 1. Again, section 67 provides that "whoever claims an interest in registered land by reason of any implied or constructive trust shall file for registration with the assistant recorder a statement thereof which shall contain a description of the land, and a reference to the number of the certificate of title and the volume and page of the registration book in which it is entered. Such claim shall not affect the title of a purchaser for value and in good faith before its registration." Here, Small holds the certificate of title to the land in question, and is not its purchaser for value and in good faith. The trustee claims an interest therein by reason of an implied trust arising out of the bankrupt act. This interest is not barred by the land registration act. All the provisions just mentioned, when taken together, indicate plainly that the Legislature did not intend to cut off rights like those of the trustee here in controversy. His appropriate remedy was by bill in equity. Lowell on Bankruptcy, 96.

Small urged that the failure of Morris to act upon the notice of the proceedings which he received proves that he slumbered on his rights, and so that he is barred from maintaining his bill in equity. But this construction of the plea is not warranted by its language. The due notice of the proceedings which was received by Morris may have been given him before he found that he had rights in the land, and he may have brought this bill as soon as possible after his discovery of these rights. At the argument this was alleged to have been the fact. The plea in bar must be overruled.

PENNSYLVANIA SUGAR REFINING CO. v. AMERICAN SUGAR REFINING CO. et al.

(Circuit Court, S. D. New York. March 20, 1908.)

MONOPOLIES—INTERSTATE COMMERCE—SUGAR TRUST.

The purchase of a controlling interest in the stock of a sugar refining corporation, to acquire control thereof and prevent the corporation from refining sugar in competition with the purchaser, that the latter might control the business of refining sugar for sale in the United States, does not involve a monopoly or combination in restraint of commerce within the state, in violation of section 7 of the Sherman act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), as the manufacture of sugar does not constitute trade or commerce and only incidentally affects it.

Battle & Marshall (Frank S. Black, H. Snowden Marshall, and John W. Hutchinson, Jr., of counsel), for plaintiff.

Henry B. Closson and Tompkins McIlvaine (Henry W. Taft and John G. Johnson, of counsel), for defendants American Sugar Refining Company and Parsons.

Francis H. Kinnicutt, for defendants Robinson, Twigg, and Werner.

George H. Earle, Jr., receiver.

HOLT, District Judge. This is a motion to dismiss the complaint on the trial on the ground that it does not state facts sufficient to constitute a cause of action. The complaint alleges, in substance, that the plaintiff is a corporation organized under the laws of Pennsylvania, with a capital stock of \$5,000,000; that the defendant the American Sugar Refining Company is a corporation organized under the laws of New Jersey, engaged in the business of importing raw sugar, and refining it, and selling the refined sugar; that the plaintiff, from 1883 till 1898, was engaged in the business of importing raw sugar, refining it, and selling it; that from 1898 to 1901 it ceased to do business, and that in 1901 it commenced the erection of a new and enlarged refinery, which was completed in 1903; that about the time of the completion of the refinery, and before it began to do business, the defendant the American Sugar Refining Company, Gustav E. Kissell, and certain of the other defendants entered into a conspiracy in restraint of trade and commerce between the states and with foreign countries; that pursuant to that conspiracy Kissell, as agent for the American Sugar Refining Company, but without disclosing his principal, loaned to Adolph Segal \$1,250,000, and took from him as collateral security, among other property, \$2,600,000 of stock of the plaintiff, being a little more than half its entire stock, with an agreement which provided, among other things, that four of the seven directors of the plaintiff should resign and their places be filled by Kissell's principal; that such agreement was carried out, the four directors resigned, and four persons selected by the American Sugar Refining Company were elected in their place; that thereupon the four new directors, constituting a majority of such board, pursuant to such conspiracy, and by direction of the American Sugar Refining

Company, voted not to operate the plaintiff's plant until the further order of the board; that such plant has not been operated since; that, as a result of such conspiracy and action, the plaintiff has suffered damage in the sum of \$10,000,000—and judgment is demanded for three-fold damages, or \$30,000,000, as provided in section 7 of the Sherman anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]).

The case of *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, in my opinion, controls this case. That was a suit brought by the United States against the E. C. Knight Company, a Philadelphia sugar refining company, and three other Philadelphia sugar refining companies, and the defendant in this case, the American Sugar Refining Company. The charge in that case was, in substance, that the American Sugar Refining Company had purchased the entire stock of the four Philadelphia refining companies; that the result of that purchase was that the American Sugar Refining Company had obtained a substantial monopoly of the business of refining sugar in the United States. The Supreme Court held that the action would not lie; that manufacture was not trade or commerce; that the action of the American Sugar Refining Company, in stopping the manufacture of sugar by the Philadelphia refineries, only incidentally affected the sale of the product; that Congress had no jurisdiction to pass laws to remedy injuries caused by such action, and that the states alone had power to pass such laws.

It is claimed by the plaintiff that this case differs from the Knight Case. It is said that in the Knight Case the American Sugar Refining Company purchased the entire stock of the Philadelphia refining company, and had a right to do what it chose with its own property; but that is not the ground of the decision of the Supreme Court. That decision is distinctly put upon the ground that the Sherman act only prohibits contracts or conspiracies in restraint of trade or commerce between the states, and that it has no application to a case where all that has occurred is to stop manufacture.

It is urged that the authority of the Knight Case has been modified by subsequent decisions, particularly the *Northern Securities Case*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, and the very recent case of *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. —, holding that a labor union boycott may be a combination in restraint of trade, under the Sherman anti-trust act. I have examined carefully those decisions, and I cannot see anything in them which would justify me in declining to follow the decision in the Knight Case.

This suit is obviously brought upon the Sherman anti-trust act, and the plaintiff's counsel admitted upon the argument that, in the present state of the pleadings, the plaintiff must recover upon that act, and could not recover upon any other theory of liability. In my opinion, no amendment can be made to the complaint which will make it good so long as it is based on the Sherman anti-trust act. The citizenship of some of the defendants does not distinctly appear. If in fact this court has jurisdiction of this case on the ground of the diverse citizenship of the parties, the plaintiff may desire to amend the com-

plaint and proceed upon some theory of equitable liability, in which case the plaintiff should have the usual leave to amend.

My conclusion is that the motion to dismiss the complaint should be granted, with leave to the plaintiff to amend the complaint within 30 days, upon payment of costs.

HOAGLAND v. CANFIELD.

(Circuit Court, S. D. New York. March 7, 1908.)

1. MUNICIPAL CORPORATIONS—STREETS—USE AS HIGHWAY—NEGLIGENT USE—INJURIES—QUESTIONS FOR JURY.

In an action for injuries to a pedestrian by being run into by a truck as he was crossing a city street, evidence held to require submission to the jury of the questions whether the driver of the truck was negligent in running against plaintiff, and whether plaintiff was negligent in attempting to cross in front of the truck.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Municipal Corporations, § 1515.]

2. WITNESSES—CROSS-EXAMINATION OF PARTY—COLLATERAL MATTER.

Where plaintiff was run into by defendant's truck driver, as plaintiff was crossing a city street, and defendant claimed that plaintiff was negligent owing to his intoxication, whether plaintiff was intoxicated at the time was not a collateral matter, but was within plaintiff's proper cross-examination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 967-975.]

3. TRIAL—INSTRUCTIONS—MATTER OF COMMON KNOWLEDGE.

Where, in an action for injuries, there was evidence that plaintiff was intoxicated, that the odor of liquor was perceptible and strong, that his talk was wandering and incoherent, and plaintiff admitted that he had been drinking, an instruction that some men might perhaps be able to take six, or eight, or ten drinks and not show it, while other men might not be able to take more than one or two without showing it, merely stated a matter of common knowledge, and was not objectionable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, §§ 420-435.]

4. EVIDENCE—PRESUMPTIONS—BODILY CONDITION.

While it is presumed that a man is sober until shown to have been intoxicated, yet, when he is shown to have been very much intoxicated, a court or jury may infer from that fact alone that he had been drinking intoxicants, and if it was proved that he took one drink, and his whereabouts and abstinence were not shown, and there was an opportunity, it might also be inferred and found without further proof that he drank more.

5. SAME—JUDICIAL NOTICE.

Courts and juries take judicial notice that gin and beer are intoxicants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 6.]

6. TRIAL—ACQUIESCENCE IN RULING.

Where, on an exception being taken by plaintiff's counsel to a portion of a court's charge, the court made certain further statements to which plaintiff's counsel replied, "That is undoubtedly true," plaintiff thereby acquiesced in the court's statement on the subject.

7. MUNICIPAL CORPORATIONS—STREETS—INJURIES TO PEDESTRIANS—ACTION—INSTRUCTION.

In an action for injuries to a pedestrian while crossing a street by being run into by defendant's truck, the court correctly charged that

there was evidence that if defendant's driver had not turned south just prior to the accident he would have run into a street car, and that though the driver testified he did not see the car, yet the jury might find that he had seen it, and that it affected his conduct, but that he had forgotten it, and that if he necessarily turned south of the center of the street to avoid the car, such turning was not negligence unless he saw, or ought to have seen, that in doing so he would run into plaintiff.

8. SAME—RIGHT OF WAY.

Footmen have no right of way at a street crossing over vehicles, each having a right of passage in common, and each being bound to exercise reasonable care for their own safety and to avoid injury to others equally entitled to use the street.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1515; vol. 25, Highways, § 459.]

9. WITNESSES—IMPEACHMENT—EXAMINATION.

Where, in an action for injuries, a witness for plaintiff testified that he saw the accident and described the whole transaction of the collision, and on his cross-examination on a former trial stated that he had not talked with any one representing plaintiff or defendant until he was subpoenaed a day or two before that trial, and then admitted that he had signed a statement procured from him, without reading it, defendant's counsel was entitled to frame a question to the witness from the paper so signed for the purpose of laying a foundation for its introduction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1233-1242.]

10. SAME—COLLATERAL MATTER—CONTRADICTION.

A proper foundation having been laid, such signed statement of the witness which was at variance with and contradictory of his evidence in nearly every important particular was admissible to impeach the witness, and was not objectionable as introducing a collateral matter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1247-1251.]

11. NEW TRIAL—GROUNDS—EXCLUSION OF EVIDENCE—PREJUDICE.

Where, in an action for injuries to a pedestrian by being struck by a team at a crossing, plaintiff made the driver his own witness, and proved by him that he could have stopped the team in 15 or 20 feet, and plaintiff called no other witness on that subject, plaintiff was not entitled to a new trial for alleged error in the exclusion of questions calling for a witness' opinion as to the time within which the drivers should have been able to have stopped the team, and also the time within which the witness could have stopped it.

12. EVIDENCE—OPINION EVIDENCE—ADMISSIBILITY.

In an action for injuries to a pedestrian by being struck by a truck on a street crossing, questions calling for an opinion as to what the driver of the truck should have been able to do with reference to stopping it in time to avoid the collision, and as to what the witness could have done, were inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2268.]

13. WITNESSES—EXAMINATION—LEADING QUESTIONS.

Where plaintiff was struck and injured by a team at a crossing, a question asking a witness whether it was not a fact that such a team of horses and such a truck loaded as that was could have been stopped within two feet was objectionable as leading and suggestive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 837-851.]

14. EVIDENCE—EXPERT OPINION—ASSUMED FACTS.

A question calling for an opinion of a witness as to the space within which a team with a similar load to that by which plaintiff was struck could have been stopped should have assumed the existence of the team,

the truck, the load, the weight thereof, the grade of the street, the driver, and speed, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2292-2305.]

15. SAME—MATERIALITY.

Where, in an action for injuries to plaintiff by being struck by defendant's team at a crossing, plaintiff claimed that the driver made no effort whatever to stop the team, and defendant claimed that the driver made no effort to stop until plaintiff was at the pole, some 10 or 12 feet from the front wheels, the question was, ought the driver to have made an effort to stop sooner? it being conceded that he could have done so; and hence opinion evidence as to the distance within which he should have been able to stop was not material.

16. WITNESSES—CONTRADICTION—CONFLICTING STATEMENTS.

Where, in an action for injuries, a witness testified that he did not see the accident happen, but went to plaintiff immediately after and accompanied him to the hospital with the physician, during which time plaintiff was unconscious and that his head was bloody, while defendant claimed that the witness did not go to the hospital, and did not examine plaintiff or see enough of him to say whether he was unconscious or notice his head, evidence that in conversation with the witness after the accident he stated that he did not see and knew nothing about the accident was admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1247, 1248.]

17. SAME.

Evidence that the witness arrested the driver of the team by which plaintiff was injured, and took him to the station house, and there obtained certain data from the driver which he could not have gotten elsewhere, was also admissible to show that the witness could not have accompanied plaintiff to the hospital, and known that he was unconscious.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1276, 1277.]

18. SAME.

Where, in an action for injuries in a collision between a pedestrian and a truck, a witness gave material and beneficial testimony for plaintiff, defendant was properly allowed to show that the witness, who was a truck driver, voluntarily visited defendant's place of business after the accident, and left a slip of paper with his name and address, and stated that he would testify for defendant, as "We drivers all stick together."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1189, 1201.]

19. SAME—RECOLLECTION OF CONFLICTING ACTS OR DECLARATIONS.

Acts and declarations of a witness tending to show hostility or an inconsistent position may be inquired into on cross-examination, and may be proved if the witness denies them or fails to remember.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1192-1199, 1228-1232.]

20. SAME—CROSS-EXAMINATION.

It is not necessary to the introduction of conflicting declarations or statements made out of court to contradict a party that he should be cross-examined on the subject, nor is it necessary that the declarations or statements be absolutely contradictory to those made in court, provided they are inconsistent therewith, as where the witness omits a material part of a statement sworn to on a former occasion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1233-1247.]

At Law. Motion by plaintiff for a new trial on exceptions to rulings in receiving and rejecting evidence; to the charge as made; to

refusals to charge; and on the ground that the verdict is contrary to and unsupported by the evidence.

Hector M. Hitchings, for plaintiff.

Carl Schurz Petrasch, for defendant.

RAY, District Judge This action has been tried three times. On the first two trials the jury disagreed. On the third trial, the jury rendered a verdict for the defendant. The evidence in some respects was quite conflicting. On the 15th day of August, 1903, on the crosswalk of Jay street, in the city of New York, which runs east and west and enters West street which runs north and south parallel with the North River, but does not continue further west, and at the point where Jay street enters West street, the plaintiff was struck or caught by the pole of a heavy truck, loaded with some five or six tons of ammunition, all weighing some seven or eight tons, and drawn by two heavy horses, thrown down, and his leg was run over and crushed between the knee and ankle. He was picked up, placed on a bench at the corner of West and Jay streets, and within a few moments taken by an ambulance and ambulance surgeon to the hospital a short distance away where his limb was amputated. The other foot was somewhat injured, as was his head. It is claimed by the plaintiff that the driver of this truck was negligent in several respects, viz., first, that he was on the wrong, or left-hand, side of the street as he approached this crossing; second, that he was driving at a negligent rate of speed; third, that he did not keep his team under proper control, and was unable to stop; fourth, that he did not keep a proper watch and lookout, and so failed to see the plaintiff who was crossing the street; fifth, that if he did see him he did not exercise proper care and use proper effort to stop, and so negligently ran upon plaintiff; sixth, that he was attempting to make the Erie Farm, an open space just west of West street and bounded north by the south line of Jay street extended, and so passed to the left side of Jay street, and at a rapid rate of speed proceeded down same on the south or left-hand side thereof to "cut the corner"—that is, pass close to the southeast corner of Jay and West streets ahead of plaintiff—all in disregard and violation of an ordinance or ordinances of the city regulating speed, and requiring vehicles to keep to the right side of the street both in passing along the street and in turning into another intersecting street, and hence ran upon the plaintiff. The plaintiff claims that because of this negligence, or these negligent acts, some or all of them, he was run upon, thrown down, and injured in the manner stated.

The defendant claims that the driver of this truck was not negligent in any of the respects named, and that if he was the plaintiff was guilty of contributory negligence, which caused the accident and injury. In fact, that plaintiff, despite warnings, went quickly and directly and heedlessly, if not recklessly, directly in front of the horses, when they were close to him, and that the driver did all he could to avert injury, and pulled his team and truck to the left, and left side of the street, so as to avoid doing the plaintiff injury, and for no other purpose; that the plaintiff was intoxicated at the time, and hence was heedless of

danger and warnings, and reckless and erratic in his movements, and that this condition of intoxication caused plaintiff to do what he did, and to make unexpected and reckless moves, and hence the collision and injury. Jay street runs westerly on a slightly descending grade, is paved with Belgian blocks, and was in good condition. It is 30 feet in width from curb to curb. Its cross-walk at West street is in continuation of the east sidewalk of West street. From the movements of the plaintiff and defendant's driver (defendant was not present), as the jury should find them to have been, the jury was to spell out and determine where and with whom the fault lay, if only one was at fault, and whether or not both were negligent; whether or not the concurrent negligence of both operating at the same time brought about the collision and injury.

The plaintiff says that when he was at the north curb of Jay street going south on the east side of West street, and consequently at the northeast corner of Jay and West streets, he saw this heavy truck coming west—that is, towards him—about 80 feet away, east, and that it was then to the north of the center of Jay street; that is, on the right-hand side, and, of course, where it ought to have been. "Q. How fast was this truck coming or going? A. It was going six or seven miles an hour." He thus describes what occurred in answer to a question from his counsel:

"Q. Go ahead, what did you do? A. I thought I had plenty of time to cross in safety, and I started on across at a pretty rapid pace. I got on as far as about—just past the center of the street, and I looked up, and I see that the truck was within a few feet of me, about twelve feet. I also then thought I had time to get past it, but I thought he would keep to the right, but instead of that he cut me off to the left, and run right in me, run right on top of me, and I dropped my packages."

Here follows questions and answers as to what he had in his hands.

"Q. You stated that you dropped your packages. What made you do that? A. I dropped my packages on the impulse of the moment, and made a grab for the pole of the truck. I see that I was— Q. Never mind that, what did the driver do that you saw? Did he pull up? A. No, sir; he did not. Q. Tell the jury what you saw him do, if anything, to avoid running you down? A. I did not see him do a thing. He made no motion, did not say a word, nor he didn't do a thing towards— Q. Did he call out to you in any way, or give you any warning? A. No, sir; he did not. Q. Well, did anything strike you? A. Yes, sir; the pole struck me."

He then says it struck him in the abdomen, in front, knocked him down, and that the next thing he remembers he was in the hospital.

"Q. How near the southerly curb of Jay street were you at the time that the pole struck you? A. About eight feet of the southerly curb of Jay street."

Therefore, on the plaintiff's own statement as shown specifically by his cross-examination, he moved south about 7 feet while the truck, going at the rate of 7 or 8 miles an hour, moved west only 12 feet, and thus in one second of time he had, by about two steps, placed himself directly in front of that team, which, as his cross-examination showed, he saw 12 feet away to his left, and on the south or left side of Jay street, and only 6 or 7 feet from its south curb line, and coming at the rate of at least 7 or 8 miles per hour or about 10 or 11 feet per second.

Assume this testimony to be true, and there was negligence on the part of the plaintiff or on the part of the defendant's driver, or both. But plaintiff has said, "I got as far as about just past the center of the street, and I looked up, and I see that the truck was within a few feet of me, about 12 feet. I also then thought I had time to get past it, but I thought he would keep to the right," etc. Evidently the team and truck was not then behind him, for he looked up, not back, and saw it, and he then thought he had time to get past it, not away from it, showing he was to meet it, if he failed to get past it, and that it was then to the east if not somewhat to the south of him, and, according to his story, on the left side of the street, and moving at the rate of 10 to 12 feet per second. A man at "a pretty rapid pace" will move at least 7 or 8 feet per second. On his own story, the plaintiff took desperate chances. On the cross-examination which makes his movements much more definite and plain, he says:

"Q. Now, from the time you looked up and saw it closer to you than it was when you first observed it, how many steps do you think you took before it [the pole] struck you; give us your best recollection? A. About two. Q. About two steps? A. Yes, sir. Q. And then it struck you? A. Yes, sir."

He also twice stated that after first seeing the truck, 80 feet away, he next saw it 12 feet away to the left or east of him as he was going south. He also stated that from the time he first saw it he expected it was coming towards him. Also:

"Q. I want you to tell me when you noticed this truck twelve feet to the east of you it was about in the center of the roadway, or whether it was on the uptown side or downtown side? A. It was to the south of the center. * * * Q. I want to know the distance from the downtown side of the street to the nearer wheel, being the left-hand wheels of the truck, at the time you saw this truck a dozen feet to the left of you? A. The southern— Q. The left-hand wheels, meaning the wheels on the left-hand side of the driver as he drives? A. Well, I should suppose they were about seven feet. * * * Q. It was about seven feet, was it? Yes, the left-hand wheels."

The plaintiff's evidence placed this truck on the south or left-hand side of Jay street nearer to the south curb than he was when he saw it 12 feet away coming at the rate of 10 feet per second towards him, and still he says, "I also then thought I had time to get past it, but I thought he would keep to the right." If at that time he reasoned at all, he must have calculated that, as he moved forward directly in front of the horses, the driver would pull them to the right—change their direction—for in no other way could the driver keep to the right as plaintiff moved south and more in his front.

After fixing the positions as stated, this question was asked:

"Q. That fixes your position. Now, bear in mind where you were at that time, and where this truck was, a dozen feet to your left. At least you state that the truck kept coming right on, did it, then, at this speed you have described? A. Yes, sir. * * * Q. As matter of fact he went ahead, did he, and you went ahead? A. Yes, sir. Q. And as he went ahead he turned towards the left, did he? A. He cut that corner off to the left. Q. When you say he cut off the corner, you mean he inclined his horses towards the left? A. He pulled to the left. Q. He pulled to the left? A. Yes. * * * From the time he struck you he was nearer the curb than he was twelve feet away? A. Yes. * * * Q. You do not know then, as matter of fact, whether he turned to the left before the accident? A. I do. Q. You do? A. Yes. Q.

Do you say he did or did not? A. He must have turned to the left. * * * Q. Did he? A. Yes. * * * Q. At the time of the accident you had passed or had you not passed the pole of the wagon? A. No, sir. Q. You had not passed it; is that right? A. That is right. Q. And you were to the north of the pole? A. No. I was about in front of the pole, west of the pole."

The witness then repeated that at the time of the collision he had not passed the pole. Later he was interrogated with respect to his position in respect to the horses, viz.:

"Q. Now, Mr. Hoagland, when you saw these horses a dozen feet to the left of you in the position that you have described, and you were on the crosswalk in the point you have described, which was nearer to you, the left-hand horse or the right-hand horse? A. The right-hand horse. * * * I mean the horse on the right-hand side of the driver. * * * Q. You were a little to the north of the horse when you realized you were getting into hot water, is that right? A. Yes, sir."

We therefore have this condition or situation: The plaintiff is going south rapidly; he sees the team and truck, knowing when he attempted the crossing, and all the time it is to his left and coming west rapidly, to his left 12 feet away coming rapidly on the south side of the street as near or nearer the curb than he is. He thinks, and thinks, "I had time to get past it." He makes the attempt; he knowingly and designedly, realizing he is getting into hot water, takes two steps in advance, and then finds himself immediately in front of the pole moving 10 feet per second. The collision and injury follow. He did not stop; he did not back away when he was getting into hot water, but kept on. As to his conduct there can be but one excuse—that is, that seeing the danger imminent, close at hand, in the emergency, in the haste, confusion, and possible excitement, he made a mistake and took the wrong course. If he did what he says he did of choice, with deliberation, if he elected to take the chances, he can in no event recover, for such an act knowingly and deliberately done under such circumstances would be foolhardy and perilous in the extreme, and would constitute deliberate contributory negligence. It would be taking a risk no sane man would take. But the defendant has given evidence tending to show that the plaintiff was in an intoxicated condition so that he did not realize fully what he was doing, and it also appears that defendant's driver knew this before the plaintiff attempted to make the crossing. There is also evidence tending to show that the defendant's driver was on the wrong side of the street without excuse, in violation of the ordinance, driving rapidly and attempting to cut the corner, and that he saw the plaintiff from the time he first left the sidewalk and turned to the left, so that he in effect changed his course to the left as he approached the plaintiff who was moving to the driver's left, and thus kept the plaintiff in his front as he approached him until the collision occurred; that of this the plaintiff was not conscious; that plaintiff was justified in thinking the driver had kept on the right-hand side of the street, and hence would pass him in his rear, until looking to his left he found himself suddenly almost confronted by this rapidly approaching team and truck; this sudden danger and peril forced upon him by this negligence of the driver, and that, in the emergency, in the immediate presence of the peril, he did the best he could, thought he could safe-

ly pass, keep on safely to the south sidewalk and escape injury, and that acting on that impulse he did what he did and as he did. If this is not the solution, then plaintiff was guilty of contributory negligence on his own statement, even if the driver was negligent, for he could not rush into a known, impending danger and peril, and then recover damages for the injury, even if the driver was negligent in not stopping or turning to the right instead of the left, for the plaintiff saw he had not done that when he was confronted by the team and truck 12 feet to his left. Of course, it may be the jury would have been justified in finding that plaintiff did not see the approaching truck in time to stop, or step back and so avoid it. It may be the jury would have been justified in finding that plaintiff acted on the belief that the driver would swing to the right and so come upon him if he stopped. The plaintiff made no such claim but said he thought then, when only 12 feet apart, he had time to get by the team. There is no fact stated by plaintiff or his witness tending to show that the driver purposed to turn to the right at that time. The questions were left to the jury. It was also left to the jury to determine whether the plaintiff did as he did under a sudden impulse having been placed in a position of peril by the negligence of the driver, and merely erred in judgment. It was also left to the jury to determine whether the driver, seeing the plaintiff on the crossing as he admits he did, exercised due care, did all he could, to avoid running upon and injuring him; whether he, confused by the movements of the plaintiff, and acting quickly in an emergency caused by the plaintiff's negligence, or conduct, merely erred in judgment in pulling to the left to avoid him, supposing he would stop, when, had he known what plaintiff would do, he ought to have pulled to the right.

Isador Berkowitz, a witness for the plaintiff, says he saw the accident; that he was on the farm of the Baltimore & Ohio Railroad Company just across West street opposite the west end of Jay street, and must have been about 150 feet from the accident. His story, in answer to questions, is:

"I saw a truck coming down Jay street about the middle of the block on a fast trot with a load of cartridges on it—driven by a man named Foster. He was going I should judge about six miles an hour, and as he was coming down 'he pointed his pole to the southern part of Jay street as he gets to the end of it.' And so I saw a man coming south with a satchel and bundle in his hands, which got hit by the pole and runned over. 'He was hit about the middle part from the center of Jay to the south curb.' He was on the east edge of the cross-walk. Q. What did the driver do. if anything at that time, just prior to the impact? A. I did not notice him do anything more but to drive away over across west, and he stopped, and he crossed over on the farm. Q. Did you see him pull up his horses in any way, or stop his horses in any way? A. I did not, sir."

He then says he saw him stop on the farm after he crossed West street.

"Q. Now, tell us what the man did that you saw before he was struck? A. When I first see him between a crowd he was coming on West street—that is, on the sidewalk of West street—and as the truck struck him he dropped his bundles so as to grab the pole, like to hold it back, and the pole repeated and it knocked him down. Q. Did you see the pole strike him anywhere? A. Well, I could not notice that. * * * Q. Which way did he fall? A. He

fell head north. Q. His head was north, up West street? A. Yes. Q. Did you see any of the wagon go over him, of the truck? A. I have seen the nigh wheel go over one of his legs. Q. What do you mean by the nigh wheel? A. Left side; left end, left-hand wheel." He then says he did not see Hoagland before he started to cross. * * * Q. Now stop a moment and tell us just where he was when you picked him up? A. He was about the middle part from the center to the south curb of Jay street. Q. And where was he with reference to the cross-walk crossing Jay street? A. About the edge of the east side part of it."

On a former trial and on this last trial the witness swore there was a horse car which passed up West street, as the driver approached, and on this trial said that if he had not turned to the south side of Jay street he would have struck the car about the middle.

"Q. Mr. Berkowitz, please tell this jury where the street car was on West street when you saw this truck, the pole of this truck, strike Hoagland; was it between you— The Court: Do not suggest. Q. (continued). Now, explain that, and tell exactly whether there was anything in the line of your vision of that accident? A. The time I saw the truck up along Caroline street a car was coming from south north to about around Duane street, Duane and West, about, and the car kept coming right ahead of it, and this truck came down. If he had kept straight he would have run into the car. Therefore he switched his pole over towards his left so the car passed upward. The Court: So as not to run into the car, is that it? A. So as not to run into the car—to run behind the car."

This he emphatically repeated on his cross-examination, and he also stated that the team was about half way from the cross-walk to Caroline street when this was done—that is, 40 feet from the cross-walk. The evidence is clear and emphatic that Jay street was clear of vehicles. Hence, we have an undisputed excuse for the presence of the truck on the south side of Jay street and a sufficient one. Still, strictly it was his duty under the ordinance to move to the north if there was time after the car passed. On the former trial he said it happened so quick he could not tell whether any wheel went over either limb or not, and that he could not tell whether the driver pulled his horses up or back in any way at and just before he struck the plaintiff, for the reason, "I didn't pay any attention; as I said, I was looking at the man at the end of the pole."

From the evidence in the case—all the witnesses agreeing that plaintiff lay on the cross-walk with head to the north after being knocked or thrown down—it is self-evident that this plaintiff was not struck by, and that he did not grab hold of, the pole of a truck moving west at the rate of six or seven miles per hour. If he was on the cross-walk when hit, and fell on the cross-walk—east edge as they say, or either edge—and he was struck by the pole, or he grabbed it, and it "repeated," that is, moved from side to side, and threw him sidewise, it is evident the truck was nearly at a standstill, or moving slowly at that moment, and this fully corroborates the witnesses who say that, when the plaintiff appeared in front of the team, the driver pulled up and to the left. The pole of a loaded vehicle will repeat when suddenly pulled up. If that team and truck was going 10 feet or 8 feet per second, and plaintiff was on that walk and caught the pole, or was struck in the abdomen, in front as he says he was, or elsewhere, by the pole, he, in all human probability, would have struck the pave-

ment far to the west of where the impact took place; he would have been carried or thrown forward and sidewise by such an impact, not simply moved a little to one side and dropped down. On the evidence given by the plaintiff and his witnesses, weakened by the disinterested witnesses of the defendant, it is evident that the driver was not guilty of any act of wanton or willful negligence. This horse car moving between Berkowitz and the truck cut off observation for a time, and to a juror the witness said there was nothing unusual to attract his attention until the collision occurred.

It is unnecessary to recite the testimony of the defendant's witnesses in detail. William Foster, the defendant's driver, says that he came from the East river with his load and turned into Jay street, and proceeded down it towards West street, and saw nothing in Jay street to interfere with progress or cause him to turn aside; that his load on the down grade forced the team off a walk into a slow trot; that he was between the center and north curb, and had his reins taut—well held in both hands; that he saw teams passing up and down West street and people passing on this crossing; that this was a large rack truck—rack over four feet wide—and this with the wheels would make the truck about five feet wide; that the right-hand wheels were about five feet from the curb, which would bring the left wheels about five feet north of the center of the street; that he was looking ahead to see what was in front of him, and that when he was about ten feet from this crossing he first saw the plaintiff. The witness says:

"The first thing I seen, I guess I had been about ten feet or so from the corner of West and Jay, I saw a man about, I should judge about, three feet on the walk, three feet on the northerly walk of West street [meaning, as he stated, the sidewalk at the northeast corner of Jay and West streets]. Q. Go right on and tell what he did? A. Well, I see other people stop. I hollered, and naturally, seeing this man come along, I hollered. I hollered several times thinking this man would stop. * * * I naturally pulled up a little tighter on my lines. The team spread out. This man did not seem to stop, and when I see that I exerted all the strength I had in my arms to pull the team, but instead of him stopping— Q. Pulling the team how? A. I pulled it right up straight to try to stop. Q. To stop? A. Yes, sir. Q. Go right on. A. I see this man lurch out, and he grabbed my pole, and when I see that I suppose the team got frightened, and pulled harder than I could. Now, instead of him holding the pole—the pole I suppose raised about a foot with the pull that I gave my team, and naturally threw the man off, and my team had spread at that time, spread more than they had spread during this holding. I had coming down this incline, and the man fell straight, and my team traveled three foot I should say, and I see the man laying there, and I did the best I could to hold. I had no idea of running over the man. I suppose he lay in the center when he fell, and my team stopped on the uptown track."

He says he got off and went back; that the plaintiff lay three or four feet off the west side of the cross-walk, and mostly on the northerly side of Jay street. "With the second pull that I grabbed, you know my lines, when I see this man grab the pole, of course I tried with the best of my ability for to stop, and my pole naturally raised." He also said that when he pulled up he pulled to the left. On cross-examination he said that the man staggered; was not coming slow; was staggering, wabbling one way and the other, and that the man went 10 feet to the pole while he, the driver, was going 15 feet. He also said he would go 15 feet before he could stop; that he had his

horses under control before the man lurched on him and then pulled them up as quickly as he could.

"Q. Now, they have shown here that you have said that you pulled them so as to avoid the man. What did you do in that regard? A. Oh! I tried to pull away from him. * * * I guess I went a foot or so south. * * * pulled them to the left a little."

Arthur L. Foster, a business man, in no way interested or related to the driver, testified that he was walking up West street on the east sidewalk, came to the southeast corner of West and Jay streets, and saw the accident; there was a truck almost to the corner; "I did not step off the cross-walk, and intended to let it pass. To describe the accident as I saw it, the horses or the pole had traveled about three feet, four foot, on the other side towards West street beyond the cross-walk when I first saw a man struck with the end of that pole, and he fell in a northwesterly direction and the front right-hand wheel of the truck ran over his leg." As to the speed of the team, he said they were not trotting but possibly on a fast walk. He says the truck stopped when its rear end was about five feet from where the man lay. "The driver as I saw it at the time was making every effort to stop his horses. Q. What was he doing? A. The only thing that I saw him do was to pull up on his horses hard." He also says the team was going straight down Jay street; that he could not see the plaintiff until he was struck as the pole was across the cross-walk, and his attention was not attracted to him until then.

On cross-examination he fixed the distance from the south curb of Jay street to the left wheels as 10 feet. This would bring the truck just south of the center of the street. He also says the driver pulled the horses to the left; that the plaintiff was four feet west of the walk when struck; that a good many people were passing up and down the street; that as soon, practically, as the man was hit, the horses and truck came between him and the plaintiff. He also said it was the right wheel that passed over plaintiff's leg; that the driver pulled on the horses as hard as a man could pull after the man was struck, and that was the only time his attention was attracted to him.

Edward C. Conelon says he was walking down West street about 10 feet behind the plaintiff who staggered, walked zigzag, and that he was 10 feet behind at the north curb of Jay street; that the plaintiff went right on to the cross-walk; that at that time he thinks the team was 50 feet to the east but later modified that; that the right-hand wheels of the truck when the collision came, in an instant like a flash, were 10 feet from the north curb of Jay street; that he heard a yell of warning from Jay street; that the horses were coming on an incline to the right, and swung apart as they struck plaintiff; that the horses jumped or were pulled to the left; that the mix-up came a little to the south of the center of Jay street, and he is sure plaintiff was on the cross-walk; that plaintiff walked right straight on, did not halt at all until struck. He also says the plaintiff was not over 10 feet ahead of him when the impact came, and that he (witness) stopped on the corner because of it; that at that time they swung or turned south. The witness Perkins testified to hearing a

"hollering" at Jay street, and seeing a man with two packages staggering and bump against some one, and then drop his packages, also a truck; but a passing vehicle then cut off his view of what occurred.

There was evidence that the plaintiff was intoxicated, given by the ambulance surgeon when he found him on the bench a few minutes after the accident, and also from some of the physicians at the hospital, and evidence that he took one drink a short time before the accident. I am of the opinion that it was a fair question of fact for the jury whether the defendant's driver was negligent in running on or against the plaintiff; whether the plaintiff was chargeable with contributory negligence. The question of plaintiff's condition as to intoxication was important in at least three aspects of the case, as the court told the jury: First, as bearing on plaintiff's conduct and movements; second, on the question of his memory or recollection of the transaction; and, third, as bearing on the actions of the driver. It was not a collateral matter, but one the defendant had the right to go into on the cross-examination of the plaintiff. The plaintiff described the transaction in which he was injured, and the defendant had the right to show, if he could, by plaintiff himself, that he was not in a condition to observe or remember; also that because of his intoxication he did strange and indiscreet and eccentric things such as a person about to meet him would not reasonably apprehend, and that his conduct was negligent and reckless. The jury was charged:

"If the defendant's driver saw that the plaintiff was intoxicated and liable to come in front of him, unable to care for himself, then he, the driver, was bound to exercise greater care on his part to avoid doing the plaintiff injury. By being intoxicated the plaintiff forfeited no right to a safe street, or to have others exercise due care on their part towards him in using the street. * * * Defendant's driver was under no obligation to regulate his conduct so as to avoid intoxicated persons in the street unless he knew them to be there. If the plaintiff moved in a way that was not reasonably to be anticipated by a careful and prudent man of intelligence, and such movements were not anticipated by the driver, were unexpected, not reasonably to be apprehended, then the driver was not negligent in not foreseeing them, and providing or guarding against them or regulating his movements in anticipation thereof so as to avoid their consequences. Now, gentlemen, it is for you to say whether or not the plaintiff was under the influence of liquor to such an extent that it affected his conduct, his movements, his memory here, and, if so, to what extent? You have heard the evidence that he did take at least one drink a short time prior to the accident, and you have heard the remark of one of the plaintiff's witnesses here that it occurred to him when he heard of this accident that the plaintiff was sober when he saw him about 2 o'clock p. m. that same day. Then you have also heard the evidence of his injury, as to whether he was conscious or unconscious when removed to the hospital, the evidence of shock and concussion, and the description of the symptoms of shock and concussion. It is for you to say what the condition of this plaintiff as to sobriety or intoxication actually was, and how far it affected the actions and the movements of the plaintiff, and also those of the defendant's driver."

There was no request to charge differently on that subject, but plaintiff's counsel excepted to the remark, "You have heard the evidence that he did take at least one drink a short time prior to the accident." Thereupon, after some little discussion as to the evidence, the court stated to the jury:

"You will remember exactly what Behreus said. I do not. But the effect of it was that it was one drink that he took there; that is the sum and substance of it. Now, the plaintiff himself has come here upon the stand and he swears that he only took one drink that day. Mr. Hitchings: And he took that at the hotel of Behreus. The Court: There is the one-drink evidence. Now, here is a witness who says he walked down behind him, and he has described it; I won't repeat it, because it is not pleasant to repeat. Then, here is the evidence of the ambulance surgeons, and you heard what they said. Now, notwithstanding what the other witnesses say who saw him, there is evidence in the case which would justify you in finding that the plaintiff that day—that afternoon—took more than one drink. (This was excepted to.) The Court: But it is for you to say whether he did or not. (This was excepted to.) The Court: I have left it to you to say and consider—of course to see a man, if you prove a man was staggering through the streets, even if you do not prove by somebody that they sold him liquor or something—that they saw him drink it, that fact alone is evidence that would justify a jury in finding that he drank something that was intoxicating. (This was excepted to.)"

The jury having come into court for further instructions, it was finally agreed by counsel that the jury should take the plaintiff's evidence, and this led to a statement that the last time plaintiff was on the stand his evidence related solely to his taking one drink. Thereupon a juror inquired, "Your honor, have we any right to ask where and how and in what manner he spent his hour between three and four, about which there is no evidence?" Thereupon the following occurred:

"The Court: Yes, sir. In the course of all the evidence of others, there are some witnesses called to show the plaintiff was at certain places of business about two o'clock, perhaps they differ somewhat about the hour, but it was about two. There is no direct evidence as to where he was or what he did between that hour and the time he was at this hotel. Mr. Hitchings: Your honor is in error. We had two witnesses who swore they saw him at Bates at three o'clock. Mr. Petrasch: Some said between one and two, and some said between two and three. The Court: There is a variation; some of them varied. I think one man said he thought it was near three o'clock. Mr. Hitchings: Two men said they saw him at three o'clock. The Court: They said, as I recited in the charge, one man said that he was sober at the time he saw him—perhaps he said three o'clock. He said when he heard of the accident that night, this particular witness—I have forgotten his name—he said that it occurred to him then that he was sober when he saw him. Now, other witnesses say, and you have heard them—the one that says he was following behind him, and the two doctors at the hospital—they say he was intoxicated. Now, then, gentlemen, as I have told you, if it is true that a man is intoxicated at a certain hour, even if you do not call witnesses who swear that they were present and saw him drink before that, the jury has the right to find if there was any time or opportunity that he did drink somewhere before that. Mr. Hitchings: I want to take an exception to that. The Court: Because men do not become intoxicated on air even in the city of New York. You have a right to take cognizance of that fact. So that you have a right to consider whether or not he was at other places in getting at whether he was in point of fact intoxicated. Of course you should remember he says he took that one drink only. If you should conclude he did not take only one drink, but he had been drinking, you may consider how much he took, and what the effect was on him. The question is whether he was intoxicated, and there you will see [referring to the minutes of evidence handed the jury] what his evidence was as to crossing the street. Mr. Hitchings: May I make a suggestion? The jury having asked for your honor's memory of the evidence, I ask your honor to state to them that Bates, who gave the testimony with regard to the fact, stated that he noticed that he was sober, and that at three o'clock there was not the slightest odor of liquor on his breath, and he had a conversation with him, and that Courtney, who was with him at the time,

stated the same thing. The Court: It is a question for you when he drank, how much he drank, if he was intoxicated, when he got it, and how long it takes for liquor to take hold of a man. You probably know, some of you, if not, I do not think it is improper to say that science teaches that some men can drink a great deal more liquor than others without showing it, and it will affect some men much quicker than it will others. You have a right to consider all that from your experience and knowledge and general learning. It might take some men—some might, perhaps, be able to take six or eight or ten drinks, and not show it. Other men might not be able to take more than one or two without showing it. It is a matter for you to decide. Some men might take very big drinks and not show it, and others would show it with small drinks. It depends largely upon the temperament. Those things you can consider, just how much and under what circumstances, it would take to make a man intoxicated. The question is, was he intoxicated? That is one question, of course. As I said, it has an important bearing, not only upon the conduct of the plaintiff himself, but upon the conduct of the driver in case he was under the influence of liquor which affected his action."

Plaintiff's counsel excepted as follows:

"Mr. Hitchings: I do want to take an exception to what you have said about drinking, because there is no evidence in the case on that subject, no evidence how liquor affects men, no evidence in this case to show one drink will affect one man, and six drinks not another."

This, of course, confined the exception to what the court remarked as to the effect of liquor on men. There was much evidence in the case as to the effect of liquor on men. But not specifically that one drink will affect one man and six will not affect another. There was evidence that plaintiff presented the "clinical picture of intoxication." "One drink will produce as much odor in the breath as twenty drinks." Dr. Warner gave pages of testimony of symptoms this man presented, and said they were symptoms of alcoholism—intoxication. Dr. Marshall said that liquor affects the pulse and temperature; and the indications or symptoms would depend entirely on the amount of liquor the man could stand; also that the more liquor he had drank the more pronounced the symptoms; also, that the effect of one drink was different from that of more. The court referred the jury to their knowledge and experience on that subject, and to a fact of common knowledge, and what science teaches. The court remarked that "some might perhaps be able to take six or eight or ten drinks and not show it, other men might not be able to take more than one or two without showing it."

This is all that was excepted to. I do not think it was error, for this is a matter of common knowledge and experience. There was evidence from four witnesses that this plaintiff was intoxicated, and that the odor of liquor was perceptible and strong, and that his talk was wandering and incoherent. One surgeon said it was a typical case of intoxication. One said he admitted he had been drinking, "said it was the first time he had taken anything in twenty years." There was evidence it could not have been taken within 10 or 15 minutes. There was no evidence he was a regular drinker, and there was evidence he was sober as late as 3 p. m. There was also some evidence of a medical nature that some of the symptoms might have been caused by concussion of the brain. But the surgeons did not admit that there was concussion or any material injury to the head or brain. There are

some things of such common knowledge and experience that I think a jury has the right to consider them, when pertinent, even if proof of such facts is not offered in the case, and such is the law, as, for instance, that one man will eat more than another; that one man will endure more cold or more heat than another; that some are stronger than others; that tobacco and drinks of liquor affect different men differently are matters of common knowledge. If proof is given that two men at a certain moment take the same sized drink of liquor from the same bottle and it is shown that one is intoxicated a half hour later, and that he has not drank in the interim and had not drank before, is this proof that the other was also intoxicated, the same facts appearing as to his not having had further stimulants? Or may a jury say, and may the court say, the same sized drink affects different men differently, and you may so find? I think that the presumption is that a man is sober until shown to be intoxicated, and that when shown to be very much intoxicated a court or jury may infer from that fact alone and find that he has been drinking intoxicants; also, that if it is proved that such intoxicated person took one drink, and his whereabouts and abstinence are not shown, and there was opportunity, it may fairly be inferred and found he took others. I do not think it necessary to prove that a man was actually found in a snow bank, an ice chest, or a place where the temperature was below freezing in order to justify a jury in finding he had been in a place where things freeze when he is found with frozen feet and hands. "Courts may properly take judicial notice of facts that may be regarded as forming a part of the common knowledge of every person of ordinary understanding and intelligence." 16 Cyc. 852, 871, and numerous cases cited; *Com. v. Peckham*, 2 Gray (Mass.) 514; *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *Murdock v. Sumner*, 22 Pick. (Mass.) 156; *People v. Maxwell*, 87 App. Div. 391, 84 N. Y. Supp. 947; *Baker v. Hope*, 49 Cal. 598; *Kiernan v. Met. Life Ins. Co.*, 13 Misc. Rep. 39, 34 N. Y. Supp. 95. "Well-known facts concerning the phenomena of human life in its various forms need not be proved." 16 Cyc. 871.

Courts and juries take judicial notice of the fact that gin and beer are intoxicants. *Com. v. Peckham*, 2 Gray, 514; *Sothman v. State*, 66 Neb. 302, 92 N. W. 303. That the height of men is not eight feet; "of facts official, scientific, or historical character." *Hunter v. N. Y. & O. R. R. Co.*, 116 N. Y. 615, 621, 624, 23 N. E. 9, 10, 6 L. R. A. 246. In this case the court said:

"Courts may take judicial notice of facts which are a part of the general knowledge of the country, and which are generally known, and have been duly authenticated in repositories of facts open to all, and especially so of facts of official, scientific, or historical character, and within this rule the court may take judicial notice of the size and height of the human body."

Courts should also take judicial notice of the fact "that swamps and stagnant waters are the cause of malarial and malignant fevers" (*Leovy v. United States*, 177 U. S. 636, 20 Sup. Ct. 803, 44 L. Ed. 914); and that the manufacture of wearing apparel in improperly ventilated and unsanitary and overcrowded apartments is likely to promote the spread of disease. *State v. Hyman*, 98 Md. 596, 57 Atl. 6, 64 L. R. A. 637. I think that these medical and scientific facts are not nearly

as well known as that the same number of drinks of the same liquor affects different men in different ways, and that some men can drink much more than others without becoming intoxicated. This is not only a scientific and medical fact, but a physical fact as well, and as commonly known as that the sun rises in the east, or that water quenches thirst, and that food satisfies hunger, and that different men demand and require different kinds and amounts of food. All matters of this kind are for the jury to consider without proof. *Kiernan v. Met. Life Ins. Co.*, 13 Misc. Rep. 39, 34 N. Y. Supp. 95; *Com. v. Peckham*, 2 Gray. (Mass.) 514. "Jurors may act upon matters of common observation within their general knowledge without any testimony on those matters." 16 Cyc. 852, and cases there cited.

The plaintiff's counsel took an exception to what the court said "about the plaintiff's seeing this truck coming right at him; that if he undertook to cross that that was negligence." The court had made no such statement as that. What the court had said was:

"I said, and I say again— I won't undertake to repeat. I won't turn to my charge, but I will give the substance of it: If this plaintiff started to cross this street there, and was going directly across, if he looked up and saw that team ten or twelve feet distant from him up Jay street to his left hand coming rapidly down, almost upon him, if he was then to the right of the off horse—which is the horse, you understand, on the right-hand side as you look at it from behind—if he was then to the right of that horse, that off horse, if he saw it, if the plaintiff saw that situation and appreciated it, if he then had time to stop and could stop, could have stopped, and by stepping backward or doing anything to avoid coming into collision could have avoided the collision. but instead of doing that he willfully, knowingly, stepped right forward in front of that team as it was coming towards him, it was an act of contributory negligence on his part which would defeat recovery. To that I give you an exception."

Defendant's counsel excepted, but Mr. Hitchings, the plaintiff's counsel, said, "Nobody would except to that." The court immediately said:

"If a person is forced into a position of danger by the negligence or act of another, and in trying to extricate himself from that position of danger, if in the hurry and excitement he makes a mistake, there is an error of judgment, and he don't choose the best way, even if there should be, as I told you, a way of escape, and in the hurry and excitement and suddenness of the occurrence there is an error of judgment, why, then, it is not contributory negligence—that error of judgment is not contributory negligence; * * * and neither is the plaintiff responsible and under the charge of contributory negligence for a mere error of judgment on his part if he was forced—brought—into a place of danger by the act of the driver, and he did the best he could."

The same proposition had been charged before with more care and strict accuracy.

The court had said of plaintiff's contributory negligence, if any, "this contributory negligence must have occurred, in order to defeat recovery, after he saw the nearness of defendant's team, or ought to have seen it, and must have consisted in some act of commission or omission on his part without which the accident would not have occurred." But irrespective of that, the court, on the exception being taken and the ground stated by counsel, said, "Gentlemen, he said that in the beginning," and then stated what the plaintiff said later, and

plaintiff's counsel said, "That is undoubtedly true." This was an acquiescence in what the court said on that subject.

The plaintiff's counsel took an exception to what the court said about the passing car at the time of the accident. Berkowitz, as we have seen, said that a car passed as the driver was coming down Jay street and was near the crossing, and that the driver turned south to avoid it; that if he had kept on he would have struck the car in about the center. That came from plaintiff's witness. The driver says he did not notice the car. The defendant was entitled to the benefit of all the evidence in the case; to have every issuable and pertinent fact found in his favor if there was credible evidence to sustain it, and the jury was satisfied of its truth. He was entitled to the benefit of this evidence. On that subject the court charged, and correctly:

"There is evidence from one of plaintiff's witnesses, Berkowitz, that there was a car passing up West street at this time, and that if the defendant's driver had not turned south he would have run into it. The driver says he did not see the car. Still, gentlemen, he may have seen it, and it may have affected his conduct, and he may have forgotten it. If to avoid the car he necessarily turned south of the center of Jay street, then such turning was not negligence unless he saw, or ought to have seen, that in so doing he would run into the plaintiff. You are not bound to find a fact in favor of or against either party for the reason a witness called by him has testified it was so. On all the evidence in the case you are to ascertain what the actual truth is—what actually did occur. Neither the plaintiff nor the defendant's driver may now remember correctly just what they did see or what did actually influence and determine their course and conduct."

It would be a monstrous proposition to hold that the jury was bound to find that Foster did not see the car and turn to the south side because of it for the reason he was called by the defendant, and says he did not see it when Berkowitz says the car was directly in front of him, and that he would have gone into it if he had not turned. Several years have gone by, and it is not at all strange that witnesses vary in their descriptions, and in all human probability the eyewitnesses have forgotten many of the important details of that transaction. I doubt if either the plaintiff or the driver could have correctly told what he saw, or all that influenced his conduct, a week or a month after the transaction. If the plaintiff's case is to stand solely on his own statement of what transpired, under the decisions of the Court of Appeals of the state of New York, he cannot recover. *Bambace v. I. S. R. Co.*, 188 N. Y. 288, 80 N. E. 913; *Lofsten v. B. H. R. Co.*, 184 N. Y. 148, 76 N. E. 1035. See, also, *Long v. U. R. Co.*, 122 App. Div. 564, 567, 107 N. Y. Supp. 401. But he is entitled to the benefit of all the legal evidence in the case, and neither court nor jury was bound to accept his statement as correct. What did occur, what did influence and determine conduct, was to be ascertained from the testimony of all the witnesses. The jury was cautioned by the court that in referring to the facts "it is not with any intention or purpose to tell you what your finding should be in regard to the facts or to intimate what I think in regard to the facts or what the evidence establishes. * * * You are judges of questions of fact."

The plaintiff's counsel also excepted to the charge that neither plaintiff nor the driver had the right of way at the crossing, but that both

were bound to be cautious, etc.; and requested the court to charge "that foot passengers upon a cross-walk have a right of way in preference to vehicles on the street." That the court declined, and charged:

"But I charge, gentlemen, if a driver of a team approaching a crossing sees a person upon the cross-walk ahead, and sees that the person does not notice him, sees that they seem to be unconscious of it, why, then, it would be the duty of that driver to slow up, to turn to one side, to use every precaution he could, everything reasonably possible to avoid injury, even to stopping."

The court had before charged on that subject:

"It was the duty of the driver to be on the lookout for persons crossing that street, and to apprehend that people would be or might be crossing it, and hence it was his duty to approach the crossing at such a rate of speed and with such care as would enable him, so far as reasonably possible, to avoid injuring persons lawfully crossing the street and exercising care on their part to avoid injury. Neither had a right of way as against the other, but both were under obligations to be watchful and cautious and to exercise ordinary care at the cross-walk and in going upon and using the same, such as the circumstances of the case demanded. Greater care was required if circumstances demanded it, and the greater the danger seen or apprehended or reasonably to be apprehended, the greater the care required of both the plaintiff and the driver. If the defendant's driver saw the plaintiff crossing the street, then, notwithstanding the fact that the plaintiff was himself negligent in attempting to cross the street ahead of the defendant's team, if he was, it was the driver's duty to do everything within his power to stop or turn one side so as to avoid doing the plaintiff injury. * * * A person on foot desiring to cross a city street has a right to cross not only at the cross-walk, but wherever he pleases, and one driving horses upon the street is bound to be watchful at all points as well as at the cross-walks so as not to injure a person crossing."

This is the law as declared by the Court of Appeals of this state, by the courts of other states, and by common sense. *Barker v. Savage*, 45 N. Y. 191, 6 Am. Rep. 66; *Elliott, Roads & Streets* (2d Ed.) 911; *Moebus v. Herrmann*, 108 N. Y. 349, 15 N. E. 415, 2 Am. St. Rep. 440; *Brooks v. Schwerin*, 54 N. Y. 343; *Coombs v. Purrington*, 42 Me. 332; *Boss v. Litton*, 5 Carr & P. 407; *Robinson v. R. Co.*, 48 Cal. 409; *Simons v. Gaynor*, 89 Ind. 165. Says the court (*Barker v. Savage*, supra):

"Footmen have no right of way at a crossing in a city street superior to that of vehicles. Each have the right of passage in common, and in its use are bound to exercise reasonable care for their own safety, and to avoid doing injury to others who may be in the use of the right of way with them."

If foot passengers have a right of way over vehicles at street crossings in the city of New York, all other traffic must cease. There would be such a blockade on many of its streets during many hours of each day as would bring business to a standstill. If that is the law, then the police of great cities interfere with the rights of foot passengers every minute of the day by holding them back to allow vehicles to pass over cross-walks.

The plaintiff contends that it was error to permit the defendant to contradict Berkowitz, a witness for the plaintiff, who claimed he saw the accident by showing his statements made on former occasions at variance with and contradictory of those made in the trial. Berkowitz was called by the plaintiff to describe the whole transaction of the collision, what immediately preceded it, and what followed, down to

the time plaintiff was placed in the ambulance and on his direct examination he purported to do so. On his cross-examination he was asked if he did not on the first trial, which took place in December, 1906, state that he had not talked with any one representing plaintiff or defendant until he was subpoenaed a day or so before that trial. His answer was, "Yes, he is the only man I talked to." He then said he remembered that a Mr. Moskowitz called on him at his residence in Seventh street on the evening of January 16, 1906. He was then shown a written statement, and asked if Moskowitz wrote it that day, and if he (Berkowitz) signed it. He said, "Yes; that is my signature." It was marked for identification "Defendant's Exhibit 1." He then said it was written in his house, but not in his presence, in another room; that he made a statement to Moskowitz, and Moskowitz wrote something in another room, and then presented it to him, and he signed it without reading it, and did not ask to read it. The court then ruled that defendant's counsel could not then read from the paper, but might frame a question, looking at it, so as to lay a basis for its introduction; that he might use the paper in framing his questions and ask if he said so and so to Moskowitz. The plaintiff's counsel again objected to any reading from the paper, or to the framing of any questions from the paper. The court said:

"The objection is overruled. He can frame his questions from anything he pleases; but [addressing the jury] you are not to understand, gentlemen, he is reading from that paper. He has a right to use anything he pleases in framing his questions."

Berkowitz was then asked certain questions as to what he stated to Moskowitz regarding the accident, and when defendant's counsel was questioning him as to what he said, as to where plaintiff was when he first saw him at the time of the accident, he asked, "Q. Don't you remember, Mr. Berkowitz, that at the first trial the court asked you—" Here the plaintiff's counsel objected, and the court ruled as follows:

"Mr. Hitchings: I object, if your honor please, to any attempt on the part of this counsel to contradict or impeach the testimony of this witness upon this collateral matter which he has brought out for the first time, either from the former hearing of testimony or in any other matter. The Court: It is not a collateral matter at all. This witness is here to testify what he saw there on the occasion of that accident. This witness has been sworn twice before, and admits he had a conversation with Mr. Moskowitz on the same subject as to this accident, and what he saw and what occurred there. It is not a collateral matter at all. He has a right to ask him if on either of these occasions, or any other occasion, he said anything in regard to those transactions, and what it was, and unless he admits it, if he denies it, or even says he don't remember, they may then call witnesses to show he said something in regard to this accident which varies from what he now testifies to here."

To this ruling the plaintiff excepted. The witness was then asked several questions as to what he said to Moskowitz, and he either denied making the statements, or said he did not remember. The defendant's counsel did not offer the paper at that time, and closed his cross-examination having laid a foundation for calling Moskowitz, and showing what Berkowitz said, and also laying a proper foundation for putting the paper (Exhibit 1) in evidence.

On redirect examination the plaintiff's counsel started in to inquire

about the signing of the paper, but the court ruled that it was not in order at that time; that neither the paper nor its contents were in evidence, and there was no evidence as to what Berkowitz said on that occasion; that the questions had been asked to lay a foundation, but that if it would be of any convenience the plaintiff might go fully into that transaction then. Thereupon the plaintiff's counsel said, "I will take your honor's suggestion." He then went into the matter with Berkowitz as fully as he desired. Berkowitz by consent of all, and at the suggestion of the court, was recalled and described the passing car and some other matters. On the part of the defense Moskowitz was called and identified the paper; said that Berkowitz made the statement, and he wrote it from what Berkowitz said who was sitting next to him; that he then read it over to Berkowitz pointing to each word with his pen; that he read it correctly; that Berkowitz then signed each page and assented to its correctness. The paper was then offered and read in evidence, under plaintiff's objection that it was a collateral matter and gone into by defendant. This was not a collateral matter, and did not relate to a collateral matter. It was a statement by Berkowitz as to the very transaction in question, and which he had described on his direct examination as a witness for the plaintiff, and was at variance with and contradictory of that evidence in nearly every important particular. The defendant had the right to impeach him by showing that he had made statements, oral or in writing, out of court contradictory of or at variance with or inconsistent with those he made in court, so far as they related to that transaction; his attention having been called to time and place and he having been asked whether or not he made such statements, whether oral or written. This is elementary in the law of evidence. 13 Abb. N. Y. Cyc. Dig.; Doyle v. N. Y. E. & E. Infirmary, 80 N. Y. 631; Homer v. Everett, 91 N. Y. 641; Maher v. N. Y. C. & H. R. R. Co., 20 App. Div. 161, 46 N. Y. Supp. 847; People v. Schuyler, 106 N. Y. 298, 12 N. E. 783; Chesbrough v. Conover, 140 N. Y. 382, 35 N. E. 633. People v. Brockett, 85 Hun, 138, 32 N. Y. Supp. 511; Jamieson v. N. Y. & R. B. R. Co., 11 App. Div. 50, 42 N. Y. Supp. 515; Lennon v. N. Y. C. & H. R. R. Co., 65 Hun, 578, 20 N. E. Supp. 557; Gilbert v. Sage, 5 Lans. 287, affirmed, 57 N. Y. 639. Of course he must first be interrogated as to his statements (McCulloch v. Dobson, 133 N. Y. 114, 30 N. E. 641), and if it be in writing as to that (Speyer v. Stern, 32 N. Y. Super. Ct. 576; Stephens v. People, 19 N. Y. 549; Everson v. Carpenter, 17 Wend. 419). See, generally, cases cited in 13 Abb. Cyc. Dig. p. 928.

In *Smith v. L. V. R. Co.*, 177 N. Y. 379, 69 N. E. 729, the contradiction was as to a collateral immaterial matter; the question of the ringing of the bell at a point several miles distant from the accident. The defendant read the evidence of the witness on a former trial as to the ringing of the bell, etc., at the crossing—the place of the accident. Thereupon plaintiff read the evidence of the witness on such former trial as to the ringing of the bell, and that it did ring at the point several miles distant from such crossing, an irrelevant matter as the court said. This was not a part of the *res gestæ*; the

defendant had not gone into it in any way. Then the plaintiff was permitted to call witnesses to contradict the witness by showing the bell did not ring at that distant point, an irrelevant matter. This was clearly error. The court said:

"If defendant upon this trial had called the engineer to testify that the bell was automatic, and was started at Rochester Junction and continued to ring until after the accident, plaintiff would have had the right, undoubtedly, of contradicting this testimony by calling witnesses to testify that at an intermediate point the bell was not in fact ringing. But defendant did nothing of the kind."

In the case now before the court Berkowitz testified as to the whole accident, the *res gestæ*, in behalf of plaintiff. Thereupon he was cross-examined as to that identical transaction, the main question in the case, and as to his former statements, oral and in writing, as to it. Then, he having denied making such alleged contradictory statements as to such accident, or said he could not remember, the defendant had the right and was permitted to show by Moskowitz that he did. *Smith v. Lehigh V. R. R. Co.*, 177 N. Y. 379-382, 69 N. E. 729, is in point, showing that the ruling of this court was correct. On the trial the following occurred on the redirect examination of the witness Berkowitz and before plaintiff had rested his case:

"Q. Mr. Berkowitz, at the speed this man was driving, with the load that he had on, the team of horses that he had, in what distance ought he have been able to stop that truck? Mr. Petrasch: I object to that. (Objection sustained. Exception by plaintiff.) Q. Within what distance could you have stopped the truck on Jay street in the situation of this man, and with a similar load on? Mr. Petrasch: I object to that as incompetent, irrelevant and speculative. (Objection sustained. Exception by plaintiff.) Q. Have you driven on that street with trucks of a similar kind, and loaded as heavily as that truck was loaded? A. Yes, sir; plenty of times, four or five, six, ten times a week. Q. Have you stopped those trucks and started those trucks on the streets of the city of New York and on similar grades to that on Jay street? A. Yes, sir. Q. You knew the speed and saw the speed at which this man was driving on that day, did you? A. Yes, sir. Q. Within what distance could you have stopped a team of horses loaded as that team was loaded, had you attempted to stop it? Mr. Petrasch: I object to that, if your honor please. (Objection sustained. Exception by plaintiff.) Q. Is it or is it not a fact that such a team of horses and such a truck loaded as that was could have been stopped within two feet? Mr. Petrasch: Objected to as leading in form, trying to put in the mouth of the witness what has hitherto been sustained. (Objection sustained. Exception by plaintiff.)"

It is claimed that this was error. I think not. Even if it was, it was harmless, as plaintiff proved by Foster, making him his own witness on that subject, that he could stop in 15 or 20 feet, and he called no other witness on that subject. But there was no error in the ruling. The first question called for an opinion as to what Foster, the driver, ought to have been able to do. The second question called for an opinion to what the witness Berkowitz could have done, and the third called for an opinion as to what he (Berkowitz) could have done. The fourth, and last, called for an opinion, and was leading and suggestive, on which ground it was objected to, and did not contain any statement of all the facts on which a proper and legitimate opinion could be expressed. It made no reference to the grade or condition of the street, time, or place, or speed of the team, and it

called for an opinion, suggested and invited, as to whether such a team and such a truck, loaded as it was, could have been stopped within two feet regardless of the means employed or of place or of the speed of the team or grade of the street. There was no evidence that Berkowitz knew how it was loaded, or how heavily it was loaded. At that time there was no evidence in the case as to the weight of the load. If matter of opinion at all, the question should have assumed the existence of the team, the truck, the load, the weight of the load, the grade of the street, as to which, at that time, there was no evidence whatever, a driver, and, on those assumptions, inquired the time required to bring the team and truck to a standstill or stop. 1 Wigmore on Evidence, § 672, where the rule is fully and well stated; *Gall v. Gall*, 27 App. Div. 173, 50 N. Y. Supp. 563; *Abb. Trial Brief. Civil Jury Trials* (2d Ed.) 144; *O'Neil v. The Dry Dock, East B. & B. R. Co. et al.*, 129 N. Y. 125, 129, 29 N. E. 84, 26 Am. St. Rep. 512. In the *O'Neil Case*, supra, the question specified the conditions and facts upon which the opinion was based with particularity. The Court of Appeals said:

"This belongs to a class of questions not much to be encouraged. The answer to such a question can be of but little service to jurors. They are generally well acquainted with such common things as trucks and horses, and the power, actions, and capacity of horses which, particularly in the city of New York, are constantly open to observation. Yet we cannot say that the expert witness did not know more about the subject of inquiry than ordinary jurors can generally be supposed to know. The question is barely competent, and probably was not harmful; and the judgment should not therefore be reversed because the judge allowed it to be answered."

This was equivalent to stating that such opinion evidence, even when the question is properly framed and assumes the facts shown by the evidence as the basis for the opinion, is incompetent and improper. The court said it was "barely competent" and "probably was not harmful"—that is, it was a harmless error to admit the evidence. Clearly, it was not proper to allow Berkowitz to speculate or guess, or tell what he could have done or what the driver ought to have been able to do or might have done, and when the desired answer was suggested the question was clearly improper. In this case the jury was as competent to judge of the time required to stop as was Berkowitz when all the facts appeared. It is common knowledge that some horses will stop at the word "Whoa," while others will not; some will stop by a sudden pull of the reins, while others will not. Assume that these horses would stop at word of command or at a sudden pull up, or at both, and the stop would be almost instantaneous; say, two seconds on a level grade. Six miles per hour was the rate of speed Berkowitz had stated, and this meant about 18 feet of advance in 2 seconds, enough to run onto the plaintiff after the driver made any attempt to stop. This makes no allowance for the momentum of the team, and 7 or 8 tons of load behind them on a down grade, going at the speed stated. There was no evidence as to the effect of such load under such momentum on such a team. In the absence of proof of the facts which subsequently appeared such opinion would have been surmise and speculation, and not founded on

a proper basis. It is a self-evident fact, on the driver's own statement, that after he saw plaintiff, and tried to stop, it was impossible to do so in time to prevent running over his leg; and that if he did not see the plaintiff when he ought to have seen him according to plaintiff's statement—that is, 40 to 80 feet away—he had an abundance of time to stop before reaching plaintiff. The driver said he could stop, and that he did stop, within some 17 to 25 feet; that is, on the first car track, 17 feet from the curb of West street. In no possible view was the opinion evidence material. The claim of the plaintiff was that the driver made no effort whatever to stop; the claim of the defendant was that the driver made no effort to stop until the plaintiff was at the pole some 10 or 12 feet from the front wheels. The question was, ought the driver to have made an effort to stop sooner, it being conceded he could have done so? But in no event was either question competent or proper. All the facts should have been before the jury, including weight of truck, character of horses, weight of load, grade of street, speed, etc., and then it was for the jury to determine whether or not he was negligent in not stopping sooner. *Harley v. Buffalo C. Mfg. Co.*, 142 N. Y. 31-38, 36 N. E. 813; *Schneider v. Second Ave. R. Co.*, 133 N. Y. 583, 587, 30 N. E. 752; *Roberts v. N. Y. El. R. Co.*, 128 N. Y. 455, 464, 28 N. E. 486, 13 L. R. A. 499; *Van Wycklen v. City of Brooklyn*, 118 N. Y. 424, 429, 24 N. E. 179, 181, etc.

In this last case the Court of Appeals said:

"To render the opinions of witnesses competent as evidence, the subject must be one of science or skill, or one of which observation and experience have given opportunity and means of knowledge, which exist in reasons rather than descriptive facts, and therefore cannot be intelligently communicated to others, not familiar with the subject, so as to possess them with a full understanding of it. Such testimony cannot be resorted to, therefore, where the facts can be placed before a jury, and they are of such a nature that jurors generally are as competent to form an opinion in reference to them as witnesses. In an action to recover damages for injuries alleged to have been caused by negligence or wrongful acts of the defendant, expert testimony, to be competent, must be based on evidence in the case, and confined to the causes of the injury complained of."

What is there of science or skill in the mere stopping of a team that is not perfectly familiar to a jury? But when we come to a team with a load of seven or eight tons on a down grade going at a speed of seven or eight miles per hour, we have a different question. It then becomes a question of the holding power of the team, and its ability to overcome the momentum of the load; the momentum it has gained, and which must be overcome on such a grade. Hence the opinion to be competent at all must be based on all the facts, especially the most material ones—the weight of the load, the grade, the speed, the size and strength of the team, etc. If a question of dynamics—how much time it would require for one force to overcome another on such a grade—then it was all-important that all the facts be given the witness, and his opinion based thereon. If a matter of experience and observation, then equally important that the answer be based on the facts as they actually existed. Opinion evidence is to be received with care and caution, and must come from those hav-

ing expert knowledge on the subject and be based on well-defined facts. If the witness had been asked how long it takes to stop a team with such a load on such a grade at such speed he would have been allowed to answer, assuming there was proof that he knew from experience. That would have called for a statement of fact which would have been proper for the jury to consider in connection with the other evidence in the case in determining whether the driver did all he reasonably could to stop when he discovered the plaintiff. But later on, when the facts and the conditions had appeared, the plaintiff, on the time required to stop the team, made Foster his own witness, and proved that he could stop within 15 or 20 feet. Plaintiff's counsel also made the witness Charles T. Canfield his own, and on that subject was allowed to show that on a level and going at a walk this truck could be stopped within 10 feet; on a down grade at a speed of six miles an hour, he was not asked. The evidence was permitted when the situation as to load was before the jury. He then called no other witnesses on that subject.

Plaintiff insists there was prejudicial error in allowing contradictions of the testimony of John Lynch, a witness for the plaintiff. Lynch testified he did not see the accident happen, but went to plaintiff when on the bench at corner of Jay and West streets immediately after the accident; that he was then unconscious; that he went with the ambulance to the hospital riding on the tailboard; that he saw Dr. Warner, the ambulance surgeon, and saw him inject something into plaintiff's leg before he was put into the ambulance; that the surgeon dressed the leg in some way on the corner; that plaintiff's head was then bloody; that he went into the hospital with the plaintiff when carried in; that he stayed there 10 or 15 minutes. On cross-examination he was asked if he was asked by one Loder, in November, 1906, what he knew about this case, and replied he knew nothing about it. He said, "I don't remember anything about it; I didn't see nobody." He was also asked if he said he did not know anything about this accident. He replied he did not remember. He was also asked if in January, 1907, he told Loder at a place mentioned that he did not reach the place of the accident until after the man had been carried to the sidewalk, and knew nothing more about the accident. Whether the plaintiff was conscious or unconscious when on the corner was a very material matter, also whether or not his head was bloody. Dr. Warner said he was conscious, and described how he talked, and serious injury to the head was denied. This bore on the important question of intoxication. Plaintiff claimed the doctors mistook concussion and its evidence for intoxication. The witness Lynch said he was unconscious and he saw blood on his head. Lynch also said on direct examination he went to the hospital. Lynch immediately after accident arrested the driver. The question whether he went to the hospital bore on his knowledge of the plaintiff's condition. He said it was his duty to go to the hospital, and also to take the driver to the station house. The defendant claimed he took the driver to the station house and did not go to the hospital, and did not examine the plaintiff or see enough of him to say whether he was conscious or unconscious at the corner—or notice his head. As bearing on the consciousness

of the plaintiff Lynch was also asked if, when he left the hospital, he did not have the name of plaintiff, etc., seeking to show that plaintiff was conscious and gave it with other information. Benjamin C. Loder was called to show that in November, 1906, he saw Lynch, and had a conversation with him in which Lynch stated he did not see and knew nothing about this accident. If Lynch said to Loder that he did not see and knew nothing about the accident, it was a statement inconsistent with and contradictory of his evidence on the trial that he saw the plaintiff on the corner, and that his head was then bloody and that he was then unconscious, and that he went with him to the hospital. If he saw all that he knew something about the accident, even if he did not see the actual collision.

The fact that Loder saw Lynch and conversed with him, and that Lynch made the statement referred to, was therefore competent. It was competent also to show by Sergeant Hulse that Lynch was at the station house with Foster at 4:25 p. m. of the day in question, and gave certain data, which, as was claimed, he got from plaintiff and could not have obtained elsewhere. If at the station house, he could not have been at the hospital, and, if he got the data from the plaintiff a few minutes after he was injured, it is not probable he was unconscious. It all legitimately tended to weaken the statement of Lynch that the plaintiff was unconscious after the injury. The defendant was also permitted to show that Berkowitz made a statement to one Singer, in substance, that he was going to testify for the defendant, "We drivers all stick together," his attention having been called to it on his cross-examination and he having admitted a talk, but said he did not know whether he said it or not. If he said it, it was of consequence as bearing on his truthfulness. If his then attitude was he would testify for defendant so as to "stick by," support, or defend, a fellow driver it affected his credibility. If he made the statement to mislead it had the same effect. If it was true that there was such an arrangement, then it was an evidence of moral obliquity, and legitimately affected his credibility. In any aspect, it was competent, for his evidence on the direct examination was anything but favorable to the defendant. The statement related to the evidence he was to give, and his reasons for giving it. So it was competent and proper to show that Berkowitz, without invitation, or other business than to tender himself as a witness, visited the defendant's place of business after the accident, and left a slip of paper with his name and address. His attention was called to this suspicious circumstance, and he denied it, claiming he gave the paper to Foster. When a person comes into court as a hostile witness, and gives damaging testimony against a party to the litigation, I think it competent to show he has stated out of court that his testimony would be favorable to that party, and that he has voluntarily visited the business place of such party, and left his name and address. It may be that his purpose and intent were honest; that he was prompted by a virtuous desire to see justice done; but an intelligent court and jury might properly draw other inferences of a different nature. His conduct in this regard while posing and proposing as an eyewitness to the transaction favorable to the defendant, are as proper for the consideration of the court and jury, in view

of his testimony on the trial, as his actual conduct and demeanor on the witness stand. As all this related to his conduct in respect to this case, and his evidence to be given in the case in reference to this transaction the defendant was not concluded by his answers, or denials, or want of recollection on cross-examination. This was not a collateral matter. Not called on the one side to whom he had declared himself and his testimony favorable, he appears as a damaging witness on the other side. The evidence with what he did on the trial tended to show bias—hostility—on the part of the witness. Suppose Berkowitz had offered to testify in behalf of defendant for a certain amount of money, and he had denied it on cross-examination, could or could not defendant have proved that he actually did? That all this evidence was competent and proper is fully shown by *People v. Webster*, 139 N. Y. 73, 85, 86, 34 N. E. 730.

Failure to remember, and saying, "I do not recollect," does not prevent showing by others that the witness did make the statement and do the act alleged. *Crowley v. Page*, 7 C. & P. 789; *Sloan v. N. Y. C. R. Co.*, 45 N. Y. 125; *Weeks v. Fox*, 3 Thomp. & C. 354; *Kelly v. Cohoes K. Co.*, 8 App. Div. 156, 40 N. Y. Supp. 477. Acts and declarations of the witness tending to show hostility may be inquired into on the cross-examination of a witness, and, "if denied, he may be contradicted by other witnesses." 1 Greenleaf on Ev. (Redfield's Ed.) § 450; *Brink v. Stratton*, 176 N. Y. 150, 68 N. E. 148, 63 L. R. A. 182; *People v. Brooks*, 131 N. Y. 321, 30 N. E. 189; *Atwood v. Welton*, 7 Conn. 66; *Cooley v. Norton*, 4 Cush. (Mass.) 93; *Newton v. Harris*, 6 N. Y. 345; *Com. v. Byron*, 14 Gray (Mass.) 31. Evidence as to bias, etc., is not collateral. *Shultz v. Third Ave. R. Co.*, 89 N. Y. 242. It is not even necessary to cross-examine on the subject before giving such evidence. Same cases. It is not necessary that the declarations or statements made out of court shall be absolutely contradictory of those made in court. It is sufficient if they are inconsistent therewith. *Gilbert v. Sage*, 5 Lans. (N. Y.) 287, affirmed 57 N. Y. 639; *Porter v. McGrath*, 41 N. Y. Super. Ct. 84; *Briggs v. Wheeler*, 16 Hun, 583; *Stape v. People*, 85 N. Y. 390. Hence it may be shown that in giving the alleged statement sworn to on prior occasions a material part of it was omitted by the witness. *McAndrews v. Santee*, 7 Abb. Prac. (N. S.) 408; *Id.*, 57 Barb. 193.

I have carefully gone over the entire case, and find no prejudicial error. The motion to set aside the verdict and grant a new trial is therefore denied.

IN RE GILPIN.

(District Court, E. D. Pennsylvania. March 13, 1908.)

No. 2,474.

1. BANKRUPTCY—DISCHARGE OF BANKRUPT—PROHIBITION AGAINST—BORROWING MONEY UNDER FALSE REPRESENTATION.

One borrowing money obtains "property" on credit, within Bankr. Act July 1, 1898, c. 541, § 14, cl. b (3), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026), forbidding the discharge of a bankrupt who

has obtained property on credit upon a materially false statement in writing, etc.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

2. SAME—INTENT TO DEFRAUD—ESSENTIALITY.

Bankr. Act July 1, 1898, c. 541, § 14, cl. b (3), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026), forbidding the discharge of a bankrupt who has obtained property on credit upon a materially false statement in writing, does not require a conscious intent to defraud to prevent a discharge; and hence a bankrupt was not entitled to a discharge where he signed a blank statement of his financial condition, which at his direction his bookkeeper filled out and sent to a bank, which lent the bankrupt money on the faith thereof, though, relying on the bookkeeper's honesty and accuracy, the bankrupt did not actually know of the material falsity of the statement and did not consciously intend to deceive the bank.

3. SAME—TIME OF LOAN—EFFECT.

Where a bank lent bankrupt \$10,000 on the faith of a materially false written statement of his financial condition, it is immaterial, as affecting the bankrupt's right to a discharge within Bankr. Act July 1, 1898, c. 541, § 14, cl. b (3), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026), forbidding the discharge of a bankrupt who has obtained property on credit upon such a statement, that \$7,500 of the money was lent more than four months before the petition in bankruptcy was filed, where \$2,500 was actually advanced within such period, though it be necessary, to prevent a discharge, that the property be obtained within such period, which is not decided.

4. SAME—BURDEN OF PROOF.

Though generally the burden is on a creditor to sustain his opposition to the bankrupt's discharge, the rule does not apply where the question presented is one of law, e. g., the construction of a statute, and not one of fact.

5. SAME—"FALSE"—DEFINITION—"FALSE OATH."

"False," as used in Bankr. Act July 1, 1898, c. 541, § 14, cl. b (3), 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026), forbidding the discharge of a bankrupt who has obtained property on credit upon a materially "false" statement, means no more than "not true," though the word is flexible, and sometimes means "incorrect," and sometimes comprehends wickedness or fraud, as in section 29, where the term "false oath" means a corruptly false oath, such as would subject affiant to a prosecution for perjury.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2654, 2655.]

In Bankruptcy. Certificate of referee concerning objections to discharge of bankrupt.

John G. Johnson and J. Wilson Bayard, for bankrupt.
William T. Wheeler, for objecting creditor.

J. B. McPHERSON, District Judge. The question certified by the referee requires the court to determine whether clause b (3), § 14, of Act July 1, 1898, c. 541, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026), which forbids the discharge of a bankrupt if he has "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit," should be construed to mean,

that a conscious intent to defraud must be present. There is no such language in the clause, but in a recent case it has been held that the requirement of a fraudulent intent should be implied. Before considering what the clause means, the facts of the pending controversy may be stated. They are thus set forth in the report of the learned referee:

"The bankrupt was engaged in the construction of buildings at Baltimore, in places near New York City, and at Philadelphia. His main office was in Philadelphia, where his books were kept by a bookkeeper employed by him. It is not proved how long this bookkeeper had been in the employment of the bankrupt before the bankruptcy.

"The bankrupt was chiefly engaged in the actual supervision of the building work he was undertaking, and paid little or no attention to his books. He collected money, paid notes, and in a general way knew the condition and progress of each of his building contracts. He intrusted the keeping of his books to a bookkeeper, and in September, 1905, the posting of the books was some months behind.

"In September, 1905, the bankrupt went to the Merchants' National Bank at Philadelphia and stated that he wished to open an account, and that he would require accommodation not to exceed \$10,000. The bank informed him that they would like to have a statement, and gave him one of their blank forms to be filled out and signed by him. This form the bankrupt took to his office, and there signed the same in blank, instructing his bookkeeper to fill it out and send it to the bank. He signed it in blank before it was filled out, for the reason that he was obliged to return to Baltimore without delay. He says he instructed the bookkeeper to give him an exact statement for the bank, to which the bookkeeper replied that he could not, but that he would make an approximate statement and send it to the bank. The statement was made by the bookkeeper, upon it was written the word 'approximate,' and it was sent by the bookkeeper to the bank."

The statement in full is as follows:

Approximate Statement from

Charles Gilpin,
(Firm Name.)
1314 Pennsylvania Bldg.,
Phila., Pa.
(Address.)

Building Construction
(Business.)

(Branches.)

For the purpose of procuring credit from time to time with the Merchants' National Bank, Philadelphia, Pa., for our negotiable paper, we submit the following as being an approximate statement of our financial condition on the 28th day of Sept., 1905.

In consideration of such credit, it is hereby agreed that in the event of failure, or insolvency of the undersigned, all obligations of the undersigned held by this bank shall become immediately due and payable.

Assets.		Liabilities.	
Cash on hand.....	\$ 7,964 27	Notes payable for merchandise..	\$ 12,500 00
Cash in bank.....		Notes payable to own banks....	15,000 00
Notes receivable, due from customers		Notes payable for paper sold....	
Notes receivable, due from partners		Notes payable for other accounts	
Notes receivable, other than above		Open accounts	
Accounts receivable, due from customers (good)	92,326 00	Loans or deposits	
do (doubtful)		Mortgages or liens on real estate..	
Accounts receivable, due from partners		Accounts payable	27,620 00
Merchandise (how valued in shop)	3,000 00	Other liabilities, and of what composed	
Real estate in name of firm.....		Total liabilities	65,120 00
Machinery and fixtures and tools	4,500 00	Net worth	43,569 27
Office fixtures	900 00		
Other assets, and of what composed			
Total	\$108,689 27	Total	\$108,689 27

Contingent liabilities: Accommodation indorsements; indorsed notes receivable outstanding.

Names in full of all general partners: Charles Gilpin.

Names in full of special partners with amounts contributed by each, and until when.

Insurance on merchandise,

Insurance on real estate,

Amount of annual business for present year, approximate, \$800,000.

Dates of organization and expiration of partnership.

Date of last trial balance.

Place: 1314 Pennsylvania Bldg.

Date signed: Sept. 28, 1905.

Charles Gilpin.

The referee's finding proceeds:

"This statement was laid before the advisory committee of directors of the bank, and afterwards before the full board of directors, and the bank extended the accommodation desired, based upon the statement, and upon a note which the bankrupt was to obtain from one Stokes, of Baltimore, and place the same as collateral with the bank. The note to be made by Stokes and placed as collateral was never obtained by the bankrupt for the bank.

"About October 3, 1905, after the statement of September 28, 1905, had been filed with the bank and passed upon by its directors, the bank discounted the note of the bankrupt for \$7,500, due 30 days after date. This note was renewed on November 2, 1905, and on December 4, 1905, again renewed, in part, for \$6,500. On December 4, 1905, the bank also discounted a 10-day note of the bankrupt for \$2,500. On the 9th day of February, 1906, the bank renewed the entire amount then due, namely \$9,000, for 30 days. The adjudication in bankruptcy was entered on February 26, 1906, and the bank holds the unpaid note for \$9,000.

"It is not proved that in October, when the first note was discounted upon the faith of the statement, or at the time when either of the subsequent notes was discounted, the bank showed the statement to the bankrupt, or that he asked to see it; nor does it appear that the bankrupt ever saw the statement after he had signed it in blank until after the proceedings in bankruptcy had been commenced.

"The statement showed assets \$108,689.27 and liabilities \$65,120, and a net worth of \$43,569.27. Counsel for the bankrupt states in his brief that 'as to the items which went into that net worth it was materially false and inconsistent with the books when Mr. Gilpin went into bankruptcy. The item of cash on hand was much larger than the fact. The accounts receivable were also stated at a larger amount than those accounts appeared upon the books, and the items of liability were each stated as smaller amounts than the books showed.'

"The bankrupt, upon his examination in the proceedings upon application for discharge, offered in evidence an approximate statement made by him of his financial condition on September 28, 1905. This statement in every item differs from the statement made by his bookkeeper, which was sent to the bank, and upon which the bank relied in discounting the bankrupt's notes. It is not necessary to state in detail the difference between the two statements. It is, perhaps, sufficient to say that as to the item of cash on hand, which, in the statement made by the bookkeeper and sent to the bank, is stated to be \$7,964.27, the item of cash on hand in the statement made by the bankrupt and offered in evidence by him is stated to be \$2,504.92. The net worth of the bankrupt is shown by the statement made by the bookkeeper to be \$43,569.27 and by the statement made by the bankrupt \$45,698.09.

"It is clearly proved by the evidence that it is impossible to make up from the books a statement such as that which was made by the bookkeeper. The bookkeeper, although residing near Philadelphia, was not called by the objecting creditor, or the bankrupt, to explain the statement made by him, and it is useless to speculate upon the methods adopted by him to fill out the blank form with the particularity exhibited in it.

"The approximate statement sent to the bank is materially false in all its items, and fails to coincide with the statement made up by the bankrupt

and offered by him in evidence upon his examination in the proceeding for discharge. The approximate statement made up by the bankrupt cannot be accepted in place of the approximate statement sent to the bank. The bank, in discounting the notes of the bankrupt, relied upon the approximate statement signed by the bankrupt and sent to the bank by his direction. The bankrupt did not at any time make request to see and examine the approximate statement which his bookkeeper had made up, but accepted the discount of his notes allowed by the bank upon the faith of the approximate statement.

"Although the bankrupt testifies that he did not instruct his bookkeeper to make and send to the bank a false statement, and that his instructions were to make an exact statement of his condition, and, when told this could not be made, then to make and send an approximate statement, and to mark the statement with the word 'Approximate,' nevertheless the discount of the bankrupt's notes was made and the money obtained upon a materially false statement in writing signed by the bankrupt, and without examination by him sent by his direction to the bank."

These facts bring the case precisely within the words of clause (3), and prima facie would require the discharge to be refused; but the referee declined to sustain the bank's objection, and gave the following reasons for his ruling:

"Although the falsity of the statement sent to the bank has been proved, the fact that the bankrupt knew it to be false, or did not know it to be true, must also be proved. The bankrupt has testified that he did not direct the bookkeeper to make up an incorrect statement, and that he had no reason whatever to suppose that he would not make a correct statement from the books. No evidence has been offered in contradiction of the bankrupt's testimony on this point. The bank did not at any time exhibit the statement to the bankrupt, or call his attention to it in any way. The bookkeeper has not been called as a witness. The burden of proof is on the objecting creditors, and the proof must be strict and convincing. There is no evidence to support the contention that the bankrupt knew, or had any reason to believe, that the statement sent to the bank by the bookkeeper was false, or that the bankrupt intended in any way to deceive the bank."

Exceptions were filed to this report, but the referee dismissed them, adding the citation of *Re Dresser* (D. C.) 13 Am. Bankr. Rep. 616, 144 Fed. 318, Id., 145 Fed. 1021, 74 C. C. A. 680, and *Freyer v. McCord*, 165 Pa. 540, 30 Atl. 1024, as authority for the foregoing conclusion of law. He then gave, as an additional reason for overruling the bank's objection, that clause (3) did not apply to the present case at all, because the borrowing of money was not the obtaining of "property" on credit, within the meaning of the clause under consideration. In support of this additional reason, he relied solely upon *Re Pfaffinger* (D. C.) 154 Fed. 528; and this is no doubt a decision squarely in favor of his ruling concerning the scope of the word just quoted. The position that when a man borrows money he does not obtain "property" on credit, within the meaning of clause (3), may be disposed of preliminarily and at once. It does not call for discussion at my hands; for, although any opinion from Judge Evans deserves and will always receive respectful consideration, it is only necessary now to say that his argument in *Re Pfaffinger* did not meet with the approval of the Court of Appeals for the Sixth Circuit. Judge Richards, speaking for that court (19 Am. Bankr. Rep. 309, 158 Fed. 403), gives the following reasons for reversing the decision:

"The court below took the view that the statute did not apply, because it applied only to a materially false statement in writing made for the purpose of obtaining property on credit, and that money is not property. In support of this view, Collier on Bankruptcy (6th Ed.) pp. 196, 197, is cited, and also the rule in *U. S. v. Isham*, 17 Wall. 496, 504, 21 L. Ed. 728, in which Mr. Justice Hunt, speaking for the court, says:

"The words of the statute are to be taken in the sense in which they will be understood by that public in which they are to take effect. Science and skill are not required in their interpretation except where scientific or technical terms are used."

"We approve of the rule laid down by Mr. Justice Hunt, but we do not think it sustains the construction claimed in this case. The position taken by Collier on Bankruptcy is in our opinion without support. If we were to apply the rule laid down by Mr. Justice Hunt, and take the common, ordinary meaning of the word 'property,' we think we would reach the usual definition given to the word; that is, 'anything of value,' 'anything that may be owned or possessed,' 'anything which has debt-paying or debt-securing power.' One of the common crimes is obtaining property under false pretenses. It has never been restricted to the obtaining of property other than money, but to the obtaining of property including money. No good reason can be advanced for limiting the term 'property' in this statute to property excluding money. Money is property in its most available and efficient form. According to the construction of the lower court, the bankrupt could, without subjecting himself to a penalty, obtain money by making a materially false statement in writing; but he could not, without subjecting himself to the penalty, obtain property, exclusive of money, by making such false statement. Still with the money which he could thus obtain without penalty he could readily purchase the property which the law prohibited him from thus obtaining. In our opinion the case of *Pirie v. Chicago T. & T. Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, 5 Am. Bankr. Rep. 814, settles the question. There the point was made 'that a transfer of any of his (the bankrupt's) property' was limited in meaning to a transfer of any of his property excluding money, and the court held that the phrase included 'anything of value, anything which has a debt-paying or debt-securing power; and money is property.'"

It being settled, therefore, that Charles Gilpin, the present bankrupt, obtained property on credit, namely, a loan of \$10,000 from the Merchants' National Bank, the objecting creditor, it must also be regarded as beyond dispute that the foregoing written statement was made and successfully offered to the bank for the purpose of securing the loan, and that the statement was materially false. These facts are distinctly found by the referee, and are in effect conceded in the brief of the bankrupt's counsel. If, therefore, the statement had been written and presented by the bankrupt with knowledge of its falsity, the pending question could not arise; for both parties would then agree that the discharge might properly be refused, upon the ground that the inference of an intent to defraud could scarcely be resisted. But, in my opinion, the case is to be treated exactly as if the bankrupt had himself prepared the statement in question, and is to be decided without regard to the existence, or the absence, of an actual intent to defraud. I accept; and shall act upon, the finding of the referee that the bankrupt either did not actually know what the statement contained, or did not know that it was materially false, and that he did not have a conscious intention to deceive the bank. Nevertheless, the facts make it plain, as it seems to me, that he was chargeable with knowledge, and cannot avoid liability for the consequences of his ignorance and carelessness, not to say his reckless reliance on the cor-

rectness of his agent's statement. That he would be responsible in a civil action—altogether aside from any intention to defraud—there can be no reasonable doubt. The situation is this: A principal directs his bookkeeper to do an act strictly within the line of the agent's duty, namely, to make a financial summary, compiled from the books in his care, and to show it to a person from whom a loan is expected, which can only be had if the facts which the agent is thus to put together disclose a solvent condition. The order of the principal is carried out; the summary is made and exhibited; the loan is obtained on the faith of its correctness; but the statement turns out to be false. It appears, also, that the principal, relying on the agent's honesty and accuracy, never takes the trouble to verify the summary, or even to look at it; but, with the knowledge that the creditor regards it as satisfactory, he accepts the money that is lent upon the faith of it, and therefore profits by the mistake, or (it may be) the fraud of his subordinate. Certainly, under such circumstances, a principal could not be permitted to disclaim civil responsibility for his agent's act, if it should afterward turn out that the summary was materially wrong, whether the error was due to the agent's negligence or to his fraud. If a principal intrusts an agent with power that is capable of abuse, and the agent does abuse it, the principal, as a general rule, is civilly liable, because he has armed his agent with ability to do wrong to others, and he must therefore make good whatever harm has thus befallen an innocent person.

These principles, I think, are not likely to be disputed; and, if they are correct, the civil liability of the present bankrupt for his bookkeeper's act must be admitted. The language of clause (3) puts the refusal of a discharge upon a civil liability, since the act that is visited with this consequence is not a crime (unless, indeed, the crime is to be implied), and it therefore remains to inquire whether the face of the clause should be so modified by implying an intent to defraud that the act denounced becomes the crime of false pretense instead of a civil default. This is the contention on the part of the bankrupt. He seeks to relieve himself from liability for his agent's acts, taking the position that the clause in question does not refuse a discharge unless he himself has been guilty of false pretense, as distinguished from civil misconduct. Of course, if clause (3), properly construed, does so declare, that is the end of the matter; and it is vital, therefore, to submit the clause to the established rules of construction, in order to get the meaning out of it, if possible, taking care to avoid putting into it a meaning that may seem to be desirable but is not really there.

It should first be observed, I think, that the clause in question is one of the amendments of 1903, and was not part of the act as originally passed. As thus passed in 1898, the statute specified as the only grounds for refusing a discharge (1) the commission of an offense punishable by imprisonment under a subsequent section, and (2) destroying, concealing, or failing to keep, books of account or records, with fraudulent intent to conceal the bankrupt's true financial condition and in contemplation of bankruptcy. The offenses which the act punished by imprisonment are set forth in section 29, and all

involve the element of conscious fraud, namely, knowingly and fraudulently transferring or embezzling property, or concealing it from the trustee, and committing perjury by taking a false oath during the proceeding. So, also, it should be noted that the second ground for refusing a discharge was not complete unless the same element of conscious fraud was present. As a further civil penalty for fraudulent conduct, section 17 provided that a discharge should not affect "judgments in actions for frauds or obtaining property by false pretenses or false representations," or such debts as were created by the bankrupt's "fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." When, therefore, the statute as originally drawn intended to make fraudulent intent a necessary element, it knew how to use appropriate and unmistakable language. Congress soon discovered, however, that section 14 was too generous in permitting discharges, and to remedy this defect (among others) the amendments of 1903 were adopted. These left untouched the provision that forbade a discharge when the bankrupt had committed one of the offenses described in section 29, but they made significant changes in two other sections, all of them putting new difficulties in the way of a discharge, or enlarging the class of fraudulently contracted debts upon which a discharge was to have no effect whatever. Thus, by the amendment to section 17, a creditor was relieved from the need to obtain a "judgment" in an action based upon the bankrupt's fraudulent conduct; for the amendment struck out "judgments in actions for frauds or obtaining property by false pretenses or false representations," and substituted the wider phrase—"liabilities for obtaining property by false pretenses or false representations." And in section 14 the second ground for refusing a discharge—destroying, concealing, or failing to keep, books of accounts or records from which the bankrupt's true condition might be ascertained—was materially changed by striking out the original qualification, "with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy," and substituting, "with intent to conceal his financial condition," thereby making essential the mere intent to conceal, whether or not such intent be fraudulent. Congress then proceeded to add four more grounds for refusing a discharge, of which two, the fifth and sixth, have no relevancy to the present inquiry. (The fifth forbids the discharge of a voluntary bankrupt more than once in six years, and the sixth forbids the discharge of any bankrupt if he has disobeyed a lawful order of the court.) The fourth ground, however, bears upon the question now under consideration. It forbids the discharge if within four months the bankrupt by act or permission has diminished his stock of valuable property; but, as it was obvious that not every such act or permission should be visited with the same consequences, Congress was careful to say precisely that the penalty was to be imposed only where the court should find an "intent to hinder, delay or defraud [the bankrupt's] creditors." Otherwise, the consequence would follow that any retail sale over the counter would prevent a discharge. The third additional ground for refusing a discharge is the clause with which we are now concerned; and, from the foregoing discussion of the original act and of the amendments,

I think it is fair to say that, if Congress had thought it wise to annex a fraudulent intent to the obtaining of property by a material false statement in writing, they would hardly have overlooked it. And this is especially true, because at the same time they were dealing with a similar intent in clause (2), immediately before the clause now in question, and also in clause (4), immediately after it. Certainly, as I think, it is wandering in the region of conjecture to say that a fraudulent intent should be implied in clause (3), in spite of the fact that Congress took the pains to express such intent distinctly in clause (2) as originally framed, and afterwards in clause (4), and could just as easily have expressed it again in the intermediate sentence.

But there are two other reasons, as I think, why the intent to defraud should not be implied in clause (3). The first is this: There is no need to imply it, and therefore the well-known rule of statutory construction is against the implication. If the fraudulent intent is inserted, as I am now asked to insert it, clause (3) becomes the precise equivalent of obtaining property by a particular form of false pretense; and with this form, and all other forms, of false pretense, section 17, both in 1898 and in 1903, deals effectively and completely, by declaring that debts thus fraudulently created are not to be discharged at all. Is it to be supposed that Congress, having preserved such debts from extinction by section 17, thus giving to creditors in this class all the protection that was necessary, nevertheless added what would seem to be a superfluous refinement, by declaring that, if the bankrupt had obtained the property by a false pretense that he had taken the trouble to write, he should not be discharged from any debt whatever, whether it were honest or were founded upon fraud? Or, to put the difficulty in other words, why should Congress punish a false pretense in writing by refusing a discharge altogether, while it only punished a false pretense that was spoken by preserving the particular liability thus created? I do not doubt the power of Congress to affix different penalties to different kinds of false pretenses, but surely there is an *a priori* probability that it is not intended to punish offenses differently that are essentially alike; and I think the court is therefore justified in laying stress upon the absence of definite and express language from which it might be seen clearly that a difference in punishment had actually been made. It must not be forgotten that the present argument is based solely upon the proposition that there is a necessary implication in clause (3) that requires a false pretense in writing to be dealt with differently from a false pretense in spoken words; and it seems to me, therefore, that in weighing an argument of this character it is legitimate to balance the probabilities for and against the construction insisted upon.

The second reason against implying the intent to defraud is to be found in the mischief at which clause (3) is evidently aimed. This is the obtaining of property by means of a written statement that is not true. It may be fraudulent, or it may be innocent; but in either event it does the same harm. The creditor loses his property because he relies upon a material statement which he can rarely check or verify, and the quality of the bankrupt's intention—whether it be good or

bad—is in no way essential to the result. Indeed, it may not contribute to the result in the slightest degree. The central fact is that a material misstatement has been made, for example, about the volume of the bankrupt's business, or the value of his assets, and, although the statement may be innocently mistaken, it does as much harm as if it were willfully intended to deceive: Why, then, should not Congress impose a civil penalty upon the bankrupt for the injury that he has done, even although he had no criminal intent? If he had a criminal intent, the statement becomes a false pretense at the common law, and is punishable by the criminal law of every state, from whose power Congress cannot relieve him; and it is also punished by the bankruptcy act itself, because section 17 refuses to discharge the debtor from the liability that has thus been fraudulently contracted. Since, therefore, two penalties are already provided—by section 17a (2), and also by section b (3)—for a false statement that is also fraudulent, why may there not be one punishment for a similar false statement (not fraudulent) that does the same harm, but differs from the fraudulent statement in the single fact that the bankrupt is not a conscious criminal?

Further, it is fair to require the bankrupt to know the important facts about his business, so as to be able to state them with substantial accuracy. The bankruptcy act endeavors to enforce this obligation by requiring him to keep sufficient books and records, at the peril of being refused a discharge if he shall fail to do so, with intent to conceal his financial condition—whatever other motive he may have. And, at the same peril—of being refused a discharge—clause (3) seems to require him to be substantially accurate whenever he seeks to use a written statement in order to obtain property from another person. If his books and records are properly kept, he can always know with sufficient precision where he stands; and if he keeps no books, or keeps them badly, so that his condition cannot be ascertained with a fair approach to the truth, he must take the risk and the consequences of being wrong, whenever he is reckless enough or careless enough to make written statements that do harm to his creditor. No doubt the bankrupt may sometimes rely innocently upon subordinates, and be misled by their negligence or by their fraud. This is his misfortune; and, whenever the effort is to charge him with conscious crime because he has acted upon an erroneous statement made by a clerk and accepted in good faith by himself, his lack of actual knowledge will, of course, protect him from criminal consequences. But, where he is not charged with a crime—and he is not so charged by clause (3)—I see no good reason why Congress may not properly hold him to a civil liability (even although it may be severe) for wronging his creditor by indorsing the errors or the lies of his agent. And, in this connection, it seems pertinent to point out the obvious danger of permitting the bankrupt to take shelter behind his subordinate's act, while he profits by the error or fraud which his duly authorized agent has committed in his name. The agent could not be punished (unless in the contingency that a conspiracy could be proved), because he himself does not obtain the property; and the principal would ordinarily escape, because of the practical difficulty of proving the actual fraudulent intent.

It is no doubt true that cases of hardship will arise in the application of this rule. The situation now being considered may present an example; but it is safe to say, I think, that a merchant (save in exceptional cases) knows, or can know, with approximate accuracy what he owes and what he owns, and that he ought to be perfectly able to make statements about his financial condition that are substantially close to the truth. Nothing more is required by the bankruptcy act, and this much at least may properly be required in the interest of a high standard of commercial integrity and of scrupulously fair dealing between debtor and creditor.

The cases in which clause (3) has been considered have not been numerous. Perhaps the earliest is *Re Petersen*, 10 Am. Bankr. Rep. 355, in which Judge Lochren concurred in the findings of the referee, who had refused a discharge because the bankrupt had obtained merchandise by means of a materially false statement in writing. No intent to defraud was found, and apparently none existed; for the referee said:

"Nor can it make any difference whether or not (the statement) was intentionally false. The statute does not require that such a statement be intentionally false. It is sufficient to come under the ban of the law if it is materially false in fact, without regard to intent. The bankrupt above all others is presumed to know his financial condition, and he cannot be permitted to shield his reckless making of false property statements, upon the strength of which creditors relied and had a right to rely, but to their injury and loss, by a plea of ignorance of his true financial condition."

In the case of *Margaret Goodhile* (D. C.) 130 Fed. 782, 12 Am. Bankr. Rep. 383, Judge Reed refused a discharge upon the ground that the statement was "materially false, was made for the purpose of obtaining from this creditor property on credit, and upon the strength of which the property was so obtained by her." He added that "the bankruptcy law expressly provides that a discharge shall not be granted to a debtor who obtains property upon credit on a materially false statement in writing made for such purpose"—making no allusion to an intent to defraud. The case of *Re Harr* (D. C.) 143 Fed. 423, was decided by Judge Trieber, who refused a discharge because the bankrupt had "obtained the cattle on a credit from Wood Bros., upon a materially false statement in writing, made to them by the bankrupt for the purpose of obtaining the said property on credit." No reference is made to an intent to defraud, but in a later case (*Re Collins*, which will be considered in a moment) it is stated by the same judge that "in *Re Harr* there was no question but that the false statements were made knowingly." The case of *Re Hardie* (D. C.) 143 Fed. 607, decided by Judge Maxey, holds that a fraudulent statement made by one partner affects another partner, so as to prevent him from being discharged, although he himself (page 608) "did not participate in the wrongful act and had no knowledge of its perpetration." This decision is said (*In re Collins*) to be inapplicable, and it may perhaps be distinguishable. But if clause (3) requires, as is now contended, that an intent to defraud must be present, and therefore that the bankrupt must be guilty of false pretense, it seems no more than fair to say that, as a crime of one partner should not be imputed to the other, the discharge of the in-

nocent partner could only, be properly refused on the ground that he was bound by the civil consequences of the false statement, although he himself had no criminal intent. The referee, in *Re Dresser* (D. C.) 144 Fed. 318, 13 Am. Bankr. Rep. 637 (differing from *Re Hardie*, supra), held that, where one of two partners was ignorant of the making of a false and fraudulent statement by the other and took no part in the transaction, his discharge should be granted. This ruling was apparently acquiesced in by the parties interested before the referee, for no exceptions seem to have been taken to it, and no allusion is made to it, either by Judge Holt in affirming the referee's refusal to recommend the discharge of the fraudulent partner (13 Am. Bankr. Rep. 638, 144 Fed. 318), or by the Court of Appeals for the Second Circuit in considering the case afterwards (*Re Dresser*, 145 Fed. 1021, 74 C. C. A. 680, 16 Am. Bankr. Rep. 561). Indeed, so far as I can discover, the only case supporting the position now urged is *Re Collins* (D. C.) 157 Fed. 120, in which the same judge who decided *Re Harr*, supra, has squarely ruled (page 123) that a discharge can only be refused where the bankrupt has been "guilty of such acts as would sustain a civil action for fraud or deceit, and [where] the statements were either knowingly false or fraudulent, or made so recklessly as to warrant a finding that he acted fraudulently." With great respect for a view from which I feel obliged to differ, I may perhaps be allowed to suggest that the discussion in *Re Collins* seems rather to be rested upon the assumption that it would be a hardship to deny a discharge, unless the bankrupt has been guilty of false pretense or of deceit, than upon a preliminary application of the rules of statutory construction to the language of the clause then, and now, in question. If clause (3) is ambiguous, such considerations as appear in the following paragraph are no doubt pertinent:

"That the debtor must have known the representations to be false, or at least that he did not know them to be true, in order to prevent his discharge under the present bankruptcy act, is also the conclusion reached by the author of *Collier on Bankruptcy* (6th Ed.) p. 198. Any other conclusion would result in many instances in preventing a discharge of a worthy bankrupt, whose business was too large to permit him to attend to all the details thereof, including the keeping of the books. A man conducting a large mercantile business, employing a bookkeeper for the purpose of attending to the books, he attending to other branches of the business, has the right to rely on a statement prepared from the books; and if, relying upon such a statement, he acts upon it in good faith, he is not guilty of such recklessness as amounts to fraud in the eyes of the law, or as should prevent his discharge. How many merchants can tell their liabilities, or even their assets, except by reference to their books? If, as happened in this case, the bookkeeper by reason of illness had to absent himself from business, and during that time some bills which arrived had not been entered, which fact is unknown to the merchant himself, shall it be said that a statement prepared in good faith from these books, if by reason of the illness, or even neglect, of the bookkeeper some liability was left off, thereby making the statement materially false, should be sufficient to brand a man as guilty of a fraud? Such is not the law. All presumptions are in favor of honesty, and, if the actions of a party are such that the presumption of honesty is as strong as that of wrong, the law requires that the theory of honesty, rather than that of guilt, be adopted."

This is the familiar and acceptable argument *ab inconvenienti*, which should always be considered where the language of the statute

is not clear; but it loses much of its weight where the clause is not of doubtful meaning. A situation of undoubted hardship such as was before the court in *Re Collins*—and may perhaps be also presented here—should not be allowed to lure the court to a construction that opens the door to evasion and fraud, and relaxes seriously a strong and needed motive to compel the debtor to exercise great caution whenever he is engaged in so important an act as the obtaining of property from a prospective creditor by means of a written, and therefore presumably a deliberate, statement.

It is also argued that, as the bank parted with the money more than four months before the petition in bankruptcy was filed, the clause under consideration does not apply. For this position the following sentence from *Brandenburg on Bankruptcy* (3d Ed.) § 370, is cited:

"While no specific time is fixed by the statute within which such statement must have been made, by analogy to other provisions of the law it is evident that Congress intended that the statement must have been made within four months of the institution of the bankrupt's proceedings."

No authority is quoted for this statement, and in opposition thereto reference may be made to *Re Scott* (D. C.) 126 Fed. 981, in which Judge Bradford (of this circuit) decided that a false statement made six months before the proceedings in bankruptcy barred a discharge. But the point need not be decided in the present case. The referee has found—and there is no dispute about the fact—that the statement in controversy was made for the purpose of obtaining a loan of \$10,000; and as \$2,500 of this amount was actually paid over by the bank and was thus obtained by the bankrupt within four months before the petition was filed, it evidently makes no difference that the rest of the money was lent by the bank before that period began. It is "obtaining" the property that is made objectionable by clause (3). A false statement, innocent or fraudulent, does no harm unless it is successful, and the act denounced by the clause is not complete until the creditor parts with his money or other property.

One or two other matters may call for a few additional words, even at the risk of lengthening an opinion that is already too long. It is argued that the burden of proof is on the objecting creditor to sustain his opposition to the bankrupt's discharge. Speaking generally, this is true; but it does not apply to such a situation as is now before the court, where the question is of law, and not of fact. Here the dispute is solely concerning the construction of a statute, and, where that is the point at issue, there is evidently no burden of proof one way or the other.

The other matter that may properly need a moment's consideration is the effect that should be given to the word "false" in clause (3). In my opinion the argument for the bankrupt must rest wholly upon the construction that this word should bear. It is unquestionably a flexible word. Sometimes it means incorrect, or not true. Sometimes it includes the idea of wickedness or fraud—as in section 29, where a false oath is evidently a corruptly false oath, such as would subject the affiant to a prosecution for perjury. That "false" means no more in clause (3) than "not true" I have tried to establish in the preceding

pages of this opinion, and, if I have failed hitherto to give good reasons to my belief, I am sure that I shall not strengthen the argument by stating them again in somewhat different words.

The decision of the referee is reversed, and the clerk is directed to enter an order sustaining the first objection of the Merchants' National Bank to the bankrupt's discharge.

AMERICAN BANANA CO. v. UNITED FRUIT CO.

(Circuit Court, S. D. New York. March 4, 1908.)

1. EVIDENCE—OFFICIAL DOCUMENTS—POLITICAL QUESTIONS.

In a suit involving complainant's right to certain land in Costa Rico of which complainant had been deprived by that government at the alleged instigation of defendant, a certified copy of a letter written by the United States Secretary of State with reference to Costa Rico's jurisdiction over the territory, which the United States claimed belonged to Panama, was admissible as an official document constituting a statement of the position of the United States on a political, nonjudicial question.

2. INTERNATIONAL LAW—RIGHTS OF CITIZEN—GOVERNMENTAL TORTS—DAMAGES.

Where plaintiff, a corporation of the United States, was ejected from certain land and other property over which the government of Costa Rico was exercising de facto authority by soldiers and officers of such government, whose acts were subsequently ratified by the government, plaintiff could not maintain a civil suit in the United States against defendant therefor on the ground that such governmental acts were inspired by defendant, since there was but one tort, and, as the government of Costa Rico could not be sued, no action could be maintained against defendant.

3. SAME—DAMAGES—PROSPECTIVE PROFITS.

Where, in an action for damages for ejecting plaintiff from a plantation in Costa Rico, the court could not give judgment on the validity of the original taking of plaintiff's plantation because it was a governmental act, it could not award damages for the loss of prospective profits resulting from such taking.

4. MONOPOLIES—SHERMAN LAW—DEPRIVATION OF PROFITS.

Sherman Act, Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), authorizing recovery of treble damages, accruing through an unlawful combination in restraint of interstate and foreign commerce, gives no right of action to one who is not deprived of his existing profits, trade, or commerce by the formation or action of an unlawful combination or monopoly, but is merely prevented from embarking on a new enterprise by the threatening aspect of an already existing monopoly or combination.

5. SAME—ACTS IN FOREIGN COUNTRIES.

That the banana market of Central America or some portions thereof has been closed to plaintiff because defendant offered higher prices to producers than did any one else, and so obtained long-term contracts for the exclusive purchase of the producers' product, did not constitute a violation of the Sherman act prohibiting combinations, monopolies, etc.

6. SAME—ENTICEMENT OF EMPLOYÉES.

That defendant had enticed or sought to entice away plaintiff's employés and to oppress such of defendant's own employés as presumed to buy stock in plaintiff company, its business rival, did not of itself constitute a violation of the Sherman act, prohibiting combinations and monopolies, so as to entitle plaintiff to recover damages on that ground alone.

7. CARRIERS—DUTY TO FURNISH TRANSPORTATION.

Where plaintiff sought to establish his banana business in Central America, and expended considerable money in his plant, it was engaged in foreign commerce when it began to move men, material, and supplies to and from the United States and Central American ports in furtherance of its business, and was therefore entitled to compel defendant to furnish transportation facilities on the same terms that defendant furnished such facilities to others.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2883.]

At Law. This cause, brought under section 7 of the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), having been called and a jury impaneled, defendant moved to dismiss on the pleadings.

Wheeler, Cortis & Haight, Everett P. Wheeler, and Horace E. Deming, for plaintiff.

Strong & Cadwalader, Moorfield Storey, and Henry W. Taft, for defendant.

HOUGH, District Judge. For the purposes of this motion it will be assumed that the allegations of the complaint show the following facts to be either well pleaded or capable of judicial cognizance: In June, 1904, there existed in the United States a combination in restraint of trade or commerce in bananas with foreign nations, and defendant was an active party in and to such combination. At the same time defendant was either monopolizing or attempting to monopolize trade or commerce in bananas with foreign nations. By these assumptions it is not intended to intimate any opinion as to the sufficiency of all the allegations in respect of combination or monopoly. On March 30, 1899 (the alleged date of the organization of defendant), and continuously since that time, the plaintiff has been a corporation duly organized and existing under the laws of Alabama, and formed for the purpose of importing bananas into the United States from Central and South America; this is the only business of the plaintiff shown in the complaint. In June, 1904, one McConnell was in peaceable possession of a certain plantation, which was and is wholly situated within the boundaries of the Republic of Panama, as previously delimited by the arbitration of President Loubet of France. Prior to June, 1904, plaintiff had not actually engaged in the banana business, or any productive business whatever. In that month and year it acquired McConnell's rights to his plantation, as also his right to construct and intention to build a railway, to bring the produce of said plantation to tide water. At that time McConnell had a grant or concession from the Republic of Panama or its predecessor sovereign, to construct said railway, which concession was assignable and actually assigned. Later in 1904 the Executive Department of the government of Costa Rico, acting through officials (either military or civil) and soldiers in its service, forcibly ejected plaintiff from the plantation in question, or the most important portion thereof, and seized *vi et armis* plaintiff's personal property situated there or thereabouts, including especially the material for the construction of the aforesaid

railroad. Such ejection of plaintiff from the real estate in question, and such seizure of personalty was perpetrated by the Costa Rican officials and soldiers aforesaid at the instigation, suggestion, and procurement of defendant, and for the purpose of preventing plaintiff from reaping the fruits of its investment in land and personalty, and in order to prevent it from harvesting bananas from its plantation, and transporting the same to the United States in competition with defendant's own importations. Whether or not an order for the seizure aforesaid was given by the supreme governmental authority of Costa Rico before seizure made, the conduct of said soldiers and officials was approved and ratified by the government of Costa Rico, and the seizure and occupation aforesaid continued by the authority of said government down to the time of the beginning of this suit.

Before the transfer of the plantation in question to plaintiff, a certain action had been begun in a court of Costa Rico seeking to establish title to said plantation, or to the most important portion thereof, in one Astua, a citizen of Costa Rico. In that suit such proceedings were had that after said transfer of the said plantation a judgment or decree was entered declaring title to be in said Astua. Such judicial proceedings were taken at the instigation or for the benefit of this defendant with the purpose of preventing plaintiff from gathering bananas from the land in question, and exporting them to the United States in competition with defendant's imports, and, shortly after said decree passed Astua's title was transferred to a corporation allied with and controlled by defendant, and identified with the unlawful combination and monopoly aforesaid. Said proceedings of the civil or military officials of Costa Rico, and of the soldiers of that government and of the court thereof, were taken in pursuance of an asserted right of sovereignty over the plantation in question, or the principal portion thereof, and over the land on which the plaintiff's personal property aforesaid was physically situated; and such assertion of sovereignty so as aforesaid made is irreconcilable with said delimitation of boundaries between Panama and Costa Rico made by President Loubet in pursuance of an international arbitration agreement. Despite protests from the Department of State of the United States, made to the government of the Republic of Panama, Costa Rico down to the time of the beginning of this suit maintained *de facto* jurisdiction and sovereignty over the plantation in question and the land on which the seizure of said personal property was made. By reason of the facts so assumed for the purposes of this motion, plaintiff has never exported, gathered, cut, or harvested any bananas from the plantation in question, and has never as matter of fact at any time entered upon or engaged in trade or commerce in bananas. Both Costa Rico and Panama are sovereign independent nations, and were so at all the times in the complaint mentioned. The action of Costa Rico constituted an invasion of the territorial rights of Panama—in which invasion, however, Panama has acquiesced down to the time of the beginning of this action, and the fact of such acquiescence in the *de facto* sovereignty of Costa Rico over the premises in question has been recognized by the Department of State of the United States.

For the purpose of preventing competition in the exportation of bananas from Costa Rico and Panama the defendant, by outbidding all other competitors, has secured long-term contracts with most, if not all, of the producers of this fruit in that region. Defendant has also caused to be established a transportation line between ports of the United States and the region where this plantation lies. Such transportation line holds itself out as a common carrier, but has refused to accept from this plaintiff lawful merchandise, and when it did not so refuse charged the plaintiff higher rates for its service as common carrier than it charged other persons and corporations similarly situated; and, finally, defendant has sought to cripple and embarrass plaintiff in its attempted or intended business operations by enticing away its employes and threatening to discharge from its own service such of its workmen as became interested financially in plaintiff's enterprise. I believe the foregoing constitutes an interpretation of the complaint as favorable to the plaintiff as could be asked upon a general demurrer.

In arriving at the foregoing statement of plaintiff's position, I have examined the certified copy produced of Secretary Root's letter dated April 16, 1906, being of the opinion that this official document constitutes a statement of the position of our own government upon a political and nonjudicial question, and is therefore open to judicial cognizance within *Jones v. United States*, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691, approved in *Paquete Habana*, 175 U. S. 696, 20 Sup. Ct. 290, 44 L. Ed. 320. The communications from Governor Magoon also handed up at the hearing have not been regarded, as they contain no more than information concerning the attitude of foreign governments which might or might not be accepted by our own Secretary of State.

1. The important question of law presented by the above statement is whether any damages can be recovered or any action brought in this court for the ejection of plaintiff from its plantation and the seizure of its personal property. Plaintiff asserts as the first step in establishing its demands that this court must hold that the property was in Panama; that being established, the seizure and ejection becomes as unauthorized as the acts of a sheriff outside his bailiwick when armed only with local process; and it follows that defendant as a joint tort-feasor is liable equally with the offending Costa Ricans. Let it be assumed that a tort was committed; that such tort is within the purview of section 7 of the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), that both this defendant and the Costa Rican officials would be liable to civil suits were such tortious act committed in the United States, and that the cause of action is transitory—the inquiry still remains, who actually deprived plaintiff of its property? The answer is clear—the Republic of Costa Rico, by either originally directing or subsequently ratifying the acts of certain executive officers. The ratification is equivalent to prior authorization, on which point *Buron v. Denman*, 2 Ex. 167, is sufficient authority. This case was not overruled or doubted in *Baird v. Walker* [L. R. 1892] App. Cases, 491. The sole question in this later judgment was whether an officer of the crown could by

virtue of some treaty obligation entered into after another subject acquired property rights destroy such fellow subject's property without being answerable therefor. If the act complained of was done by Costa Rico, it is of no moment that the defendant and that republic were joint tort-feasors. There was but one tort, and if one offender can be sued, it is of the essence of the doctrine that the other must be equally suable. But neither Costa Rico nor its officers could be brought into our courts, for reasons fully and forcibly set forth by Wallace, J., in *Underhill v. Hernandez*, 65 Fed. 581, 13 C. C. A. 51, 38 L. R. A. 405, affirmed 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456.

No opinion is here expressed as to whether the cause of action be local or not, or whether within the reasonable interpretation of section 7 the act of seizure was "anything forbidden or declared to be unlawful" by the Sherman act. The case last cited renders the plaintiff's claim untenable by civil action in any American court, and on grounds of the highest public policy. It is impossible to adjudicate this matter without sitting in judgment on the right of Costa Rico to do what was done. The defendant's malice, intention, or expected profit is no more important than are similar considerations in an action for false arrest—before the illegality of the arrest be demonstrated. There, as here, it is of the essence of the court's jurisdictional power to determine the validity and legality of the governmental action out of which the suit grows; and this court has no power to sit in judgment on the validity or legality of the act of any sovereign independent nation.

2. The complainant specifically demands as damages prospective profits—profits that would have flowed from the uninterrupted enjoyment of its plantation and railway, and to be obtained by harvesting (in years after 1904) its ripened crops, exporting the same to the United States, and there selling bananas without the monopolistic oppression or competition of defendant. If this court cannot give judgment on the validity of the original taking of the plantation, it certainly cannot award damages for the result of the taking. But apart from that difficulty, it appears that never did plaintiff enjoy or possess any trade or commerce in bananas from the plantation in question; and, remembering that this is an action under the Sherman law, I remain of the opinion that that statute gives no right of action to one who is not deprived of his existing profits, trade, or commerce by the formation or action of an unlawful combination or monopoly, but merely prevented from embarking upon a new enterprise by the threatening aspect of an already existing monopoly or combination. *Thomson v. Union Castle S. S. Co.* (C. C.) 149 Fed. 933. And this is in accord with the general rule of speculative damages, especially in actions of tort. *Dudley v. Briggs*, 141 Mass. 582, 6 N. E. 717, 55 Am. Rep. 494. A citizen who finds a desirable avenue of business activity closed, for reasons obnoxious to the Sherman act may pray the department of justice to remove the unlawful obstruction; but he has suffered no actual pecuniary damage by being thwarted in what he would like to do at some future time.

3. Plaintiff further shows that the banana market of Central America, or some portion thereof, has been closed to it because defendant offered higher prices to producers than did any one else, and so obtained long contracts for the exclusive purchase of their product. I fail to see that this procedure, so beneficial to the producer is obnoxious to any section of the statute in question, even if the transactions occurred in the United States. It is still more difficult to conceive how a procedure which affects only bananas growing in Central America can be said to be affected by any law passed in pursuance of a power to regulate commerce with foreign nations and between the several states.

4. It is further shown that defendant has enticed or sought to entice away plaintiff's employes, and oppressed, or sought to oppress, such of its own employes as presumed to buy stock in plaintiff's company. These proceedings, however unfair and immoral, are not in and of themselves forbidden or declared to be unlawful by the Sherman act, and I do not think that a cause of action can be built upon these acts alone. I cannot regard it as more than a statement of evidence, which may well be used in explaining or proving the operation if not the formation of the alleged combination and monopoly.

5. Plaintiff's case finally rests upon the statement that defendant's transportation line, while acting as a common carrier, discriminated against plaintiff. The really serious question raised by this motion should in fairness have been long ago presented by demurrer, and on this motion plaintiff is entitled to great laxity in interpreting its pleadings. Regarded as an independent cause of action, I greatly doubt whether it is sufficiently pleaded. Yet it is true that although the plaintiff never harvested nor exported bananas, it had a business by way of preparation. It expended considerable money in its Central American plant; it was engaged in foreign commerce when it began to move men, material, and supplies to and from the United States and Central American ports; and if the plaintiff so elects I will hear testimony on this point.

This opinion is filed several days before March 9th in order that counsel may have an opportunity to consider it, and decide before the opening of court on that day whether, inasmuch as rulings in accordance herewith will exclude from the consideration of the jury the substantial case which plaintiff intended to present, it be not advisable to permit judgment to go for the defendant, that the correctness of the views here expressed may be tested in the appellate court promptly and at small expense.

NOTE.—Upon resumption of the trial on March 9th, plaintiff withdrew its claim for damages arising from defendant's refusal to transport goods at fair rates, and thereupon judgment dismissing the complaint passed in favor of defendant.

COOPER v. NEWTON.

(Circuit Court, S. D. Georgia, N. E. D. February 3, 1908.)

1. COURTS—FEDERAL COURTS—ANCILLARY JURISDICTION—AMOUNT IN CONTROVERSY.

Where a federal court had jurisdiction of proceedings for the dissolution of a building and loan association, it had jurisdiction of an ancillary suit by the association's receiver for an accounting and foreclosure of a deed made to secure a loan to a borrowing member, though the amount due was less than \$2,000.

[Ed. Note.—For cases point, see Cent. Dig. vol. 13, Courts, §§ 799-801.

Supplementary and ancillary proceedings and relief in federal courts, see note to *Bedford Quarries Co. v. Thomlinson*, 36 C. C. A. 276.]

2. BUILDING AND LOAN ASSOCIATIONS—BORROWING MEMBERS—CONTRACTS—CONSTRUCTION—"LOAN"—"INSTALLMENTS."

Where the note of a borrowing member of a building and loan association contained the words "monthly installments on said share," but no reference indicated an agreement to apply such installments on the member's loan, and the deed to secure the loan was conditioned on the payment of the "loan" and of "installments on certain shares," referring to the principal debt covered by the note both as a "loan upon 18 membership shares," the terms "loan" and "installments" were not used synonymously.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Building and Loan Associations, §§ 61, 62.

For other definitions, see *Words and Phrases*, vol. 5, pp. 4196-4200.]

3. SAME—INSOLVENCY—SETTLEMENT—APPLICATION OF PAYMENTS.

Intestate subscribed for \$900 of the stock of a building and loan association, and at the same time obtained by a pledge of the stock a loan equal to the par value thereof, giving a deed to certain real estate as security for the loan. She also agreed to pay interest at 5 per cent. and 5 per cent. premium, the note providing for monthly payments of 5 per cent. per annum, and containing an assignment of the shares of stock as security for the payment "of the monthly installments of said shares, interest and premium required," and, in case of default in the payment of such installments, interest, premiums, or fines for a period of three months, the association might forfeit the shares. *Held*, that the contract for the purchase of the shares was distinct from the loan, so that, on the association's insolvency, intestate's administrator was not entitled to have all intestate's payments on her share apply in payment of the loan.

4. SAME—ACCOUNTING—BILL.

Where a bill by a receiver of a building and loan association for an accounting against the administrator of a borrowing member showed an indebtedness with interest and premiums due on October, 1902, of \$1,605, on which indebtedness the payment of monthly installments of interest and premiums together amounted only to \$1,267.50, the bill sufficiently showed an indebtedness to the association, regardless of the question of the application of payments.

In Equity.

Ellis, Wimbish & Ellis and William H. Barrett, for complainant.
W. K. Miller and Salem Dutcher, for defendant.

SPEER, District Judge. The questions here arise upon a demurrer to a bill in equity by the receiver of the Southern Building & Loan Association against the administrator of Mary F. Butts, deceased. Original proceedings for the dissolution of the association were filed in the Northern District of Alabama, and, shortly after, an

ancillary bill was brought in this court, and the receiver under the original bill was reappointed for the collection of assets in this district. This bill is for an accounting against the estate of the decedent "on account of a loan, or advance made by said association to her, a member of said association, holding eighteen shares" of its capital stock. Mary F. Butts, it is alleged, on December 21, 1894, subscribed for 18 shares of capital stock, of the par value of \$50 each, and on the same date also made application to the directors of the association "for a loan or advance" of \$900, offering to pledge as security her shares of stock and the real estate which the receiver now seeks to subject. The loan was made, and on March 1, 1895, was consummated by the decedent's execution of a bond or promissory note, and a deed to secure the same. The note was made payable at the office of the association in Huntsville, Ala. It provided for monthly payments at 5 per cent. per annum, and assigned the shares of stock as security for the payment "of the monthly installments on said shares, interest and premium required." In case of "default in the payment of said installments, interests, premiums, or fines" for a period of three months, it was further stipulated that the association might cancel and forfeit the shares. The bill further alleges that the testatrix on this indebtedness "paid 33 monthly installments on account of the dues on her said shares, amounting to \$5.40 each, being 30 cents per month on each of the 18 shares represented by certificate No. 11,005 issued by said association, the first of said payments covering for the month of February, 1895, and the last covering for the month of October, 1897"; that, in addition, she "made 61 payments of monthly dues, amounting to \$6.30 each, being 35 cents per month on each of the 18 shares represented by said certificate No. 11,005"; and that she also "paid the interest and premium on account of said indebtedness from the date of the first payment of dues to the date of the last payment." The receiver therefore claims a lien upon the certificate of stock, and charges that the whole sum of \$900 is now due and payable, with interest from October 30, 1902, the date of the final payment. The bill prays for an accounting before a special master, and, if the sum found to be due is not paid, that the property in Augusta covered by the deed shall be sold for its satisfaction. A general and special demurrer has been filed by the defendant, the grounds of the former being: (1) want of equity; (2) vagueness, indefiniteness, and contradiction in the allegations, not properly apprising the defendant with reasonable certainty of the claim or demand; and (3) failure to allege any default in the payments at the time of filing the bill, at the death of the testatrix, or when the association went into the hands of a receiver, and also when the default occurred and the amount then due. The defendant insists that the bill on its face shows that the debt has been fully paid, and that it should therefore be dismissed as without basis for a foreclosure of the property.

As the question of jurisdiction is raised by the special demurrer, it will be disposed of before proceeding to the vital issues raised by the general demurrer. The defendant contends that, because the suit is for less than \$2,000, jurisdiction cannot be taken. It is, however,

well settled by the rulings of the Supreme Court that where a court, under a proceeding in equity, assumes administration of the affairs of an insolvent corporation, and appoints a receiver, its jurisdiction is complete for all essential purposes and all parties interested. *White v. Ewing*, 159 U. S. 39, 15 Sup. Ct. 1018, 40 L. Ed. 67. In the case of *Porter v. Sabin*, 149 U. S. 473, 479, 13 Sup. Ct. 1008, 37 L. Ed. 815, where the lower court obtained original jurisdiction by the filing of a creditors' bill, and a receiver was appointed, it was held that:

"Any suit by or against such receiver, in the course of the winding up of such corporation, whether for the collection of its assets, or for the defense of its property rights, must be regarded as ancillary to the main suit, and as cognizable in the Circuit Court, regardless either of the citizenship of the parties, or of the amount in controversy."

"The jurisdiction," said the Supreme Court, "does not materially differ from that of the District Court in bankruptcy, the right of which to collect the assets of a bankrupt estate we do not understand ever to have been doubted." To the same effect are *Freeman v. Howe*, 24 How. 460, 16 L. Ed. 749; *Alexander v. Southern Home Bldg. & Loan Ass'n (C. C.)* 120 Fed. 963; *Armstrong v. Trautman (C. C.)* 36 Fed. 275; *Price v. Abbott (C. C.)* 17 Fed. 506. Since this court has assumed ancillary jurisdiction for the collection of all assets of the association found in this district, it makes no difference so long as the property is here, what the amount of the indebtedness may be.

The issue made by the general demurrer is, however, not so readily determinable. There is no more vexed question, nor one on which the courts have expressed a greater contrariety of opinion, than that which fixes the relationship of a borrowing stockholder to a building and loan association. The nature and purposes of these institutions have been defined in a recent case by the Supreme Court of Georgia, as follows:

"A private corporation designed for the purpose of accumulating into its treasury, by means of the gradual payment by its members of their stock subscriptions in periodical installments, a fund to be invested from time to time in advances made to such shareholders on their stock as may apply for this privilege on approved security; the borrowing members paying interest and a premium for this preference in securing an advancement over other members, and continuing to pay the regular installments on their stock in addition; all of which funds, together with payments made by the nonborrowing members, including fines, forfeitures, and other like revenues, go into the common fund. until it, with the profits thereon, aggregates the face value of all the shares in the association, the legal effect of which is to extinguish the liability incurred for the loans and advancements, and to distribute to each nonborrowing member the par value of his stock."

Cook v. Equitable Bldg. & Loan Ass'n, 104 Ga. 814, 30 S. E. 916. Other definitions may be found in *Thompson on Bldg. & Loan Associations*, § 2; *Endlich on Bldg. Associations*, § 16. These organizations were originated, according to the earliest authentic information, in 1815 by the Earl of Selkirk in Scotland. The experiment, which seems to have proceeded solely from the benevolent motives of the founder, was very successful and popular with the industrial classes. They were early extended to Great Britain, and existed there in the form of joint-stock companies, until Parliament in 1836 passed an act facilitating their operation. About that date we find them also in

America, where for some time they had flourished as private and unincorporated enterprises. Contemporaneously with the act of Parliament, a regular association was organized in Brooklyn, N. Y., and their extension throughout the country was then very rapid. Unhappily, however, their real or apparent benefits began to be somewhat tainted with those evils which have aroused the severe criticism of modern economists. This appears from an opinion of Chief Justice Lumpkin, rendered in 1857, in *Bibb County Loan Association v. Richards*, 21 Ga. 596. There the learned Chief Justice somewhat naively declared:

"Whether they will continue to be entitled to the epithet of the 'poor man's exchequer,' and whether they will, as they promise to do, enable every man to become his own landlord, will depend entirely upon the manner in which they conduct their business. Under existing regulations, I have been led seriously to doubt this, * * * but I here dismiss these preliminary observations, leaving the utility and danger of these building and loan associations to puzzle wiser heads than mine, as they have done hitherto."

Under the allegations of the bill before the court, Mary F. Butts paid to the Southern Building & Loan Association the sum of \$1,267.50. She made no default in the payment of the installments on her shares of stock, or the interest and premiums on her loan. The association having failed in its purpose by its insolvency, the bill is filed solely to fix the relative liabilities of the complainant and the defendant in its dissolution. By the latter it is insisted that his testatrix, Mary F. Butts, is entitled to a credit of all the 94 monthly installments, aggregating the sum of \$562.50, upon the principal sum of \$900 borrowed. But the complainant claims that these payments, by the terms of the contract, were applicable only to the amount due on the 18 shares of stock, and that the principal sum remains unpaid, with interest from October 1, 1902, the date of the last payment. This controverted question may be briefly resolved into the inquiry, whether or not the payments of \$5.40 and \$6.30 each month, besides those of \$3.75 each for interest and premium on the loan, operated ipso facto to extinguish the loan secured by the mortgage. In other words, did the contract of membership as a stockholder in the association, created by the testatrix's subscription to 18 shares of its stock at \$50 a share, merge into her subsequent contract of loan, whereby she obtained for 5 per cent. interest and a 5 per cent. bonus or premium an advancement of the par value of her stock, and pledged that stock and her real estate for its repayment? If we can assume from the allegations of the bill, and the copies of the contracts attached, that it was the purpose of the parties that the two transactions should be identical, this ground of the demurrer must be sustained. But that this was their express intent is by no means clear from the language of the instruments. In the note, we find the words "monthly installments on said shares," and no reference whatever to clearly indicate the application of such installments to the \$900 loan. The deed is conditioned on the payment of the "loan" and of "installments on said shares." It refers to the principal debt covered by the note both as a "loan upon 18 membership shares," and as "installments on said shares." We are not then at liberty to assume that the "loan" and the "installments" were

synonymous, and, not finding this in any express intention of the parties, we must look to the general doctrines which the law applies to these associations to determine whether or not such a construction is obligatory or proper. Some courts hold that the borrowing upon his shares of stock by a member is a simple loan. Other courts treat it as a dealing in partnership funds. Others construe it as an advance on the stock in process of liquidation, and others still, as a mere sale of the shares to the association. 6 Cyc. 144. From this contrariety of judicial opinion, Mr. Endlich in his recent work on the subject reaches this conclusion:

"An examination of the foregoing decisions would seem to justify the conclusion that the clear weight of judicial authority declines to look upon the transaction between a building association and its advanced member as constituting a loan pure and simple. At the same time the conflict between those decisions emphasizes the impossibility of declaring that transaction a mere dealing in partnership funds to the total exclusion of the idea of a loan. The truth can lie in neither of the extremes represented. It may perhaps be found most nearly accurate to say that the transaction is a loan, the terms of which are so vitally affected by the debtor's membership relation to the creditor society, in the source and profits of which the debtor has himself such a substantial interest, and the extent of his ultimate liability upon which is so contingent and uncertain at the time of its creation, that it is impossible to apply to it, in its essential features, the rules of common or statute law defining the limits of what may be bindingly assumed and lawfully exacted in ordinary transactions of borrowing and lending." Endlich on Building Associations, 327.

The legal effect of the insolvency of a building association is to terminate all of its contracts with its members. The object of the association is to accumulate a fund from the payments on shares, premiums, fines, and forfeitures, until it shall equal the par value of the shares subscribed by its members. When this is attained (generally within a time estimated by the association), the liability of all members for further payments ceases, and the same result occurs when the object is prematurely defeated by insolvency. 6 Cyc. 136. So far as a mortgage is given to insure the payment for stock, the obligation then is abrogated by the destruction of the stock and the society. Endlich on Bldg. Associations, 116, 118. While this is true, the member is not released from his liability to pay the balance of the sum he actually borrowed on his security, and the members must ratably contribute to the debts and losses of the association before they will be entitled to any surplus from their payments. *Miles v. New South Bldg. & Loan Ass'n* (C. C.) 111 Fed. 946. Upon the question of what credit shall be allowed for these payments, we find a contrariety of authority not unlike that we have discussed. The courts of last resort in the states of California, Maryland, Massachusetts, North Carolina, South Carolina, South Dakota, Utah, and Washington have held that such payments should be so credited. On the other hand, the courts of Alabama, Arkansas, Illinois, Iowa, Kansas, Missouri, Nebraska, New Jersey, Ohio, Pennsylvania, Tennessee, and Texas, and the national courts, hold that payments on stock are not ipso facto payments on the loan, and do not operate pro tanto to extinguish it. 6 Cyc. 154, 155, and cases cited. The authorities, however, preponderate to the effect that the parties must be held to the

terms of their contracts, where there appears no explicit intention to merge the indebtedness on the stock into the loan. In *Manship v. New South Bldg. & Loan Ass'n* (C. C.) 110 Fed. 845, Judge Niles states the principle in the following language:

"* * * The failure to recognize the dual relation which a borrowing member of a building and loan association sustains to the association as an investor in and a borrower from the same, and a further failure to recognize the rights of parties 'of full age and compos mentis' * * * to enter into contracts and be bound thereby, have been the fruitful source of the various opinions of the courts of the country, which have refused to recognize anything in the contract of a borrowing member from a building and loan association except the loan of money pure and simple. The arbitrary appropriation of premiums and stock payments to the liquidation of the debt of a borrowing member * * * in a contract which is plainly written and easily understood, in direct contravention of the undisputed terms of the contract, is unjustifiable."

Under the laws of Maryland, it was held in *Coltrane v. Baltimore Bldg. & Loan Ass'n* (C. C.) 110 Fed. 281, that losses of an association cannot be charged to a borrowing stockholder for contribution upon its dissolution, but he is entitled to credit on his loan the full amount paid for his stock. This decision was, however, modified on appeal by the Fourth Circuit Court of Appeals, in *Coltrane v. Blake*, 113 Fed. 785, 51 C. C. A. 457, where the conclusion of the learned district judge was discussed as follows:

"This conclusion confuses the obligation of two entirely distinct contracts. In subscribing to the stock, the shareholder binds himself to pay the subscription, either in cash at once, or in installments, called dues. * * * Having become a stockholder, he then gets an advance from the common fund. This is another, and an entirely distinct, contract, based upon an entirely distinct consideration. * * * Payments on stock are not payments on the mortgage debt, and do not ipso facto work an extinguishment of so much of the mortgage."

The court then holds that each member, as a stockholder, "has the right to participate according to the amount of his stock in the surplus assets of the corporation on a division, and ultimately, on its dissolution, in the assets remaining after payment of its debts," and states the equitable reason of this rule, as follows:

"The capital stock of a building and loan association is composed of the subscriptions to it either by cash or by dues. If any part of these dues is diverted from the claims of creditors generally, and is used for the benefit of a single stockholder by way of credit on a debt due by him to the corporation, it is a misuse of trust funds, and so unlawful."

We have, moreover, upon this question a series of direct adjudications by the Circuit Court of Appeals for this circuit, beginning with the case of *Andruss v. People's Bldg. & Loan Ass'n*, 94 Fed. 575, 36 C. C. A. 336, where Judge Shelby for the court observed:

"The claim of the appellant * * * that he is entitled to credit on his bond for borrowed money, on account of the payments he made on his subscription for stock, cannot be sustained. He was a subscriber for stock in the association, and he was under contract to pay for it just as any other stockholder. Payments on the stock, his stock being forfeited under the rules of the association, cannot be applied to his debt on account of the loan."

Again, in *Hieronimus v. New York Nat. Bldg. & Loan Ass'n*, 107 Fed. 1005, 46 C. C. A. 684, this rule was reiterated by Judge McCor-

mick, and in the recent case of *Cooper v. Brazelton*, 135 Fed. 476, 58 C. C. A. 188, by a unanimous court (Judge Meek rendering the opinion) it was held:

"Appellees contend that they are entitled to credit on their bond of the amount paid by Brazelton on his stock subscription, that B. did not desire to become a bona fide shareholder in the association, and was compelled to subscribe for shares in order to secure a part of the loan or advance made on his behalf. This contention cannot be upheld. The subscription to the stock by B., and the subsequent loan or advance of money on his behalf were two separate and independent transactions, and he cannot be heard to deny the validity or effectiveness of legal contracts entered into by him. It is neither alleged nor attempted to be shown that any fraud was perpetrated upon him, as that he is non compos mentis, and therefore he must be held to a performance of his contracts. * * *"

See, also, *Douglass v. Kavanaugh*, 90 Fed. 373, 33 C. C. A. 107; *Towle v. American Bldg. Society* (C. C.) 61 Fed. 446; *Tilley v. American Bldg. & Loan Ass'n* (C. C.) 52 Fed. 618; *Alexander v. Southern Home Bldg. & Loan Ass'n* (C. C.) 120 Fed. 963; *Interstate Bldg. & Loan Ass'n v. Edgefield Hotel Co.* (C. C.) 120 Fed. 422; *Manorita v. Fidelity Trust & Loan Co.* (C. C.) 101 Fed. 8; *Pattison v. Bldg. & Loan Ass'n*, 63 Ga. 373; *Goodrich v. City Loan Ass'n*, 54 Ga. 98; *City Loan Ass'n v. Goodrich*, 48 Ga. 446.

By the terms of her contracts, Mary F. Butts subscribed to \$900 of the stock of the Southern Building & Loan Association. This is a distinct liability. In addition, by note and deed to secure the same, she became obliged to pay her \$900 loan thereon, with interest and premium. It is not contended that the payments of 5 per cent. interest, and 5 per cent. premium for the loan, were usurious, or that the insolvent corporation was not a bona fide building and loan association, nor is it claimed that the transactions alleged were the cloak for any fraud practiced upon the defendant's testatrix. In the absence of any pleading, or proof to this effect, we must hold that the defendant's testatrix was bound by her stipulations in the note and bond executed to the association, that there is no apparent intention of the parties to apply the payments of monthly installments to reduce the principal of the loan, and that by no justifiable construction can these payments be held so applicable. Even were this not true, the dependent contention of the defendant that the bill shows on its face a full satisfaction of the debt must fail. The amount of the \$900 loan, borrowed on March 1, 1895, with the interest and premiums at 5 per cent. each, due to October, 1902, was \$1,605. On this indebtedness the payments of monthly installments, interest, and premiums amounted to only \$1,267.50. Without regard, therefore, to the questions hereinbefore discussed, there is upon the face of the bill a balance due the association, which in equitable contemplation maintains the bill. Nor is there merit in the ground of the general demurrer which sets out the failure of the complainant to allege any default in the defendant's payments. The bill shows an indebtedness by a member to the association. This being true, the gist of the bill is the insolvency and dissolution of the corporation, and the prayer for determination by an accounting before a master of the mutual rights and liabilities of the association and the member.

Other grounds of the demurrer are not deemed of consequence. For the reasons stated, both the general and special demurrers must be overruled. Orders may be taken accordingly.

In re GIRVIN.

(District Court, N. D. New York. March 12, 1908.)

1. LIMITATION OF ACTIONS—"MUTUAL, OPEN, AND CURRENT ACCOUNT."

An account of loans between the lender and the borrowing firm, kept on the firm's books or on slips of paper, did not constitute a "mutual, open, and current account," within Code Civ. Proc. N. Y. § 386, providing that in an action to recover a balance due on a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action was deemed to have accrued from the time of the last item proved in the account on either side.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 137, 296.]

For other definitions, see Words and Phrases, vol. 5, p. 4647.]

2. SAME—"MUTUAL ACCOUNT."

A current account kept by a husband of his transactions with his wife's money does not constitute a "mutual account," nor is an account mutual where it simply contains items of money received and paid, nor one in which there were but three items of credit during a period of five years; cash items being also held to form no part of a mutual, open, and running account.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 137, 296.]

For other definitions, see Words and Phrases, vol. 5, pp. 4646, 4647.]

3. SAME—DEMAND LOANS—STARTING OF LIMITATION.

Where several demand loans were made by a wife to a firm of which her husband was a member, limitations ran from the date of each loan.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 259-265.]

4. SAME—SUSPENSION OF LIMITATIONS—PART PAYMENT.

A part payment, to be effectual to interrupt limitations, must not only be voluntary and free from any uncertainty as to identification of the debt on which it is made, but it must also be made as a payment on a larger debt, and be so accepted by the creditor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 632, 634.]

5. SAME—OUTLAWED CLAIMS—PAYMENT—APPLICATION.

Claimant made several loans of money to a firm of which her husband was a member, between September, 1896, and October, 1904, aggregating \$10,786.32. Each loan was a separate and distinct transaction, payable on demand; the account being kept on slips of paper and on books of the firm in its business office. After a large part of the loan had become barred by limitations, the husband, without any request from his wife, paid a debt of \$1,000 for her, and told her at the time he had charged it to her account; but there was no agreement as to what loans it should be applied to pay. *Held*, that such payment did not constitute a recognition of the outlawed claims, nor a promise to pay them, and should be applied in payment of the remaining loans, against which the statute had not run.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 642, 643.]

6. BANKRUPTCY—CLAIMS—PROOF—DISCLOSURE OF CREDITS.

Where a claimant against a bankrupt had received \$1,000 on account of loans made to the bankrupt, but such payment was not disclosed by the claimant's verified proofs of claim, which expressly stated that no part of the debt had been paid, claimant thereby violated Bankr. Act July 1, 1898, c. 541, § 57, subd. "a," 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], declaring that proof of claims shall be by written statement under oath, signed by the creditor, setting forth the claim, etc., and what, if any, payments had been made thereon.

In Bankruptcy. Review of order of referee allowing claim of Fannie W. Girvin, wife of the bankrupt, for money loaned at different times, at the sum of \$10,630.82. The trustee and objecting creditor denies the indebtedness and says most of it is barred by the statute of limitations.

Edward F. Shea, for trustee.

Carl E. Dorr, for objecting creditor.

Edwin Nottingham, for claimant.

RAY, District Judge. While there are many facts and circumstances tending to show that the claimant, Fannie W. Girvin, has no valid claim whatever against the estate of the bankrupt, I am disposed not to disturb the finding of the referee, who saw the witnesses, that she loaned money to her husband, James E. Girvin, and a partner (a limited partnership), at the times and in the amounts specified. These loans were at different dates, in different amounts, and with the agreement that interest at 6 per cent. should be paid. The firm opened no account with claimant on its books, but kept the dates and amounts of these loans on a slip or slips of paper, except the amount of six checks, for \$500 each, given by claimant to James E. Girvin. The first loan was the sum of \$100, in September, 1896, and on October 20, 1904, the aggregate of the loans, exclusive of interest, was \$10,786.32, as shown by the finding of the referee. Thereafter there were loans of \$75, December 31, 1903, and \$5.50, October 20, 1904. Each loan was a separate and distinct indebtedness or claim, each was due on demand, each drew interest from its date under the agreement, and the statute of limitations ran as against each loan from its date. The evidence is that these were debts of the firm, and so understood and carried, not in the books, but upon these slips. Six checks, of \$500 each, were not on these slips.

February 28, 1898, Girvin added up the amount of these loans to that date, exclusive of interest, and entered the total on one of the books of the firm to the credit of the claimant, Fannie W. Girvin. This total was \$6,886.32. She had no other account with the firm. October 20, 1904, he added up certain of the other loans, exclusive of any interest, and entered the total of same in said book of the firm to the credit of claimant, viz., \$3,900. Subsequently said James E. Girvin showed these entries to his wife, the claimant, and stated, in substance, that this was the account of the amount owing her by the firm. There was no accounting or figuring up between them, and there is no evidence anything further was said or done. There was no credit of interest. Confessedly these aggregates entered on the books did

not show the amount due under this agreement for the loans, as interest accrued and due on demand was not included. As all that was said was merely a statement by the debtor to the creditor that this was the account between the firm and her, I do not think it became an account stated and settled, or that it constituted a waiver of the interest. It was done to show the wife that an account was being kept. I think the rights of Fannie W. Girvin were in no way changed or modified by this transaction or exhibition of these entries, to the making of which she was not a party. It is not shown she assented to what her husband said, or to the correctness of the account. October 27, 1904, the said partnership was dissolved, and Girvin assumed all its debts and obligations, and became individually liable to pay the indebtedness. The firm or partnership was not released.

Fannie W. Girvin owed one Warren H. Girvin, on a promissory note made by her, the sum of \$1,000. Of this fact her husband was cognizant. October 28, or November 1, 1905, James E. Girvin paid this note. Payment was not demanded, and there was no request on the part of the claimant here, Fannie W. Girvin, that he should pay it. However, it appears that on several occasions James E. Girvin told his wife that he expected to pay it very shortly. On this subject the evidence of the husband is:

"I paid for her that \$1,000 note. Q. What, if anything, had you said to her about paying that note for her prior to this time that you made the payment? A. From time to time, during a period of two or three years, I had said that very shortly I expected to pay the note. Q. What note? A. The \$1,000 note that Mr. Girvin held against my wife. Q. And did you say anything to her at the time you paid the note, about having paid it? A. Shortly after. Q. What did you say? A. I told her that I had paid the \$1,000 note that my brother held against her, and charged it to her account in the store, and showed her the note canceled. Q. Did she say anything? A. I don't recall what she said."

The wife says her husband simply showed her the note and told her he had charged it to her on her account. She said nothing. In fact, it was charged to her in the firm book referred to on the debit side: "Fannie W. Girvin, \$1,000." There was no other payment made on these loans, or either of them.

The trustee and objecting creditor set up the statute of limitations, state of New York, as a bar to so much of this claim as had accrued due more than six years prior to the adjudication in bankruptcy, which was on the 6th day of March, 1906. This would cover all items of the claim prior to March 5, 1900. Between February 15, 1899, and October 31, 1903, no loans were made, or, if made, they were not put on the slips or books. The loans after February 15, 1899, and commencing October 31, 1903, were as follows: October 31st, \$500; October 31st, \$500; December 17th, \$500. In 1904: March 17th, \$500; April 12th, \$500; July 8th, \$500; and after that items aggregating \$900, or \$3,900 in all. This is the second aggregate amount carried to the firm book; but of this only \$819.50 comes from any slip or memoranda, and does not include either of said checks. I find no evidence of an agreement or understanding to pay interest on these loans evidenced by these checks. It would seem they were temporary loans, if loans at all.

The trustee and creditor objecting says the payment of the note of Mrs. Girvin, made by James E. Girvin, and charged to her on the book, must apply on these items of indebtedness incurred subsequent to February 15, 1899, and commencing October 31, 1903, and that it cannot be treated or regarded as a payment made to apply on the prior, stale, and outlawed items of indebtedness; that is, cannot be used as an acknowledgment of the continued existence of same as valid debts or claims, sufficient to take same from the operation of the statute. They insist there is no evidence of an agreement or understanding the payment of the note should so apply, and that in the absence of such evidence the payment of the note and entry on the book were ineffectual to remove the bar of the statute.

Sections 380 and 382 of the Code of Civil Procedure of the state of New York (1 Bliss' N. Y. Ann. Code [5th Ed.] pp. 225, 227) provides as follows:

"Sec. 380. The following actions must be commenced within the following periods after the cause of action has accrued: * * *

"Sec. 382. Within six years: (1) An action upon a contract obligation or liability, express or implied; except a judgment or sealed instrument. * * *

This bars all remedy, unless there is an acknowledgment of the debt or a new promise, which must be in writing and signed by the party to be charged thereby, or a payment thereon of principal or interest.

Section 395, Code of Civil Procedure, reads as follows:

"An acknowledgment or promise, contained in a writing signed by the party to be charged thereby, is the only competent evidence of a new or continuing contract, whereby to take a case out of the operation of this title. But this section does not alter the effect of a payment of principal or interest."

Before considering the effect of the payment of said note by Girvin, it is well to dispose of another section of the Code (section 386) which reads as follows:

"Sec. 386. In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side."

This account between the firm and this claimant, Mrs. Girvin, kept on the books or slips, did not constitute it a mutual, open, and current account. *Adams v. Olin*, 140 N. Y. 150, 35 N. E. 448; *Matter of Gladke*, 45 App. Div. 625, 60 N. Y. Supp. 869; *Green v. Disbrow*, 79 N. Y. 1, 35 Am. Rep. 496; *Compton v. Bowns*, 5 Misc. Rep. 213, 25 N. Y. Supp. 465; *Raux v. Brand*, 90 N. Y. 309. Thus a current account kept by a husband of his transactions with his wife's money does not constitute a mutual account; and an account simply containing items of moneys received and paid is not a mutual, open, and current account within this section. *Adams v. Olin*, 140 N. Y. 150, 35 N. E. 448. An account upon which but three items of credit appear in five years is not a mutual, open, and running account. *Matter of Gladke*, 45 App. Div. 625, 60 N. Y. Supp. 869. Cash items form no

part of a mutual, open, and running account. *Raux v. Brand*, 90 N. Y. 309.

We have, therefore, several separate and distinct loans of money, on interest, made at different dates, and one payment credited to Girvin by himself, which he made for his creditor without her request, but of which she was informed, with a statement that he had charged it to her in her account. There was no agreement or statement on what items of indebtedness or on which loans it should apply as a payment, and it was not apportioned, and the account where it was credited did not show the several loans or the amounts thereof separately. Some—the most—of these items of indebtedness were then barred by the statute of limitations. There were new and recent loans, not affected by the statute, against which in no event had the statute run. Is this payment of \$1,000 to be apportioned pro rata to all of these various items, those accruing due before the statute commenced to run, as well as those which came due thereafter, or to those which accrued due thereafter, or is it to be applied on extinguishment of the latest loans? The decisions in the state of New York, as well as elsewhere, seem to settle the question beyond all serious controversy. Being payable on demand, they were due at once, and the statute of limitations ran from the date of each loan. *Wheeler v. Warner*, 47 N. Y. 519, 7 Am. Rep. 478; *Dolan v. Mitchell*, 39 App. Div. 361, 57 N. Y. Supp. 157.

There are two ways to take a debt from the operation of the statute of limitations: (1) By an acknowledgment of the debt in writing, signed by the party to be charged; (2) by a part payment of the debt, principal or interest, which is held a recognition of the present existence of the debt, and of an existing present obligation to pay and a promise to pay is inferred. In either case "the general rule is that an acknowledgment or promise to pay, in order to take the debt out of the statute, must satisfactorily and certainly appear to refer to the very debt in question." 25 Cyc. 1330, and numerous cases there cited. "A part payment, to be effectual to interrupt the statute, must be voluntary and free from any uncertainty as to the identification of the debt on which it is made." 25 Cyc. 1371, and numerous cases there cited; *Crow v. Gleason*, 141 N. Y. 489, 36 N. E. 497; *Shafer v. Pratt*, 79 App. Div. 447, 80 N. Y. Supp. 109; *Barnes v. Pickett*, etc., 203 Pa. 570, op. 572, 53 Atl. 378; *Burdick v. Hicks*, 29 App. Div. 205, 51 N. Y. Supp. 789. "It must also be made as a part payment of a larger debt, and be so accepted by the creditor." Same cases.

In *Shafer v. Pratt*, *supra*, the opinion was written by Hiscock, J., now of the Court of Appeals, and was concurred in by the three other judges. There defendant was indebted to the plaintiff on four claims, and defendant knew he was so indebted thereon. Three of these claims were then barred by the statute of limitations. The creditor drew an order upon the defendant, his debtor, for a certain sum, \$24, with instructions, contained therein, to "charge same to my account." The defendant kept a book of account with plaintiff, and, having paid the order, testified that he charged the order to plaintiff; that is, pursuant to directions, he charged it to the account. The court said:

"The referee has refused to find that this was such a payment as would revive said claims. We think he was correct in this holding, there being no such evidence as was necessary of an intent upon the part of the defendant to have said payment applied to the claims made by plaintiff which were then outlawed and thereby revive them."

The syllabus of the case reads:

"Where a party, indebted to another upon four claims, honors an order for a sum of money which the creditor draws upon him with instructions to 'charge same to my account,' at a time when three of the claims are outlawed, and it does not appear to which claim the payment is applied by either the debtor or the creditor, such payment will not operate to revive the outlawed claims."

In the case now before this court there was no direction as to the application by any one, and no application of the payment was in fact made. It was simply placed on the book as a credit to the firm and a charge against the wife of one of its members, the creditor. Nothing was said between Mr. and Mrs. Girvin before the money was paid by Mr. Girvin to Warren H. Girvin, which was done without her request, or at the time; and we cannot properly infer that when Girvin made the payment it was done as a payment to the wife, or on her account, to apply on his indebtedness to her. There is not a scintilla of evidence to warrant such a conclusion. True, he thereafter charged her with the amount, and subsequently informed her that he had done so, and she neither assented nor dissented; but he neither said nor did anything that indicated he intended in presenti to apply the payment to any particular debt or to all the various loans pro tanto. The burden was on the claimant here to show that the payment made to Warren H. Girvin and assented to by silence was intended by James E. Girvin as a recognition of the outlawed claims and a promise to pay them. *Crow v. Gleason*, 141 N. Y. 489, 493-494, 36 N. E. 497; *Matteson et al. v. Palser et al.*, 56 App. Div. 91, 97, 67 N. Y. Supp. 612; *Wood on Limitations*, § 108; *Murphy v. Walsh*, 113 App. Div. 428, 99 N. Y. Supp. 346; *Greenwood v. Judson*, 109 App. Div. 398, 96 N. Y. Supp. 147.

In *Murphy v. Walsh*, supra, the court held:

"The burden is upon a creditor, relying upon a part payment to take a debt out of the statute of limitations, to show that the payment was made upon the particular debt, and was so accepted under circumstances indicating absolute acknowledgment by the debtor that the money was due."

In *Matteson v. Palser*, supra, the court held:

"The burden rests upon a party, seeking to charge another with an obligation claimed to be barred by the statute of limitations to show that the payments necessary to take the debt out of the statute were made by the party sought to be charged for his own account and with reference to that particular debt."

In *Greenwood v. Judson*, supra, the niece presented a claim against the estate of her uncle, much of which was outlawed, except for a continuous series of payments proved. It appeared that the claimant married and went away for a time, but returned. It was claimed that this return was under a new contract, and that the payments made subsequently to the return did not operate as a recognition of the claim for services rendered prior to that time; more than six years having

elapsed. Held (McLennan, P. J., dissenting), that the payments took the entire claim out of the statute, "as the proof showed that the contract was a continuing one." Hence it was treated as one of debt. The prevailing opinion demonstrates that the rules of law were stretched to their limit.

In *Adams v. Olin*, 140 N. Y. 150, 35 N. E. 448, it is held:

"In the absence of a written acknowledgment or promise to take a case out of the statute of limitations, and where a payment is relied upon for that purpose, to operate as such, it must appear that the alleged payment was a deliberate act of the debtor, evidencing or accompanied by some evidence of an intention on his part to thereby acknowledge the existence of the debt. Where it is uncertain whether the alleged payment was such in fact, or was an independent transaction between the parties, not connected with the old debt, no inference can properly be drawn therefrom of an admission thereby of the existence of that debt."

In *Crow v. Gleason*, 141 N. Y., at page 494, 36 N. E., at page 498, the court said:

"And, even if it be true that the defendant never made any particular direction as to how the payments should be applied, that is not sufficient to save the bar of the statute, unless the plaintiff can show that they were made by the defendant consciously to apply upon the whole account, and in recognition of the whole account."

In *Barnes v. Pickett, etc.*, 203 Pa., at page 572, 53 Atl., at page 379, the court said:

"No quality of the payment is more strictly required than that it shall be upon the very debt sued for. In *Burr v. Burr*, 26 Pa. 284, the leading case on the subject in Pennsylvania, it was said: 'The acknowledgment must not only be clear, distinct, and unequivocal of the existence of a debt; but it must also be plainly referable to the very debt upon which the action is based.' And in *Barclay's Appeal*, 64 Pa. 69, Sharswood, J., said: 'There can be no more unequivocal acknowledgment of a present existing debt than a payment on account of it; * * * but then it must plainly appear, and not be matter of conjecture merely, that the payment was made on account of the very debt which is in dispute.' See, further, as to the strictness of the identification required, *Landis v. Roth*, 100 Pa. 621, 1 Atl. 49, 58 Am. St. Rep. 747, and *Rosencrance v. Johnson*, 191 Pa. 520, 43 Atl. 360."

In *Ft. Scott v. Hickman*, 112 U. S., at page 163, 5 Sup. Ct., at page 63, 28 L. Ed. 636, the court said:

"Although an acknowledgment need not, under the Kansas statute, amount to a new promise, yet the rule is applicable that an acknowledgment cannot be regarded as an admission of indebtedness, where the accompanying circumstances are such as to repel that inference, or to leave it in doubt whether the party intended to prolong the time of legal limitation. *Roscoe v. Hale*, 7 Gray (Mass.) 274. * * * The settled doctrine in Kansas, and the weight of authority elsewhere is that statutes of limitation are statutes of repose, and not merely statutes of presumption of payment. Therefore, to deprive the debtor of a benefit of such a statute by an acknowledgment of indebtedness, there must be an acknowledgment to the creditor as to the particular claim, and it must be shown to have been intentional."

In *Camp v. Smith*, 63 Hun, 634, 18 N. Y. Supp. 523, a number of obligations existed, one of which was barred, and a general payment was made. Held not to take the outlawed one out of the operation of the statute.

In *Blair v. Lynch*, 105 N. Y. 638, 11 N. E. 949, it is said:

"The efficacy of a payment to avert the effect of the statute as a bar resides in the conscious and voluntary act of the debtor, explainable only as a recognition and confession of the existing liability."

In *Shepherd v. Thompson*, 122 U. S., at page 237, 7 Sup. Ct. 1232, 30 L. Ed. 1156, the court said:

"If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate, and if any conditions are annexed they ought to be shown to be performed."

If that be the rule as to a written promise, it is perfectly clear that, when the new promise is left to inference from a part payment, the evidence should be clear, explicit, unequivocal, and determinate that such payment was made to apply on the particular debt in question and with an intent to renew it.

At the time this note owing by the claimant was paid by James E. Girvin, October 28, 1905, and the amount charged to her, as stated, the account on the books of the firm showed two items or claims of hers against the firm, one of \$6,886.32, entered February 28, 1898, and clearly barred by the statute of limitations, and the other, for \$3,900, entered October 20, 1904, not barred. There had been a hiatus of over three years between the last of the loans making up the \$6,886.32 and the first of the loans making up the \$3,900, with no credit or payment whatever. When the credit to the firm of \$1,000, the payment of the note of Warren H. Girvin, and the charge to the claimant of that amount were made, not a word was said indicating that it was to apply on both of such amounts. It is just as probable, to say the least, that Girvin intended the \$1,000 to apply on the \$3,900 aggregate items, as that it should apply on both; and more so, as there can be no inference or presumption that it was to apply on both. The inference is the contrary, within all the cases. *Adams v. Olin*, 140 N. Y. 150, 35 N. E. 448; *Shafer v. Pratt*, 79 App. Div. 447, 80 N. Y. Supp. 109; *Blair v. Lynch*, 105 N. Y. 636, 638, 11 N. E. 947; *Bailey v. Crane*, 21 Pick. (Mass.) 323. To warrant an inference that Girvin intended to apply the \$1,000 generally on both these claims, as shown by the books, and thus revive the old and outlawed one, the law requires either direct proof, or proof of facts and circumstances, making that inference imperative, or at least proper and legitimate. Of such proof this case is utterly barren. It is just as consistent and probable that it was to apply on the \$3,900 as on the prior, stale, aggregated amount. In *Bailey v. Crane*, *supra*, the court said:

"An acknowledgment, to take a debt out of the statute, must satisfactorily appear to refer to the very debt in question."

It is also a fact of importance and significance that, when this claimant made out and presented her verified proofs of claim, she made no reference to any payment on account of these loans, the subject-matter of her claims, but, on the other hand, expressly stated therein that "no part of said debt has been paid," and scratched

out from the blank the word "except," indicating that payments, if any, were to be there inserted in the blank space left for the purpose. In this she violated the express provision and requirement of subdivision "a," § 57, of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]), which reads as follows:

"57. Proof and Allowance of Claims. (a) Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."

The claim as presented, so far as material, and so far as it specifies the claim itself, reads as follows:

"That James E. Girvin, the person by whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of fourteen thousand four hundred ninety-one and $\frac{18}{100}$ (\$14,491.18) dollars; that the consideration of said debt is as follows: Consideration for moneys loaned and advanced to bankrupt at divers times between and inclusive of the 12th day of September, 1896, and the 1st day of October, 1904, including interest on said amounts—that no part of said debt has been paid; that there are no set-offs or counterclaims to the same."

After the year in which proofs of claim were to be filed under the provision of law, she was permitted, against objections, to amend by filing an unverified statement, in the nature of a bill of particulars, in which the alleged payment was mentioned. In substance and effect this made a new and a different claim, presented after the expiration of one year from the adjudication and appointment of a trustee. It is an important fact, however; for it tends to show that the \$1,000 had been in fact applied to the payment and satisfaction or extinguishment of other claims not included in the one presented. There is no obscurity in the section of the bankruptcy act under which this claim was made out and presented, and the blank form on which it was made called particular attention to the necessity for stating payments, if any. While mere technicalities should not prevail to defeat a just and existing claim, it is hardly consistent with the due administration of justice to permit an old and outlawed claim of \$6,886.32 to be revived in favor of the bankrupt's wife by uncertain and equivocal evidence that a payment was made and applied thereon, after the claimant has distinctly and unqualifiedly sworn that "no part of said debt has been paid; that there are no offsets or counterclaims to the same." It seems to me that there is evidence which not only rebuts any inference that possibly might be drawn from the entries on the books to the effect that the \$1,000 applied on all the loans mentioned, but which shows that such \$1,000 was not so applied or intended to be. The claimant has not only failed to sustain the burden of proving a payment on the loans aggregating \$6,886.32, those made prior to March, 1900; but the evidence, facts, and circumstances show affirmatively that no payment was ever made to apply thereon, or made with intent that same should apply thereon. The evidence to substantiate this large, and to the extent mentioned

stale, demand, comes from the bankrupt and his wife, the claimant, and is to be closely scrutinized. In re Rider (D. C.) 3 Am. Bankr. Rep. 192, 96 Fed. 811; In re Wooten (D. C.) 9 Am. Bankr. Rep. 247, 118 Fed. 670; Matter of Brewster, 7 Am. Bankr. Rep. 486.

There will be an order reversing the order of the referee, disapproving the findings and conclusions, and sending the matter back to the referee, with instructions to make an order disallowing all of the claim for the loans made prior to March, 1900, and allowing the other items specified in his findings and allowed by him, amounting to some \$3,900, with interest from the date of each loan to the time the \$1,000 was paid, when that payment will be deducted, and interest allowed upon the balance.

In re GIRVIN.

(District Court, N. D. New York. March 12, 1908.)

BANKRUPTCY—CLAIMS—ASSUMED DEBT.

Where a bankrupt for a valuable consideration assumed payment of certain notes, his estate was liable for the entire debt, notwithstanding the holder might also have enforced payment against another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 476.]

In Bankruptcy. Appeal from order of referee allowing claim of Warren H. Girvin at \$6,000, besides interest.

Edward F. Shea, for trustee.

Edwin Nottingham, for claimant.

RAY, District Judge. As the bankrupt, James E. Girvin, duly and for a valuable consideration assumed the payment of this indebtedness, his estate is liable therefor. While Mary S. Walrath, as executrix of C. A. Walrath, deceased, may be liable to Warren H. Girvin on one of the notes, and individually on the others, still, as James E. Girvin assumed the payment of all the notes, Warren H. Girvin may pursue his estate in bankruptcy, or Walrath, as he elects. Should he pursue Walrath and collect, she could then pursue the estate of James E. Girvin, but for the fact the year in which claims are to be proved has elapsed. If there were any equities in the transaction demanding that the claimant first pursue Walrath, the case would be different. There is no pretense the estate of Girvin is not ultimately liable for the entire claim. There is no pretense of a defense as against Walrath, had she paid the notes and presented her claim against the estate in bankruptcy under Girvin's agreement to pay the notes. There is no occasion for the application and enforcement of the equitable doctrine that where two parties are liable for a debt, and there is a fund for its payment out of which one can reimburse himself, but the other cannot, the one who has such right of reimbursement should first be compelled to pay, as there is no such fund and no recourse for either. As be-

tween the claimant and this estate, the estate is liable, and as between Walrath, should she pay, and the estate of Girvin, the estate is liable. The estate in bankruptcy is liable for the whole amount in any event.

The order of the referee, allowing the claim, is therefore affirmed.

UNITED STATES v. TOM WAH.

(District Court, N. D. New York. March 12, 1908.)

1. UNITED STATES COMMISSIONERS—NATURE OF OFFICE—POWERS.

United States commissioners are neither judges nor courts, nor do they hold courts, though at some times acting in a quasi judicial capacity, nor do they possess the power of courts except in so far as the acts of Congress conferring certain authority and imposing certain duties on them specially confer the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, United States Commissioners, § 3.]

2. CONTEMPT—COURTS OF RECORD—POWER TO PUNISH.

All courts of record have inherent power to enforce their orders and mandates by punishment as for contempt, unless the law creating them expressly limits such power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 95.]

3. WITNESSES—REFUSAL TO TESTIFY—PUNISHMENT—CONTEMPT.

By the express provisions of Act Cong. March 2, 1831, c. 99, 4 Stat. 487, Rev. St. § 725 (U. S. Comp. St. 1901, p. 583), a federal court has power to punish a duly subpoenaed witness for contempt in refusing to obey its commands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 37-41; vol. 10, Contempt, § 103.]

4. SAME—DEPORTATION PROCEEDINGS.

Power to enforce their processes not being specially conferred on United States commissioners, there is no authority vested in such commissioners sitting in a Chinese deportation case to compel a witness duly subpoenaed to be sworn and give evidence, but, if the witness refuses, his refusal should be reported to the United States District Court, which has authority to compel the witness to testify by means of contempt proceedings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 37-41; vol. 10, Contempt, §§ 98-103.]

5. CONTEMPT—HEARING BEFORE REFEREE.

Under a state statute authorizing courts of record to appoint referees and refer cases to them to hear and report, or to hear and determine, such courts may punish contempts committed before such referees, in the absence of a statute conferring such power on the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 95-98.]

6. WITNESSES—REFUSAL TO TESTIFY—PRIVILEGE—CHINESE DEPORTATION PROCEEDINGS—"PENALTY"—"FORFEITURE."

Allen Chinese persons not of the exempt classes having no right to be or to remain in the United States, a deportation proceeding is a civil proceeding, not involving punishment for a crime, the imposition of a fine, or the enforcement of a "penalty" or "forfeiture"; and hence the defendant may not refuse to become a witness against himself (citing 8 Words & Phrases, 2893, Title "Forfeiture," and 6 Words & Phrases, 5272, Title "Penalty").

At Law. Proceeding in the nature of contempt to compel the defendant, Tom Wah, to be sworn in this proceeding as a witness in

behalf of the United States, and to testify and answer questions material to the issue.

Geo. B. Curtiss, H. E. Owen, and Alford W. Cooley, for the United States.

R. M. Moore and B. W. Berry, for defendant.

RAY, District Judge. This is a proceeding, under the Chinese exclusion act, for the deportation of the above-named defendant, Tom Wah, who asserts the right to remain and be in the United States on the ground that he is a citizen thereof. His claim is that he was born in the United States, and is therefore entitled to be and remain here. The United States denies this, and seeks his deportation. On the trial of this question before Benjamin L. Wells, one of the commissioners of the United States in and for the Northern district of New York, duly appointed by the District Court and district judge of the said district, and after the said Tom Wah had produced a witness who gave evidence tending to show that said Tom Wah was born in the United States, and rested, the United States, having duly subpoenaed him, called said Tom Wah as a witness in its behalf, presumably to show or give evidence tending to show that he was not born in the United States, and therefore is not entitled to be or remain here. Tom Wah took the stand before the commissioner, and, on advice of counsel, refused to be sworn or testify or answer questions relevant and material to the issues being tried then and there put to him. Thereupon the matter and facts were certified to this court for such directions and order as it shall see fit to make in the premises. The commissioner held he had no power to compel the witness to be sworn, or to commit or punish him in any way for refusing to be sworn, or to testify, or to punish him for contempt. This is an important question, and one in which the government as well as all Chinese persons are deeply interested.

United States Commissioners are neither judges nor courts, nor do they hold courts, although sometimes they act, so far as jurisdiction and power is conferred upon them, in a quasi judicial capacity. *Todd v. United States*, 158 U. S. 282, 15 Sup. Ct. 889, 39 L. Ed. 982; *Ex parte Hennen*, 13 Pet. (U. S.) 230, 10 L. Ed. 138; *United States v. Allred*, 155 U. S. 591, 15 Sup. Ct. 231, 39 L. Ed. 273; *United States v. Clark*, 1 Gall. 497, Fed. Cas. No. 14,804; *In re Perkins* (D. C.) 100 Fed. 950; *United States v. Beavers* (D. C.) 125 Fed. 778. When exercising their powers, they do not sit as courts; nor do they possess the power of courts, except in so far as the acts of Congress conferring certain authority and imposing certain duties upon them specially mention certain powers. They may do what they are authorized to do, but no more. Same cases. All courts of record have the inherent power to enforce their orders and mandates by punishment as for a contempt of court unless the law creating them expressly limits that power. *Rapalje on Contempts*, 1, and numerous cases cited; *Bessette v. W. B. Conkey*, 194 U. S. 324, 326, 24 Sup. Ct. 665, 48 L. Ed. 997; *Ex parte Robinson*, 19 Wall. 505, 510, 20 L. Ed.

205; *In re Chiles*, 22 Wall. 157, 168, 22 L. Ed. 819. Says the court, per Brewer, J., in *Bessette v. W. B. Conkey Co.*, *supra*:

"The power to punish for contempt is inherent in all courts."

In *Ex parte Robinson*, *supra*, the Supreme Court said:

"The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject they became possessed of this power. But the power has been limited and defined by the act of Congress of March 2, 1831. The act in terms applies to all courts. Whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt. But that it applies to the Circuit and District Courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is therefore to them the law specifying the cases in which summary punishment for contempts may be inflicted."

By Act Cong. March 2, 1831, c. 99, 4 Stat. 487 (Rev. St. § 725 [U. S. Comp. St. 1901, p. 583]), this power is limited as follows:

"That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the said courts."

By the very terms of the act a witness duly subpoenaed may be punished for contempt in refusing to obey its commands. It may be doubted whether Congress may create a court, and thereafter so limit its powers as to deprive it of the ordinary and necessary powers of a court. This would be to deprive it of one of its most essential attributes. No doubt the manner of its exercise may be prescribed as matter of procedure. But, however this may be, as United States commissioners of this class, those now appointed by the district judges and District Courts, are not courts, do not hold courts in the proper sense of the term "courts," they do not possess the inherent power to punish a refusal to obey their own processes and mandates, and, as such power is not expressly granted or conferred, there must be a resort to some tribunal having power if their mandates are to be enforced. As the power to enforce their processes is not specially conferred by the Chinese deportation act or elsewhere on these commissioners, there is no authority vested in a commissioner of the United States sitting in a Chinese deportation case to compel a witness duly subpoenaed to be sworn or to give evidence. If a witness subpoenaed in such a case can be compelled to be sworn, the power must be exercised by some other tribunal or officer. As a commissioner of this class is an officer, or an arm, of the court appointing him, it would seem that such court or a judge thereof ought to have power to make such orders, and compel obedience thereto, as will enable such commissioner to properly exercise or discharge his functions, exercise

and make effectual the powers committed to or conferred upon him by Congress. Jurisdiction in Chinese cases and in certain criminal cases having been conferred on such commissioners, officers of this court, it would seem there must be power somewhere to compel witnesses duly called before them by subpoena to be sworn and answer material questions. If this is not the law, then United States commissioners may as well go out of business; for, as soon as that fact is judicially declared, and until Congress acts, they would be powerless to compel witnesses to be sworn, and, as the court or judge appointing them is also declared powerless, as are all other courts, all unwilling witnesses will avail themselves of the right, and sit unsworn and silent. The administration of justice would thus be hampered, and in many cases defeated.

I am therefore of the opinion that the acts of Congress which confer on United States commissioners the authority to hear and decide these Chinese cases in the first instance commit the jurisdiction of such cases to the United States District Courts, prescribing the officers of that court who shall take cognizance of them in the first instance with right of appeal to the District Court (The U. S. Petitioner, 194 U. S. 194, 24 Sup. Ct. 629, 48 L. Ed. 931), and that the court has power to come to the aid of these officers and enforce their lawful orders and mandates in all proper ways; that the court may direct witnesses, duly subpoenaed, before such commissioners to be sworn and to answer all proper questions and punish such witnesses in case of their refusal to obey. I am not willing to concede, and protest against the doctrine advanced, that Congress has made a law authorizing the District Court to appoint commissioners, has prescribed the duties of such commissioners, including the power to try and determine certain questions in certain cases, and devolved the performance of same upon them; but has left them powerless and the court without power to aid them, in an appropriate way, in the performance of such duties. The authorities are against such a proposition. In criminal cases before them it has been well held, I think, that witnesses may be subpoenaed, sworn, and compelled to answer. In *re Perkins* (D. C.) 100 Fed. 950, 953, 954; *United States v. Beavers* (D. C.) 125 Fed. 778, 780, 781; *Ex parte Perkins* (C. C.) 29 Fed. 900. These cases hold that, while the commissioner cannot punish the witness for contempt, the court appointing him may. In the state of New York the courts of record may appoint referees and refer cases to them to hear and report, or to hear and determine. Such courts may punish contempts committed before such referees in the absence of a statute conferring such power on the court. Where the Circuit Court of the United States refers examination to a special examiner, it may commit a witness who refuses to answer for contempt. *Nelson v. United States*, 201 U. S. 92, 26 Sup. Ct. 358, 50 L. Ed. 673.

It then becomes a question whether a Chinese person found in the United States against whom deportation proceedings are taken may be subpoenaed in such proceeding and compelled to be sworn, and give evidence in behalf of the United States and consequently against himself. If the question at issue involves punishment for the commis-

sion of a crime or the imposition of a fine or the enforcement of a penalty or a forfeiture, such party called and sworn cannot be compelled to answer. *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; *Lees v. United States*, 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150. It has been finally and explicitly decided by the Supreme Court of the United States that these Chinese deportation cases are not criminal, nor are they criminal in their nature, but civil proceedings. *Fong Yue Ting v. United States*, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; *United States v. Hung Chang*, 134 Fed. 19, 67 C. C. A. 93; *Low Foon Yin v. U. S. Immigration Commissioners*, 145 Fed. 791, 76 C. C. A. 355; *Law Chin Woon v. United States*, 147 Fed. 227, 77 C. C. A. 369. In *Fong Yue Ting v. United States*, supra, Mr. Justice Gray, in giving the opinion of the court, said:

"The proceeding before a United States judge, as provided for in section 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which the word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not therefore been deprived of life, liberty, or property without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application."

This was quoted and approved by the same court in *Wong Wing v. United States*, 163 U. S. 236, 16 Sup. Ct. 977, 41 L. Ed. 140. Clearly they do not involve the imposition of a fine. Do they involve the imposition or enforcement of a penalty or a forfeiture? Alien Chinese persons, not of the exempt classes, have no right to be or remain in the United States. Congress has so declared. The Nation in the exercise of its sovereign power has so declared. The United States has the sovereign right to exclude alien Chinese seeking to enter its domain, and to send out, exclude therefrom, all such persons found therein. In so doing the United States deprives the Chinese alien of no right, imposes no fine, enforces no penalty or forfeiture. The Chinese person by unlawfully coming into or remaining or being in the United States incurs no fine, penalty, or forfeiture. He is not fined; no penalty is imposed. He forfeits no property or property rights, or other rights, as he has no right to be or remain here. This precise question has been passed upon by the Supreme Court of the United States in *Fong Yue Ting v. United States*, supra, and also by the Circuit Court of Appeals in the following cases: *United States v. Hung Chang*, 134 Fed. 19, 67 C. C. A. 93; *Low Foon Yin v. United States Immigration Commissioners*, 145 Fed. 791, 76 C. C. A. 355; *Law Chin Woon v. United States*, 147 Fed. 227, 77 C. C. A. 369. The decision of the Supreme Court is absolutely con-

trolling. The language of Mr. Justice Gray, already quoted, is emphatic that a Chinese deportation case is not within *Boyd v. United States* and *Lees v. United States*, supra. See, also, the numerous cases in 6 Words and Phrases, tit. "Penalty," pp. 5272, 5276, and also volume 3, tit. "Forfeiture." *Cassell v. Crothers*, 193 Pa. 359, 44 Atl. 446; *Wiseman v. McNulty*, 25 Cal. 230, 237; *Roblee v. M. L. Ass'n* (Sup.) 77 N. Y. Supp. 1098, 1100; *State v. McConnell*, 70 N. H. 158, 46 Atl. 458; *Van Beuren v. Digges*, 52 U. S. 461, 477, 13 L. Ed. 771.

It is true that expressions to the contrary may be found, but this was before the Supreme Court of the United States had spoken on the subject, or before its decisions had become well known. If the District Court is to punish the recusant and contumacious witness, it seems to me eminently wise and proper that it should first make an order that the witness be sworn and answer all proper questions, and that the commissioner make a like order, whereupon, if the witness still refuses to be sworn or answer proper and pertinent questions which do not incriminate or tend to disgrace him, or subject him to a fine, penalty, or forfeiture, this court on a proper report of the facts can and will make an order punishing the contempt.

BIRMINGHAM COAL & IRON CO. et al. v. SOUTHERN STEEL CO.

(District Court, N. D. Alabama. January 21, 1908.)

Nos. 7,977 (239), 7,980 (240), 8,188 (250).

BANKRUPTCY—COLLUSION BETWEEN PETITIONING CREDITORS AND BANKRUPT IN SELECTING RECEIVERS—EFFECT.

Where receivers, the appointment of whom is prayed for in a petition in bankruptcy against a corporation, were in fact selected by the alleged bankrupt and named at its instance, they will not be appointed, or if such facts are shown after their appointment they will be removed; but the court is not required because of such collusion, which was not successful in procuring the appointments desired, to dismiss the petition in favor of one filed later by other creditors, and, where it is otherwise sufficient, the adjudication will be made thereon.

In Bankruptcy. In the matter of the Southern Steel Company, bankrupt. Petitions of the Birmingham Coal & Iron Company, the Dubose Brothers Iron Company and others, and the Southern Cement Company and others for appointment of receivers.

Percy & Benners, for first petitioning creditors.

Ward & Rudolph, Lee J. Marx, Powell & Blackburn, and A. Leo Oberdorfer, for second petitioning creditors.

O. R. Hood, for Southern Steel Company.

Campbell & Johnston and E. H. Dyer, for receivers.

HUNDLEY, District Judge. In order to present a proper consideration of the issues involved in the matters here presented to the court, a brief statement of the facts and pleadings connected with this matter should be here referred to.

On the 24th day of October, 1907, a petition in behalf of certain creditors named therein was filed in this court praying that the Southern Steel Company be adjudged a bankrupt. These same creditors also filed at the same time a petition asking that Morris Adler and Edgar L. Adler be appointed receivers of the property and estates of the said steel company, which said petitions were duly presented to me at Huntsville, Ala., on the 25th day of October, 1907, at 9 a. m. At the same time there was presented to me at Huntsville a petition of other creditors named therein seeking to have other receivers appointed for the property and estates of the Southern Steel Company. In that petition the said creditors averred that the first petition was a collusive one between the creditors named therein and the bankrupt, and prayed the court that receivers should be appointed who were disinterested, and who did not bear friendly and collusive interest with the bankrupt. At that time, with one set of creditors urging the appointment of Morris and Edgar Adler and another set of creditors averring collusive effort to secure the appointment of said receivers, the court was besieged with telegrams and telephone messages on both sides of the controversy of a bewildering and contradictory nature. It was represented to the court that Edgar L. Adler was a man of practical experience in the management of such properties as formed the estates of the Southern Steel Company, and it was further shown to the court that Morris Adler had no such practical experience. With such evidence at hand as the court could at that time gather, in order to secure an impartial and intelligent management of the properties of the bankrupt, the court entered an order appointing said Edgar L. Adler, who was shown to have had some actual experience in such matters, E. G. Chandler, a man whom it was shown to the court to have had a large experience in the management of commissaries, with which the receivers would naturally have to deal in an extensive manner, and Joseph O. Thompson, a man of fine character and business integrity. At that time Edgar L. Adler was totally unknown to the court, either personally or as to his capacity and fitness to discharge the office of receiver, and he was appointed at the earnest suggestion of certain creditors and upon testimony bearing upon his fitness. The other two receivers, Chandler and Thompson, were urged for appointment by many creditors and parties in interest, and in addition thereto, from a long acquaintance, were known personally by the court to be men of irreproachable character and unquestioned business integrity. After the presentation of the petitions as above referred to, the court after a patient and careful consideration made appointment of the three receivers as above outlined.

On the 30th day of October, 1907, the receivers Chandler and Thompson filed with this court a report in writing calling the attention of the court to the fact that Edgar L. Adler was not acting in harmony with them, to the end that the best results might be obtained for the benefit of the property intrusted to their care. The court had previously learned from Edgar L. Adler, through a telegram from him, and in face of the fact that the decree of the court had required that there should be a joint bond of all the receivers in the sum of \$300,000, that he had determined to make his bond separate and distinct.

from the other receivers. The receivers, Adler, Chandler, and Thompson, appeared before this court at Huntsville, Ala., on the 1st day of November, 1907, and were examined orally as to their administration of the property and estate, and their ability to raise sufficient funds to keep the plants in operation. Edgar L. Adler was sworn, and testified, in answer to questions by counsel and also by this court, that neither he nor his brother, Morris Adler, could in any manner, nor would they, raise sufficient funds, to be obtained upon receivers' certificates, to pay the expense of keeping the plants of the bankrupt in operation, although their appointment as receivers had been urged upon the court, based upon the grounds that they would furnish such funds. Thereupon it was suggested that, by the addition of T. G. Bush to the number of receivers—who being a man known to the court for many years as a man of highest character and integrity, and a man having had experience in the management of all kinds of properties pertaining to this district, and a man of well-known financial ability—he could secure such funds as might be needed to properly finance the steel company and keep it in operation, so long as said operation might remain profitable. The court thereupon appointed T. G. Bush as the fourth receiver, and he was afterwards made chairman of the receivers. Upon the appointment of said Bush as said receiver all parties in interest, who were present before the court, including the receivers Adler, Chandler, and Thompson, were asked as to whether they had any objections to urge to the appointment of said Bush, and the court was thereupon informed that no objection could be made to his appointment from any source. These receivers immediately took charge of the property of the bankrupt, and secured such funds on receivers' certificates necessary to keep the plants of the Southern Steel Company in operation, which they continued to do, so long as the said operation proved profitable. These four receivers made a report to this court on the 12th day of December, 1907, in which with minutest detail they presented each and every act of theirs from the date of their appointment. Notice of the date fixed for the making of this report was given to all the creditors of the bankrupt corporation, and, without attempting to present the contents of that report, it is only necessary in this connection to state that the records of this court show that there has been no challenge of that report in any manner. After a reference to the special master of all the petitions and pleadings in this cause, together with all the facts involved in the various controversies, in which he was ordered to report his findings and the testimony to the court, his report was duly filed, and exceptions made thereto by the second petitioning creditors. All matters connected with these causes are now presented for the consideration of the court, all parties in interest being present in person or by counsel. No exceptions were taken or filed to the report of the special master by the Southern Steel Company, or by the first petitioning creditors, who had insisted upon the appointment of Morris and Edgar Adler as receivers. The second petitioning creditors now insist that the facts shown in evidence and as found by the special master in his report, as to collusion between the two Adlers and the bankrupt, make it imperative upon the

court to dismiss the first petition and to adjudicate upon their second petition. Among the facts relied upon to sustain this contention was the uncontroverted evidence that, a week or ten days before the petitions in bankruptcy were filed, J. D. Lacey, one of the directors of the respondent bankrupt, had arranged with Edgar L. Adler and his brother, Morris Adler, to act as receivers of the Southern Steel Company in case of necessity, and that when the necessity did arrive, and before the petition was presented to this court, the two Adlers, with the actual consent and knowledge of the bankrupt, allowed their names to be inserted in the first petition for receivers filed in this cause, and made bond prior to and in contemplation of their appointment. There is further evidence and admissions, shown by the testimony, tending to show collusion and an effort on the part of the bankrupt to control or participate in the management of its estate, even after it had been committed to the jurisdiction of this court. It is most vehemently urged, therefore, that in view of this evidence and admissions the bankrupt should not be adjudicated on the first petition, but that it should be dismissed, and an adjudication be had on the second petition.

There can be no question that in such cases as this, where it is shown that the appointment of a receiver or trustee in bankruptcy is brought about by active interference and procurement of the bankrupt, the appointment of the same will be set aside on proper petition and showing to the court, it matters not how high the character or capacity of the receiver or trustee may be who is so attempted to be procured by the bankrupt. As is said by Lochren, District Judge, in the case of *In re Hanson* (D. C.) 156 Fed. 717:

"It is well settled by all the authorities that the trustee represents the creditors, and not the bankrupt, in the administration of the estate; and that it is improper that the bankrupt shall actively interfere with the matter of his selection and appointment; and that if he does interfere, and the person aided by him is appointed by votes procured by such interference, the appointment should for that reason be disapproved. *In re McGill*, 106 Fed. 57, 45 C. C. A. 218; *In re Rekersdres* (D. C.) 108 Fed. 206; *In re Henschel* (D. C.) 109 Fed. 861."

What is said here as to the application of this principle to trustees must of course apply with much more force to receivers, for whom the court alone is responsible. Many cases to the same effect might be cited, and I have found none contrary to the principle announced in the *Hanson* Case, *supra*. The rule is based on sound reason, and is a salutary one. It often becomes the duty of the receiver directly to antagonize the bankrupt by efforts to discover secreted assets. Surely, then, there should be no color of basis for any suspicion of partiality or sense of obligation on the part of the receiver toward the bankrupt. While this is undoubtedly the law, and the contention made would have authorized the court to entirely disregard the request by the first petitioning creditors, as to the receivers Messrs. Adler, yet it is not sufficient cause to justify a setting aside of their petition at his time. The action of this court in disregarding in part their request as to receivers and in appointing three other receivers, who are entirely disinterested, purged those proceedings of

any collusive effect, growing out of the promotion of the Adlers by the bankrupt. There can be no question but that the bankrupt can act in harmony with creditors of his own selection for the purpose of surrendering his estate to the court, but the line is drawn when he attempts in any wise to interfere with or procure the appointment of a receiver or trustee. There has been no objection filed with reference to the appointment of any of the receivers in this cause, except as herein set forth. No act of theirs has been challenged by any party to this record. All of the parties in interest are now present before the court, and with surprising unanimity they admit and agree that the Southern Steel Company should be declared a bankrupt on one or the other of the grounds alleged in the pleadings. It may be that the act of bankruptcy averred in the first petition cannot be sustained as matter of law on the proof offered in support thereof. It is not necessary to decide that question here. That petition is in all respects regular on its face, and sufficiently avers an act of bankruptcy. Under that petition every order of this court has been made. The acts of bankruptcy averred under the amendment offered by the first petitioners are claimed to be sustained by the testimony, and are not denied. The application to amend this petition so that the same shall contain all the allegations of bankruptcy alleged in the second petition is granted. No objection being made, and after notice to all parties in interest in open court, all the proceedings in bankruptcy pending against the Southern Steel Company will be transferred to the Southern division of this district. And there being no objections interposed to the consolidation of all the said causes as amended such will be done, and these causes will proceed as one. The Southern Steel Company will be adjudged a bankrupt, and a decree will now be entered in accordance with this opinion. The special master, Sterling A. Wood, is hereby appointed special referee in bankruptcy in this cause. All other questions are reserved.

DE VALLE DA COSTA v. SOUTHERN PAC. CO.

(Circuit Court, D. Massachusetts. March 16, 1908.)

No. 244.

1. DEATH—ACTION FOR WRONGFUL DEATH—RIGHT OF ADMINISTRATOR.

Ky. St. 1903, c. 1, § 6, giving a right of action for negligent death, entitles the duly appointed administrator of one negligently killed on a vessel owned by a Kentucky corporation while lying in a harbor in Texas to sue for such death.

2. ADMINISTRATORS—APPOINTMENT—ASSETS—SITUS—CLAIM FOR WRONGFUL DEATH.

A cause of action for wrongful death expressly authorized by Ky. St. 1903, c. 1, § 6, was not insufficient to justify the appointment in another state of an administrator, on the ground that under the statute no right of action arose in behalf of any one until after the administrator had been appointed, and that hence the appointment was necessarily invalid as needing to sustain it assets in existence before it was made. It is enough that assets and appointment come into being at the same moment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 24.]

3. REMOVAL OF CAUSES—WAIVER OF OBJECTION TO JURISDICTION.

The requirement of Act March 3, 1875, c. 137, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508), that an action in the federal court based upon a diversity of citizenship be brought in the district of the residence of either plaintiff or defendant, is waived by defendant's removal of the cause to the federal court from the state court where it is brought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 238.]

4. ADMINISTRATORS—APPOINTMENT—WHERE TO BE MADE—CLAIM FOR WRONGFUL DEATH.

A cause of action for wrongful death warrants the appointment of an administrator in any jurisdiction wherein defendant may be sued.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 24.]

At Law.

W. P. Murray, John S. Patton, and Charles F. Smith, for plaintiff.
Foster & Turner, for defendant.

LOWELL, Circuit Judge. This is an action of tort removed from the state court. The declaration alleged that the plaintiff was the administrator of Rodriguez, late of Boston. The first count alleged that on a voyage from New York to Galveston, on board the steamer El Valle, in the harbor of Galveston, within three miles from the shore of Texas, Rodriguez was injured by the negligence of the defendant, from which injury his death resulted six days afterwards; that he left a widow and seven minor children dependent upon him for support, wherefore a cause of action accrued to the plaintiff by virtue of Rev. St. Tex. 1895, arts. 3017-3027. The second count alleged that the defendant operated a line of steamers to which the El Valle belonged, and which plied between New York and Galveston; that, by reason of the accident above described, an action accrued to the plaintiff by virtue of Code Civ. Proc. N. Y. § 1902. The third count alleged that the defendant was incorporated under the laws of Kentucky, and that in consequence of the accident above described a cause of action accrued to the plaintiff by virtue of Ky. St. 1903, c. 1, § 6. The defendant had constituted the Massachusetts commissioner of corporations its attorney to receive service of process; and the writ was duly served upon him. To this declaration the defendant pleaded in abatement that the plaintiff was not the administrator of Rodriguez, and further denied "that Rodriguez was a resident of Boston at the time of his death, or left goods or estate within the county of Suffolk, so that, if the plaintiff was appointed by the probate court within the county of Suffolk, said court had no jurisdiction to make such appointment."

The case was heard upon the declaration, the plea in abatement, and the following agreed statement of facts, as follows:

"It is hereby agreed that unless the right of action against the plaintiff is assets in this jurisdiction, the deceased having no property here and not having been at the time of his death a resident of the state of Massachusetts, the plea in abatement is to be sustained, but, if such right of action is assets sufficient to give jurisdiction to the probate court to bind an administrator here, the plea in abatement is to be overruled, and the case is submitted to the court for a ruling upon the matter."

That a cause of action arose under the Kentucky statute in favor of an administrator of Rodriguez duly appointed seems to be settled by *The Hamilton*, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. —. Was this cause of action assets of Rodriguez's estate in Massachusetts sufficient to justify the appointment here of the plaintiff as his administrator? The defendant answers this question in the negative, alleging two reasons: First. That under the Kentucky statute no right of action arose in behalf of any one until after the administrator had been appointed, and hence that the administrator's appointment was necessarily invalid, as needing to sustain it assets in existence before it was made. This contention is too artificial. It is enough that assets and appointment come into being at the same moment. Second. That the right of action was not assets of Rodriguez's estate in Massachusetts, a jurisdiction within which Rodriguez did not reside, and of which the defendant is not a citizen. This action is based upon diversity of citizenship. Such an action "shall be brought only in the district of the residence of either the plaintiff or the defendant." Act March 3, 1875, c. 137, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508). But this requirement was waived by the defendant's removal of the cause from the state court. The defendant does not now urge that this court is without jurisdiction by reason of the statute just cited, but only because the plaintiff was not duly appointed administrator by the probate court. The defendant's contention raises this question: Does a claim like that here sued upon warrant the appointment of an administrator in any jurisdiction wherein the defendant may be sued? The question is answered in the affirmative by *N. E. Ins. Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. Ed. 379: "The letters being valid on their face, and in the form prescribed by the statute, * * * and apparently authorized by law, their validity must be distinctly negatived by what is set forth in the record, if the plaintiff's authority to sue is not to be supported by them." 111 U. S. 144, 4 Sup. Ct. 368, 28 L. Ed. 379. "Yet [the defendant's] availing itself of the privilege of doing business in Illinois, and subjecting itself to the liability to be sued in a court in Illinois, with the effect of making the policy assets in Illinois, were voluntary acts, which, though not affecting the jurisdiction of the federal court, may well be held to give a locality to the debt for the purposes of administration, so that a suit may be brought under such letters in Illinois." 111 U. S. 147, 4 Sup. Ct. 368, 28 L. Ed. 379. The opinion in *Connor v. New York, N. H. & H. R. R. (R. I.)* 68 Atl. 481, expressly refuses to follow *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439, and makes plain that the statutes of Rhode Island, as authoritatively construed, differ from those of Massachusetts. Plea in abatement overruled.

HENSEL, BRUCKMANN & LORBACHER v. UNITED STATES.

(Circuit Court, S. D. New York. December 9, 1907.)

No. 4,890.

1. CUSTOMS DUTIES—PROTEST—SUFFICIENCY.

In his protest against the assessment of duty, an importer asserted that the goods were "dutiable under Act July 24, 1897, c. 11, § 1, Schedule M, par. 400, 30 Stat. 188 (U. S. Comp. St. 1901, p. 1672), at the rate or rates therein provided according to thickness, cutting size," etc. The only articles dutiable under that paragraph according to the conditions thus specified were lithographic prints. *Held*, that under Customs Administrative Act June 10, 1890, c. 407, § 14, 28 Stat. 187 (U. S. Comp. St. 1901, p. 1933), the protest was sufficiently specific and distinct, that it should be treated as a reference to the provision for lithographic prints, and that, as the collector presumably had samples of the goods and could thereby ascertain their cutting size, etc., it was not necessary to point out the particular rate that was applicable.

2. SAME—SAMPLES—PRESUMPTION OF RETENTION BY COLLECTOR OF CUSTOMS.

Inasmuch as section 2901, Rev. St. (U. S. Comp. St. 1901, p. 1921), provides for an examination of imported merchandise by customs officers, and the customs regulations provide that collectors of customs shall procure samples in cases in which protests are filed by importers, it is to be assumed that the collector complied with these provisions and had samples in such cases.

On Application for Review of a Decision by the Board of United States General Appraisers.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

J. Osgood Nichols, Asst. U. S. Atty.

MARTIN, District Judge. This is an appeal by the importer from the decision of the Board of General Appraisers assessing the merchandise in suit as lithographic prints (should be "printed matter") at 25 per cent. ad valorem under Act July 24, 1897, c. 11, § 1, Schedule M, par. 403, 30 Stat. 189 (U. S. Comp. St. 1901, p. 1673). The material part of the protest is as follows:

"Said merchandise is not dutiable as assessed. It is otherwise more aptly and specifically provided for. It is covered by and is dutiable under paragraph 400 at the rate or rates therein provided, according to thickness, cutting size," etc.

No question is made but what the merchandise herein involved is lithographic prints, denominated as "post cards," and specifically provided for in paragraph 400; that the cards in question do not exceed twenty one-thousandths of 1 inch in thickness or 35 square inches in cutting size in dimensions, and, therefore, dutiable at 5 cents per pound under said paragraph; but it is contended on the part of the government that paragraph 400 is a long one, and that this protest fails to state on what grounds the objection is made or what rate of duty is claimed, and therefore does not comply with the law, which provides that:

"The importer shall set forth in his protest distinctly and specifically the reason for his objection to the assessment."

It has been repeatedly held that the protest must be sufficiently specific, so that the collector can readily ascertain what was in the mind of the importer, to the end that the collector may ascertain the precise facts and correct the error. The plain meaning of the protest in the case at bar is this: The merchandise in question is not dutiable under paragraph 403, as the collector has assessed it. It is specifically provided for in paragraph 400. Take the sample that the collector has drawn, ascertain its thickness and cutting size, and fix the rate of duty prescribed in paragraph 400 according to the thickness and size, as he finds them to be. The sample shows the merchandise to be lithographic prints. It shows the material of which it is composed. The character of the print, the size and thickness, are readily ascertainable from the sample. It is not necessary that the protest should describe the sample, as the collector has that before him, but must distinctly and specifically state the reasons for the protest. This protest calls the collector's attention to his error in fixing the duty under the wrong paragraph. It points out the correct paragraph, and that the duty should be assessed under the provisions of that paragraph relating to lithographic prints or pictorial post cards, and that portion of the paragraph which is applicable to the post cards in question according to the dimensions of the sample in hand.

Mr. Fischer, for the Board of General Appraisers, states, after quoting the protest, as follows:

"These protests are not a sufficient compliance with the requirements of Act June 10, 1890, c. 407, § 14, 26 Stat. 187 (U. S. Comp. St. 1901, p. 1933), that the importer in his protest shall set forth distinctly and specifically his objections to the decision of the collector. Discarding the words that follow the numeral 400 in the above excerpt from the protest, for they add nothing to the specifications of the claim, we have merely a bald claim that the goods are dutiable under paragraph 400."

I regard the words following the numeral 400 as important, and as referring specifically to that clause of paragraph 400 under which the duty should be assessed. The special deputy of the collector to whom was referred the protest in question, in his letter to the Board of United States General Appraisers, states:

"It appears that the merchandise in question is properly dutiable at 5 cents per pound, under paragraph 400."

It is self-evident that the protest was sufficiently definite to enable the deputy collector to measure the post cards and ascertain just how much the duty should be and give this information to the Board of General Appraisers; so the protest was sufficient in fact, and I hold it was sufficient in law. In so holding, I assume that the collector had before him the sample, or, in other words, that he complied with the provisions of section 2901, Revised Statutes (U. S. Comp. St. 1901, p. 1921), and with article 1471 of the customs regulations of 1899.

Section 2901 of the Revised Statutes requires that:

"The collector shall designate on the invoice at least one package of every invoice, and one package at least of every ten packages of merchandise, and a greater number should he or either of the appraisers deem it necessary,

imported into such port, to be opened, examined and appraised, and shall order the packages so designated to the public stores for examination."

Article 1471 of the customs regulations of 1899 provides as follows:

"Collectors should require importers filing protests involving questions of fact to supply within a short period, say five days, after filing the protests, samples of the merchandise covered thereby. The samples should be verified by the officer who is immediately responsible for the classification against which the protests are filed, and be transmitted to the board at the same time as the protests to which they belong. Exceptions to this rule may be made in cases where the appraiser has already in his possession sufficient samples to answer the purpose, where the question involved is one of law, and does not necessitate the inspection of samples by the board, and where the merchandise is heavy, bulky, or otherwise of such character as to be unsuited for transmission through the mails or by express, without considerable expense. In the last-named class of cases, the report of the collector or appraising officer should contain a full and accurate description of the merchandise."

The decision of the Board of General Appraisers is reversed.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(Circuit Court, S. D. New York. December 13, 1907.)

STREET RAILROADS—RECEIVERS—NECESSITY FOR SEPARATE RECEIVERSHIPS.

Where receivers for a system of street railroad lines leased from different owners have been appointed in a suit against an insolvent lessee, to which suit the various lessor companies or their stockholders have, or may, become parties, the fact that there may be a conflict of interests as to the distribution or application of the earnings of the receivership does not require nor warrant the appointment of separate receivers to operate the property of the several lessors.

See 158 Fed. 460.

Byrne & Cutcheon, for complainant.

James L. Quackenbush, for defendant New York City Ry. Co.

J. Parker Kirlin, for defendant Metropolitan St. Ry. Co.

Arthur H. Masten, for receivers.

LACOMBE, Circuit Judge. In a memorandum filed in this suit on October 8, 1907, it was said:

"For the present, therefore, the receivers will continue to pay such rentals and mortgage interest (on leased lines). This will not include the rental to the Third Avenue Railroad which will fall due the last of this month. A clause in the lease by that road provides that default in the payment of any installment of that rental cannot be availed of for six months. Long before that time sufficient information can be gathered (and made public) by the receivers to give such enlightenment as to the whole situation as will enable the court to deal understandingly with all questions as to payment of all these items of rent and mortgage interest. Before default is made, * * * petition will be filed setting forth all the facts bearing on the question and asking instructions, and a day will be fixed on which not only the parties to the suit, but all in any way interested (including the Public Service Commission as representative of the traveling public), will be heard as to the most equitable and wisest course to pursue."

The receivers were also directed forthwith to "employ an accountant of the highest standing to make an investigation of the books and papers," etc.

It appears that the accountant has made an investigation as to the operation of the Third Avenue Railroad under the lease, and has reported thereon to the receivers. On January 1st next two further installments will fall due under the Third avenue lease, in the shape of interest on Third avenue mortgage bonds; and as to these installments the lease gives no extension of payment. They must be paid when due, or the contract of lease is broken. The amount of such mortgage interest is \$125,000 on first mortgage bonds, and \$751,200 on first consolidated mortgage bonds.

The receivers have filed a petition setting forth the facts and figures bearing on the question thus presented, and asking instructions. The same has been printed, and copies will be furnished to representatives of persons who expect to be heard thereon; Thursday December 19th, at 12 o'clock noon (room 124) is set for the hearing. The receivers will give notice to all parties to this suit and to the foreclosure suit, also to the trustees under the Third avenue mortgages, and to any committees or associations of bondholders thereunder, also to the board of directors of the Third Avenue Railroad, and to any committees or associations of stockholders of such railroad. Also to any committees or associations of stockholders of the Metropolitan Street Railway Company, and to any such stockholders as may have applied to intervene. And they will also advise the Public Service Commission of such hearing, and furnish that board with copies of the petition. In addition to those above enumerated the court will hear the representative of any one who has filed a claim before the special master against either the New York City Railway Company or the Metropolitan Street Railway Company.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

Appeal of KOHN et al.

(Circuit Court, S. D. New York. January 7, 1908.)

STREET RAILROADS—CREDITORS' SUITS—INTERVENTION BY STOCKHOLDERS.

In such a suit it is not the practice to permit individual stockholders in the various corporations interested to intervene, but such permission will usually be granted to a group relatively large in numbers and holdings and which offers to take in all others having like interests.

See 158 Fed. 460.

Henry Wollman, for petitioner Kohn.

Byrne & Cutcheon, for complainant.

James L. Quackenbush, for defendant New York City Ry. Co.

J. Parker Kirlin, for defendant Metropolitan St. Ry. Co.

Arthur H. Masten, for receivers.

LACOMBE, Circuit Judge. The first petitioner applied to be allowed to intervene November 25, 1907. He holds 500 shares of Metropolitan Street Railway stock. The second petitioner made a similar application December 2, 1907. It holds in trust 7,800 shares of Metropolitan Street Railway stock. The third petitioner made a similar application December 13, 1907. It is a group of more than 10 stockholders of the same company whose holdings aggregate upwards

of 10,000 shares, and who have formed themselves into a stockholders' protective committee to represent the interests of themselves and others similarly situated and are advertising for others to join with them. Upon the argument of the three applications the Fidelity Trust Company stated that it had joined such committee. Besides these applications to intervene the first-named petitioner asks that separate receivers be appointed for the Metropolitan Street Railway Company on the ground that the interests of that company and of the New York City Railway Company are independent and opposing. In the memorandum which was filed October 1, 1907, it was stated that the interests of lessor and lessee are different and diverse, but the opinion was expressed that the receivers could, for the present at least, discharge their functions, and it was added that, "should future experience seem to indicate that a separate trustee for one of the parties is required, some way to meet the difficulty will be found."

Nothing has occurred to indicate any necessity for the appointment of separate receivers. The only controversies now presented between lessor and lessee of the property of the Metropolitan Street Railway Company arise out of the lease, and are confined practically to the question, what shall be done with the moneys received from operating the property? Shall any surplus over operating expenses go to lessor or to lessee (or, rather, to their creditors)? Shall any particular expenditure be charged against lessor's or lessee's interest? Inasmuch as the receivers are expending such money only as is required to operate the railroad property as a unitary system and to maintain it in proper condition to render efficient public service, and are not to make any distribution until after liquidation of the claims, these questions do not require an immediate answer. The receivers can perfectly well discharge their functions as operating conservators of the property without the addition of other receivers; and there would be practical difficulties in the way of undertaking to operate the same road at the same time by two different sets of receivers. The application now made is apparently founded on some misapprehension of the nature of this receivership. This seems to be indicated by the reference to *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.* (C. C.) 70 Fed. 423, when the relation of trustees under successive mortgages was considered, and by the phrase used in argument that these receivers "represent the New York City Railway Company," and therefore should not also represent the Metropolitan Street Railway Company. Strictly speaking they do not represent either corporation. They are receivers appointed under a creditor's bill—and subsequently under a bill to foreclose a mortgage—whose duty it is to conserve the property of the debtors keeping it as a going concern so that its value be not destroyed, marshalling assets and ascertaining claims, so as ultimately to distribute the assets equitably among creditors under direction of the court. The different corporations have their representatives appearing in the suit, and it is the practice here to permit the intervention of committees or representatives of every conflicting interest, creditors—general, preferred, or secured—stockholders, majority and minority, and bondholders. Any one who may thus intervene as representative for some group of persons united in interest has

notice of all steps in the litigation and may himself ask the court at any time to give any particular instructions to receivers. In this way all diverse interests are at all times represented by persons whose personal interest it is to press their claims, and the receivers are left as they should be, free to operate and preserve the property for the ultimate benefit of all. This—and not the appointment of separate receivers—was the course followed by Judge Jenkins in the very case upon which petitioner mainly relies. *Farmers' L. & T. Co. v. Northern Pac. R. Co.* (C. C.) 66 Fed. 169.

There has been some delay in making application for intervention in this proceeding, the present group being the first to apply on behalf of stockholders of the Metropolitan. It is not the practice in this circuit to allow individual intervention, where there are many persons whose interests are identical. If the man with 500 shares were allowed to intervene, it would be difficult to find any excuse for refusing a like privilege to the man with 300, while certainly his neighbor with 600 would have to be let in, and there would soon be a multitude of counsel all on the same side. Where, however, application is made on behalf of a group relatively large in numbers and holdings, and which offers to take in all others having like interests, the application is usually granted.

The applications, therefore, of Kohn and of the Fidelity Trust Company are denied, and that of the "Waterbury Committee" is granted. Counsel for the first-named petitioner objects to joining this committee on the ground that he does not think it will efficiently represent the interests of stockholders, although no evidence warranting such conclusion is presented. If a group of stockholders shall hereafter appear, relatively large in numbers and amount of holdings, and shall show that the committee now admitted is not efficiently attending to the interests of stockholders, or that its policy and actions in specified particulars are not in accord with the views of a substantial minority of the stockholders, the propriety of admitting a second committee of Metropolitan stockholders will be considered.

It was the expectation of the court not to decide this application until after the disposition of the mandamus proceeding, but so many applications are being constantly made where it is important that the views of different interests should be presented, that it seems wiser to file this memorandum, so that the various committees which are forming and may wish to intervene may make application.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(Circuit Court, S. D. New York. January 31, 1908.)

COURTS—FEDERAL COURTS—SURRENDER OF PROPERTY TO STATE RECEIVERS.

A petition to a federal court to direct its receivers appointed for the property of street railroad companies having mutual relations to each other in suits by creditors and mortgagees to turn the same over to temporary receivers appointed by a state court in separate suits brought by the state each against a different one of the corporations defendant denied, with leave to renew when the suits had so far progressed in the state

court as to determine whether or not the state would prevail in either or both, and to disclose the precise situation on which the court was required to act.

In Equity. Petition of state receivers to have turned over to them the property now in the hands of federal receivers.

See 158 Fed. 460.

F. R. Coudert and Herbert R. Limburg, for receivers.

Byrne & Cutcheon, for complainant.

J. Parker Kirlin, for Metropolitan St. Ry. Co.

James L. Quackenbush, for defendant New York City Ry. Co.

LACOMBE, Circuit Judge. At the opening of the argument counsel for petitioners stated that some preliminary objection might be raised to this application in the theory that petitioners have as yet only an appointment by order as temporary receivers, the actions in which they were appointed not having yet come to trial. The court nevertheless heard argument on all the questions presented, expecting that, if the objection were raised (as it subsequently was), it might possibly be disregarded as an unimportant technicality, and the underlying questions discussed. More careful examination, however, presents the matter in a somewhat different aspect. The petitioners have been appointed temporary receivers in two separate actions brought by the people of the state of New York against two different corporations; one action against one corporation, another against the other. These actions are different not merely because the defendants are different and different testimony may have to be considered, but the causes of action themselves are different. One action is brought under sections 1785 and 1786 of the Code; the other under section 1781. The relief prayed for is different; in one case it is the dissolution of the corporation, in the other that certain directors account for alleged delinquencies, be removed from office, etc. Presumably the state expects to prevail in both actions, but it is quite conceivable that it may prevail in one and be defeated in the other. Bearing in mind the mutual relations of these corporations and the rights and interests, owned or claimed, by others in the property now in custody of this court, it is quite apparent that the situation, which would be presented if the state should succeed in action No. 1 and fail in action No. 2, might be radically different from that presented, if the state should fail in action No. 1 and succeed in action No. 2. It would, therefore, seem to be most unwise to consider the underlying questions until by further action of the state courts it may be determined precisely what the situation is upon which this court is to be asked to take action. The petition is therefore dismissed as being prematurely presented, without prejudice to its renewal whenever petitioners may be so advised. The various papers may remain on file, and in the event of a new application may be referred to without reproducing.

The petition contains a request that the federal receivers, who have possession of the books and papers of both companies, be directed to set forth in their answer copies of all entries in the minute book

or any other book or books in any way referring to the appointment of receivers or to this suit or to any of the proceedings herein. There can, of course, be no objection to the receivers filing copies of any such entries as they may find in the books for the enlightenment of whomever it may concern. They may do so, and notify petitioner's counsel of the date of filing.

In re FORTY-SECOND STREET, M. & ST. N. AVE. R. CO.

In re NEW YORK CITY RY. CO. et al.

(Circuit Court, S. D. New York. February 15, 1908.)

STREET RAILROADS—RECEIVERS—RECOMMENDATIONS AS TO OPERATION.

Recommendations of the receivers of street railroad properties proposing changes in the operation of cars to afford an increased service to the public adopted.

In Equity. On application of receiver.

Byrne & Cutcheon, for complainant.

James L. Quackenbush, for defendant New York City Ry. Co.

J. Parker Kirlin, for defendant Metropolitan St. Ry. Co.

Arthur H. Masten, for receivers.

LACOMBE, Circuit Judge. The receivers of these roads have submitted to the court for its consideration certain proposed changes in the operation of cars thereon. These appear to be so arranged as to afford an increased service, as will appear from the following summary:

The receiver of the Forty-Second Street, Manhattanville & St. Nicholas Avenue Railroad has decided to confine the service of its cars to its own line, instead of using them to increase the service on the lines of other railroads. His road is now insufficiently supplied with cars, and by calling in cars from outside service he will be able forthwith to secure better service on his own line, and expects to still further increase that service with additional cars as soon as he can make arrangements to purchase them. Therefore the so-called "Boulevard cars," which used to continue down Broadway on the tracks of the Metropolitan, will turn east at Forty-Second street and run to the east side ferries, on the tracks of the Forty-Second Street and Manhattanville. Having received a sufficient number of the new cars, built to replace those lost in the fires which last year destroyed three car barns, the receivers of the Metropolitan Street Railway Company will run on Broadway below Forty-Second street cars equal in number to the Boulevard cars thus diverted from their former route, and will run them as far downtown as the Boulevard cars used to run. No question of transfers having been yet raised passengers on the one road may transfer to the other at Sixty-Fifth street or Forty-Second street and continue down Broadway and vice versa. The additional cars put on by the receivers of the Metropolitan will run down Amsterdam avenue from 125th street—the service on Amsterdam and Sixth avenue remaining unchanged. These additional cars, however, will continue down the old Amsterdam avenue route to Seventy-First street, down Boulevard to Sixty-Fifth street and down

Ninth avenue to Fifty-Third street where they will turn east to Seventh avenue and thence down that avenue and Broadway.

The net result of these changes will be that on the Boulevard to Forty-Second street, and on Broadway south from Forty-Second street, the number of cars run will be the same as heretofore. On Forty-Second street and thence to the east side ferries the number will be materially increased. On Amsterdam avenue and down to Forty-Second street the number of cars in service will also be materially increased, and a passenger taking a car on Amsterdam avenue will be able to select one which will give an uninterrupted ride to either Sixth avenue or Broadway shopping and theater district as he may prefer. The service from the west side down will thus be materially increased, and will be rendered under conditions which make the two lines, Amsterdam and Boulevard, competitors of each other, each solicitous to attract passengers from the other by more efficient and comfortable service. Under the changed conditions residents of the west side on the line of the Boulevard will have to walk a block further to reach a car which will take them down Broadway below Forty-Second street, but those residents on the line of Amsterdam avenue will be able to find such a car by walking a block less. It would seem that inconveniences and conveniences will fairly balance each other, and, since the service as a whole will be increased, the proposed changes are approved.

HOUGHTON v. WHITIN MACH. WORKS.

(Circuit Court, D. Massachusetts. January 8, 1908.)

No. 213.

EQUITY—DISMISSAL OF BILL WITHOUT PREJUDICE—RIGHT OF COMPLAINANT.

A complainant may ordinarily dismiss his bill without prejudice at any time before final hearing, unless such dismissal will cause prejudice to defendant beyond that which arises from the risk of another suit; and the filing of a so-called cross-bill by defendant praying for a discovery will not prevent such dismissal, where it seeks no affirmative relief and the discovery sought relates solely to matters of defense in the pending suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 749-752.]

In Equity.

Fish, Richardson, Herrick & Neave and Louis W. Southgate, for complainant.

Wetmore & Jenner, for defendant.

LOWELL, Circuit Judge. Houghton filed a bill against the Whitin Machine Works to restrain the infringement of letters patent No. 795,769. The defendant duly answered thereto, and the complainant replied. Thereafter counsel for the complainant signified to counsel for the defendant that the complainant proposed to dismiss the bill without prejudice. Almost immediately after learning this,

the defendant filed a cross-bill, having for its sole object to prevent the dismissal of the complainant's bill without prejudice. This was admitted with honorable frankness by the defendant's counsel at the oral argument. The cross-bill prays that the complainant be enjoined from litigating the infringement except in the suit now pending, and it seeks the discovery of evidence applicable to that suit. No other suit is alleged to which the evidence sought is applicable. There is also a general prayer for relief.

A complainant may ordinarily dismiss his bill without prejudice at any time before final hearing. An exception to this rule exists where dismissal will cause prejudice to the defendant beyond that which arises from the risk of another action. "Whenever in the progress of the cause a defendant entitles himself to a decree, either against the complainant or against a codefendant, and a dismissal would put him to the expense and trouble of bringing a new suit and making his appearance anew, such dismissal will not be permitted." *Bank v. Roze*, 1 Rich. Eq. (S. C.) 294. In the case at bar the defendant is entitled to no decree. His cross-bill seeks no decree against the complainant, except in the suit now pending. To that suit the discovery sought is applicable. The defendant complains of the hardship which is imposed upon it by the complainant's threats of another suit and by its own apprehensions. But the courts have declared that the like threats shall not be taken to hinder a complainant from dismissing his bill without prejudice at his own option. This right of dismissal would be empty, indeed, if it could be defeated by the filing of any document which the defendant styles a "cross-bill." To prevent the dismissal of the original bill, the cross-bill must pray affirmative relief, and must not confine itself to a method of defense in the pending suit. *Gilmore v. Bort* (C. C.) 134 Fed. 658; *Chicago & Alton R. R. v. Union Rolling Mill Co.*, 109 U. S. 702, 713, 3 Sup. Ct. 594, 27 L. Ed. 1081.

Bill to be dismissed, without prejudice and on payment of costs. Cross-bill dismissed, on payment of costs by complainant.

MAURER v. UNITED STATES.

(Circuit Court, S. D. New York. December 17, 1907.)

No. 4,909.

CUSTOMS DUTIES—APPEAL—ADDITIONAL EVIDENCE—FAILURE OF IMPORTER TO RECEIVE NOTICE OF HEARING.

The rule that no evidence may be introduced on appeal from the Board of General Appraisers by the importer, where he offered none before the board, *held* to apply even though he failed to receive the board's notice of hearing, where the failure was due to his own fault.

On Application for Review of a Decision by the Board of United States General Appraisers.

Walden & Webster (Howard T. Walden, of counsel), for importer.
D. Frank Lloyd, Asst. U. S. Atty.

MARTIN, District Judge. The importations in question consisted of canned pineapples from Singapore, which were assessed for duty by the collector of the port at the rate of 1 cent per pound and 35 per cent. ad valorem, under the provisions of paragraph 263 of the Tariff Act of July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1651), as "fruit preserved in sugar." The importer protested, claiming the merchandise to be properly dutiable at 25 per cent. ad valorem under the provision contained in said paragraph 263 for "pineapples preserved in their own juice."

The government contends that the importer did not appear and offer testimony before the Board of Appraisers, and therefore the testimony of the witnesses introduced in the Circuit Court shall be excluded. The importer states, however, that he had no notice of the hearing before the Board of General Appraisers, that he duly entered his protest, and heard nothing from it until he learned of the decision. He states in cross-examination that he was away on a wedding tour for several weeks about the time of these proceedings before the board.

It well enough appears that notice was duly issued to the importer. His failure to receive it was due to the fact that he was away, and left no one to look after it. The failure to appear was his own fault. He having submitted no evidence before the board I hold that the evidence taken in this court is inadmissible, and therefore the case must stand upon the facts shown before the board.

The Board of General Appraisers upon the authority of *Dudley v. U. S.* (C. C.) 148 Fed. 333, affirmed the action of the collector. But since then the decision in the *Dudley Case* has been reversed by the Circuit Court of Appeals, 153 Fed. 881, 82 C. C. A. 627. Had the latter decision been handed down before the board acted in the case at bar it is apparent it would not have held the pineapples in question dutiable as fruit preserved in sugar. There was no claim made upon the hearing that the amount of sugar found in the pineapples in the *Dudley Case* differed materially from the amount found in the pineapples here in question. In fact it was so conceded by counsel for the government.

In view of the cases above cited, even excluding the evidence of the importer taken in this court, and resting the case squarely upon the evidence as it stood before the Board of Appraisers, I think the decision must be reversed. So ordered.

In re MARCUS.

(District Court, D. Vermont. March 18, 1908.)

BANKRUPTCY—WITNESSES—FEES—PAYMENT IN ADVANCE—BANKRUPT'S HUSBAND.

Under Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], providing that a bankruptcy court may require any designated person, including the bankrupt and his wife, to appear for examination concerning the bankrupt's conduct, etc., a bankrupt's husband cannot be compelled to testify without payment to him of his lawful fees

In Bankruptcy.

J. H. Macomber, for creditors.

Brown & Hopkins and V. A. Bullard, for bankrupt.

MARTIN, District Judge. The referee reports to the court that the husband of the above-named bankrupt was ordered to appear before the referee and testify; that the said husband appeared, but refused to testify without first being paid his witness fees. This the creditors refuse to do, claiming that he should be compelled to testify without such payment. This question is submitted to the court by the referee.

Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], provides that:

"A court of bankruptcy may, upon application of any officer, bankrupt or creditor, by order, require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court to be examined concerning the acts, conduct or property of the bankrupt whose estate is in process of administration under this act," etc.

No question is made that any persons other than the bankrupt, or the wife or husband of a bankrupt, required to attend court as witnesses, should be tendered their lawful witness fees. This statute places the wife of a bankrupt husband in the list with "any designated person." The husband of a bankrupt wife is not specifically mentioned, yet must stand in the same relation to the bankruptcy proceeding as "any designated person," but cannot be compelled to testify without the payment of his lawful fees.

THE GIBSON.

(District Court, S. D. New York. January 11, 1908.)

SALVAGE—RESCUE OF DERELICT—AMOUNT OF AWARD.

A loaded coal barge, worth with her cargo in her salvaged condition about \$20,000, was found and rescued by libellant's tug when about 50 miles off the New Jersey coast. She had broken her hawser and gone adrift two days before in a storm, and had later been abandoned by her crew. When found she had 12 to 13 feet of water in her, and would probably have sunk before receiving assistance from any other vessel. The service was attended with some danger to the tug, and considerable danger to the men who went on board, owing to her condition. *Held*, that the tug and crew were entitled to a salvage award of 50 per cent. of the salvaged value, to be distributed 75 per cent. to the vessel and 25 per cent. to the crew, those who went on board to be given an extra allowance therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, §§ 60, 93-95.

Awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.]

In Admiralty. Suit for salvage.

Robinson, Biddle & Benedict, for libellant.

Wallace, Butler & Brown, for claimant.

ADAMS, District Judge. This action was brought by Frank L. Neall, Trustee, as owner of the steamtug Sommers N. Smith, and on behalf of the members of her crew, against the barge Gibson and her cargo of coal, with the freight earned thereon, to recover salvage compensation for the saving of the barge, etc., at a point about 50 miles southeast from Absecon, New Jersey, about 8 o'clock in the morning of the 7th of February, 1907. The meritorious character of the salvage services is admitted, the dispute on that point being simply whether the libellant should recover one-half or one-third of the value, and what that value amounted to, the libellant contending that it was \$27,000, and the claimant \$18,246.64.

The Gibson left Newport News, Virginia, in tow of the tug Waltham with two other barges, the Darby and Bala, all laden with coal and bound for eastern ports. The Darby was the leading barge, the Gibson the second and the Bala the last. The hawsers between the vessels were long. When in the vicinity of Barnegat on the 5th of February, a storm was encountered and early in the morning, the two stern barges broke adrift and the tug attempted to continue on with the leading barge but she soon sank. The tug after manœuvring around for a time, looking for the other barges without success, proceeded to New York. The Gibson and the Bala remained fastened together a short time, when the hawser between them parted and the Bala subsequently sank. The Gibson after drifting nearly all day was picked up about 7 or 8 o'clock the same evening by the steamer Chalmette, bound to New York. The steamer made fast to the barge with hawsers, which parted after several hours' towing, when it being found that the pumps could not altogether resist the inflow of water from leaks in the vessel, she was left drifting upon the ocean, a hopeless derelict, if the bad weather continued. The master stated to the master of the Chalmette in the evening that she would not last till morning and asked to be taken off with his crew, which was done. The weather at the time was very rough; it was blowing a gale, with snow squalls and a choppy sea. The weather moderated in a short time, however, and the barge was not absolutely in a sinking condition, notwithstanding the quantity of water in her hold, which at the time was about 8 feet forward and 5 feet aft, she being somewhat by the head. Her seams, which had been opened by the heavy seas she had encountered, doubtless closed up so that she did not leak so badly thereafter.

The Smith, a tug about 150 feet long, worth about \$40,000, and fitted with salvage appliances, was cruising on the 6th of February for a bark which she had heard was ashore. Not finding her, she went to the Delaware Breakwater, where she usually remained when not at work elsewhere, and found there a telegram from her owner about the barges, confirming information she had received from a schooner lying off Absecon, about one of them being still afloat. Having been ordered to seek it, she left the Breakwater about 10 p. m. of the 6th. She proceeded up the coast until Absecon Light was about 15 miles distant, bearing west-northwest, when she stood out to sea to the southward and eastward. She ran some hours that night, stopping toward morning on account of snow obscuring the

view. Some wreckage was observed, which it was supposed might indicate the loss of the remaining barge, thought to be the Gibson, but it was found to belong to another barge and when the snow ceased, the search was continued. About 7:30 a. m. of the 7th, the Gibson was sighted about 50 miles southeast from Absecon. The Smith ran up to her and found her lying in the trough of the sea, the wind being then to the northward and the barge heading to the eastward. The night had been very cold, the Smith's decks were covered with ice, and the barge also was almost covered. The barge was lying low in the water, so that her decks were practically awash amidships. The Smith endeavored to put some of her crew aboard by having them jump but it was deemed a dangerous attempt and it became necessary to lower a small boat in which the chief engineer and two deckhands went to the barge. There was a heavy sea running at the time and there was considerable danger to the boat and occupants from collision with the barge, particularly as there was no one on board to assist the rescuers. After some difficulty, however, the engineer and one of the hands got aboard while the other hand remained in the small boat. Those who went aboard discovered that the booby hatch leading down into the boiler room was open and that some water was finding its way thence into the body of the vessel as she rolled with the sea. This opening was on the port side of the vessel about 12 feet from her stem. It faced toward the stern and had upright sides and back a few feet high with a curved top or slide, which could be moved back. It had also a sliding upright door through which entrance could be gained to the boiler room of the barge, reached by means of the hatch companion-way covered by the hatch. Ordinarily the door was not used as the opening could be reached by climbing over the sides. When the crew left the barge, the top was pushed back but the door was in place. When the men from the Smith went aboard, the top was still open but the door was washed from its place into the engine room, thus giving access to the water from the deck through the door which otherwise would have been kept out. The quantity of water, however, which reached the hold was not very great, as it was only when the barge was in a position to facilitate it that the water gained an entrance. The other hatches were well secured and no water entered the hold except through the seams and the booby hatch. By the time the men went aboard, there had been sufficient leakage to increase the water in the hold to 12 feet forward and 13 feet aft and it was contended by the libellant that under the existing circumstances she would not have remained afloat for much longer than an hour. Of course that is a matter of conjecture but there can be no question that the barge was in serious danger and the possibility of her being picked up had not the Smith reached her was very remote. She was low in the water and taking some in, which in all probability would have continued, until she was sunk in deep water, especially considering that she had a sinking cargo on board. When the engineer reached the engine room and discovered the condition, he sent one of the men back to the Smith in the small boat for nails and canvas and with them, in conjunction with some boards found on the vessel, the

hatch was nailed up and that source of danger removed but not without some risk to the men because of the freezing weather and the heavy sea that was still running. As soon as this hatch was closed a line was run from the Smith to the barge and the former went ahead slowly, holding the barge's head to the sea. A fire was then started under the boiler and soon sufficient steam was available to start the engine when pumping commenced. The Smith then started to tow the barge to the Delaware Breakwater, during which she yawed considerably rendering the towage difficult. The Breakwater was reached about 8 a. m. of the 8th, thus occupying some 18 hours. After this the Smith stood by the barge to take care of her and protect her from the ice, until the 15th of February, when the claimant sent its own tug to tow her to New York, in which work the Smith assisted but has been paid for.

The first question for consideration is the rate of compensation to be allowed.

It is contended by the claimant that the barge was still being sought for by the Waltham but the testimony shows that that tug, after arriving in New York about 11:35 p. m. of the 5th, at 6:35 a. m. of the 6th went out to look for the barges in the vicinity of Barnegat and Absecon, but did not go more than 5 or 6 miles from the beach and then she returned to New York where she remained until 10:35 p. m. of the 7th. In the meantime the barge had been picked up. If the Waltham had shown the enterprise, skill and perseverance displayed by the Smith, she might have saved the vessel, but as it was, her efforts to find the barge were entirely futile and it was left for the Smith to accomplish this very deserving piece of work.

The barge was unquestionably a derelict in the fullest sense of the word and was in great danger of becoming a total loss. While she may not have sunk within an hour, in all probability she would have done so before any assistance reached her. The services of the Smith were very opportune as well as skillful and attended with some danger to the tug in approaching the barge and getting her men aboard, but the principal consideration is that of the danger to the barge, which was imminent. The rescuing men on board were also subjected to considerable risk of being drowned in their efforts. Various authorities have been referred to by the claimant to sustain its contention for a 33 per cent. award but I do not consider them in point—*The Theta* (D. C.) 135 Fed. 129, seems to me to be the case most nearly similar to the present one and I refer to it and the authorities cited to sustain the 50 per cent. award which I deem it proper to allow here. In *The Theta* there are some features which do not appear in this case, that of removing a dangerous wreck from the path of commerce in approaching New York, for example, but that was a lumber laden vessel with a probability of there being some salvage from other vessels or beaching, while here the probability was that save for the Smith and her crew, the barge would have been a total loss. It does not seem necessary to point out and discuss the other differences. In fixing the award of 50 per cent., the master of the tug and the engineer who went on the barge should have an extra share of the 25 per cent. which is allowed to the crew of the tug. The other man who went to the barge's

assistance should have one-half of an extra share. Otherwise than as here indicated, the crew's shares will be allowed in proportion to their wages.

It remains to determine the value of the property saved. There were three items, viz.: the freight, the coal and the vessel.

The freight and charges*amounted to \$1,270.82. \$300 were paid to the Smith for her services in assisting in the towage of the barge from the Breakwater to New York. One of the claimant's tugs which performed part of this service was entitled to as much. An aggregate payment of \$600 was made to two of the claimant's tugs for towing from New York to Providence. \$1,200 were therefore expended in earning the freight, leaving a balance of \$70.80 subject to salvage.

The cargo consisted of 1412 tons, which cost, free on board, in Newport News \$2.75 per ton. It was sold in Providence at \$2.25 per ton on account of its damaged condition. Therefore the salvage value was \$3,177.

The market value of the barge in her damaged condition would have been the basis for calculation for salvage purposes but the testimony shows that there is no market value for vessels of this description because they usually belong to coal transportation companies, which rarely, if ever, sell them but use them up in their business. The barge was built for the claimant at Bath, Maine, in 1898, at a cost of \$23,941.01 including her whole equipment. During her entire life she had been used in the coal trade, a severe employment, involving the carriage of heavy cargoes, and somewhat rough usage. The value here may be fairly reached by ascertaining what it would cost to build a new barge of the same character and deduct such percentage of depreciation as might be due to her age and from the amount so found also deducting the cost of repairs due to the perils to which the barge had been subjected.

Nine witnesses were examined upon this controversy. They all agreed that there had been a marked appreciation in the cost of labor and material between the time the barge was launched in 1898 and February, 1907, when the salvage services were rendered, but their estimates of the advance varied from 10 to 50 per cent. Testimony that it amounted to the latter was given by two of the libellant's witnesses but it appears that their estimates were excessive. The preponderance of the testimony shows that 25% may be safely taken as the aggregate of the appreciation. Upon the basis of the cost of a trifle under \$24,000, which was a fair market value of the barge at the time, and allowing for the stated appreciation, she could have been reproduced in February of this year at a cost not exceeding \$30,000. The testimony of nearly all of the experts on the subject confirms this estimate of value as indicated by the cost at the time of the salvage. A number of barges under construction at the time of the estimates, called "Class D," were referred to in the testimony but it appeared they were of somewhat different size from the Gibson, that they had additional strengthening through the use of iron straps and varied in other respects so that a comparison between those vessels and the Gibson does not lend much aid in reaching the desired result as to the latter's value. It appears that the Gibson required repairs on account of the stress she

had been subjected to of about \$1,500. I conclude therefore that her value was her cost in 1898, \$24,000, from which a reasonable deduction for depreciation for wear and tear of 5% per annum should be made. This would show a sound value in 1907 of \$14,400, to which should be added 25% to represent the appreciation in cost of labor and materials showing a value in 1907 of \$18,000, from which should be deducted \$1,500, the cost of repairs. This would show a value of \$16,500, which seems to fairly represent the damaged value, to be taken for salvage purposes.

The values therefore were:

Net freight	\$ 70.80	
Cargo	3,177.	
Barge	16,500.	
		<u>\$19,747.80</u>

There will be a decree for the libellant for \$9,873.90 to be divided as above indicated.

ZABRISKIE et al. v. CITY OF NEW YORK.

(District Court, S. D. New York. January 31, 1908.)

SHIPPING—CONSTRUCTION OF CHARTER—LIABILITY FOR NEGLIGENCE OF MASTER.

Under an oral letting of a scow by the day, including the services of the master who was employed and paid by the owner, the master remained the agent of the owner as to all matters relating to the care of the boat, and the charterer is not liable for her injury through the master's negligence in leaving her tied up at a dock by a line which was too short, by reason of which when the tide fell she careened, filled, and sank.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 220.]

In Admiralty.

Hyland & Zabriskie, for libellants.

John J. Delany and George P. Nicholson, for respondent.

ADAMS, District Judge. The libellants, Nelson Zabriskie and Michael H. Hyland, owners of the scow Oneida, brought this action against the City of New York to recover the damages incident to the sinking of the scow while at Riker's Island, in July, 1906, with a load of city sweepings. The scow was under charter to the city at \$5. per day. When taken to the Island she was at first placed alongside of a dock some distance away from a digger, located on the dock, which was to discharge her, but shortly afterwards she was moved nearer to the digger and while awaiting her turn to get under it, she sank.

The libellants' allegations are that the respondent took possession of the scow under an agreement to return her to the owners in as good condition as when received, ordinary wear and tear excepted, but failed to keep its agreement and took so little care of the scow that she was returned to the libellants in a damaged condition, not caused by ordinary wear and tear. The respondent admits that it hired the scow but alleges that under the agreement the libellants were to furnish and did furnish the captain and equipment of the scow; that the libellants' own captain was in charge of the scow and was supposed to guard the boat

at all times; that if any injuries were suffered by the boat, they were caused by the neglect of the captain in failing to look after the boat and that she did not suffer any damages through the use by the respondent other than ordinary wear and tear.

It appears that the boat was in good condition when the accident happened and that her injuries resulted from the sinking. The cause of the sinking has been the subject of a warm controversy, the libellants claiming that it was due to an uneven bottom at the place where she was taken for discharge, of which the libellants were not required to take notice by sounding, while the respondent claims it was solely the result of the negligence of the master of the boat in leaving her for the night without having taken proper precautions with respect to her forward mooring line and she consequently hung herself so that water came over her side and filled her.

The relations of the master to the boat and the parties do not appear in the testimony, the latter doubtless proceeding upon the assumption, that the court would take notice that this was a usual form of oral letting for boats of this character, where the hire covers the master's wages. I believe it is understood in such cases that the master, although under the orders of the charterer as to the vessel's employment, being appointed, paid, and subject to dismissal by the owner, remains his agent in matters relating to the care of the boat. Many decisions have been made by this court upon such an assumption. It would seemingly be anomalous, if in such cases the master should be deemed the charterer's agent the same as if selected and employed by him to care for a bare boat, under the principle of chartering known as *locatio navis*. The kind of chartering in this case more properly falls under the 2d class of chartering, which constitutes a demise of the vessel fit for mercantile adventure, including in a case of this kind, a master. The 3d class is a contract for the carriage of the merchant's goods in the owner's ship and by his servants. It is said in *Abbott on Shipping* (14th Ed.) pp. 60, 61, 63, 64, 75:

"Contracts between shipowners and merchants for the hire of ships, have been divided into three classes, namely: (I) *Locatio navis*, a demise of the ship itself, with its furniture and apparel; (II.) *Locatio navis et operarum magistri et nauticorum*, a demise of the ship in a state fit for mercantile adventure, including a master and crew; and (III.) *Locatio operis vehendarum mercium*, a contract for the carriage of the merchant's goods in the owner's ship and by his servants.

Respecting the first of these classes of contracts and the liability thereunder, no difficulty is likely to arise, as the shipowner surrenders to the charterer the possession of the ship with the right to appoint master and crew, and fully control them when appointed, and the charterer alone can be made liable. In the third class of such contracts it is equally plain that the shipowner retains full control over his ship, and that the master and crew are his servants, and he is therefore liable for anything done by them in the performance of the contract of carriage. But it is in the construction of the second class that difficulties have arisen. A ship may be demised with her master and crew so that the charterer has the sole control or ordering of the whole; or she may be demised so that whilst the charterer has the right to order the lading and carrying of cargo and other matters, the general control of the ship, her master and crew, remain in the shipowner; or it may be that the contract, although purporting to demise the ship with her master and crew, appears by its other provisions to be intended only as a contract for the carriage of the charterer's goods as in Class III.

There have been many varying decisions dealing with the construction of such charter-parties and the liability of owners under the same. In the earlier cases there was a tendency to hold that if there were technical words of demise, this was enough to transfer the possession and control, and consequently the liability to the charterer; but the later cases have established that the question whether the possession and control is transferred to the charterer must be determined by the intention of the parties as expressed by the wording of the contract as a whole. From the cases it appears to result that if the charterer by the terms of the contract gets the absolute possession and control of the ship, so that in the performance thereof the master and crew are acting as his servants, and not as the servants of the shipowner, the latter is not liable for their acts; but that if the control of the ship or of the master and crew remain, even partly, in the shipowner, the latter will be liable, at any rate, for anything done by them as his servants, or where they act, so that the person injured has the right to assume that they are so acting."

"The foregoing cases illustrate what does and what does not amount to *locatio navis*, or demise of the ship with its furniture and apparel. Between this class of contract and *locatio navis et operarum magistri et nauticorum*, or demise of the ship in a state fit for mercantile adventure, comes a class which is not wholly within either one or the other, but something between the two; it is the letting of more than a ship, but of something less than a ship in a state fit for mercantile adventure. Such is a charter where the owner provides the ship and crew but allows the charterer to appoint his own master. To find out whether the master is the servant of the owner or of the charterer, or whether he is to a certain extent the servant of both, depends on the variety of circumstances, for which it is necessary to look to the particular charter."

"When it is desired to find out whether the owner is the employer of the master and crew, or any of them, the primary questions seem to be, Who pays them? Who appointed them? Who can dismiss them? The last being, perhaps, the most important of the three. A master and crew appointed by the owner, but paid by the charterer, were held to be the owner's servants, and the owner to be liable for their negligence. A master appointed by, and under the control of, the owners, but paid by the charterer, was thought by Sir Robert Phillimore to have rendered the owners liable on contracts for necessities. And in the case of *The Beeswing*, decided by the Court of Appeal in 1885, it was held that a master appointed by charterers, but whom the owners had contracted to maintain, and therefore to pay, and who was subject to the owners' orders as to navigation, and to be dismissed by them, was their servant. A similar view has been taken in America. Mr. Parsons, in his treatise on *The Law of Shipping*, thus deduces the law from American as well as English decisions: 'It seems, however, to be generally the rule that the party that mans the vessel is to be considered as in possession. But this may be rebutted by clear evidence to the contrary. If one party appoints the captain, and the other pays him, he is generally considered as holding the possession of the vessel for the party appointing him.' This was written in 1869, and is in accordance with English decisions up to that time; it is now supplemented by the decision in *The Beeswing*, which seems to show that where the original appointment is in one person, and the power of dismissal in another, the control rests with the latter."

See, also, *Quinn v. Complete Electric Const. Co.* (C. C.) 46 Fed. 506.

This case is distinguishable from the doctrine of *Swenson v. Snare & Triest Co.* (D. C.) 145 Fed. 727, cited by the libellants, by the fact that the injury to the hired property there was found to be due to improper towing by the respondent. It does not cover this case, and the same may be said of other cases cited where the injury was caused by the respondent's servants.

Considering, therefore, that the master of the boat was the libellants' agent, it remains to be ascertained in what manner the accident

happened. The scow was first taken alongside of the *Citizen*, another boat of the same character lying at the dock about 200 feet below the place of the injury. The scow remained there for about 3 days and was then pulled toward the digger with the latter's lines until the scow was distant about 40 feet, where she was to remain until the space under the digger, then occupied by another boat, was vacated. This was about 5 o'clock in the afternoon. She was left in charge of her master who made her starboard side fast to the dock with a line at the bow and another at the stern. The length of and what was done with the bow line were subjects of this controversy. The line was a comparatively new one, about 5 or 5½ inches in circumference.

About 8 o'clock that night, the master left his boat and went to spend the night upon the *Citizen*, in order, as he stated, to avoid the disagreeable odor on his boat from the cargo. As both boats, however, were in the same kind of business and those on board probably suffered from the same kind of smell, it is difficult to understand how he could expect to find the *Citizen* more comfortable in such respect than his own boat and the fact doubtless is that he went to secure companionship and social entertainment. He returned to his boat the next morning, when he found her under water excepting the starboard side of the bow, where he said there were only 3 feet of water but increasing to 15 feet at the stern. He also said that on the port side he could not reach bottom with a pole 20 feet long. The lowest stage of the tide was probably about 2 o'clock in the morning.

The libellant Hyland appeared as a witness. He, as well as the master, said that the river where the bow of the boat was was quite shallow at low tide. The master said that he took measurements of the soundings which his proctor wrote down. Mr. Hyland also said he took a written memorandum of the measurements he made. These papers were called for by the respondent but not produced, it being claimed that they were lost.

Opposed to the claim of an insufficient depth of water at the place was the testimony of several witnesses. Carlsen, the first witness called by the libellants, said that he saw the *Oneida* careened over and had been in the place many times with his boat, which drew 8 feet loaded, through the low tide and nothing happened to her. Hoefling, dump inspector at the island, said it was a customary place for boats to tie up before going under the digger and he had known of boats drawing 9 feet to lie there without accident; that this case was the first he had heard of occurring at that spot. Corcoran, the master of a city scow, drawing 6½ feet of water, said he had remained there numerous times with his boat, through all stages of the tide, without injury. Baker, the master of a city scow, said she was 110 feet long and drew 9 feet of water; that he knew the location where the *Oneida* was sunk; that he had seen other scows lying in the same place and had been moored there with his boat at all stages of the tide; that he judged there was a depth of 8 feet there at the lowest tide and his boat might have touched bottom but never suffered any inconvenience. Golden, also a scow master, said his boat was 100 feet long and drew 8 feet 6 inches; that he had occupied the same berth with his boat

and seen others do it every day; that he had never seen a boat sunk at the place or in any difficulty.

The great preponderance of the testimony is in favor of the City's contention, and I conclude that the berth where the Oneida received her damages was a safe and proper one for a boat of her character to occupy.

This conclusion only leaves for determination the question of the manner in which the boat received the injury which caused her to sink. The libellants vigorously contend that it was impossible for the line to have held the boat so that she would take in water enough to carry her to the bottom because the line by which she was fastened would not have been of sufficient strength to hold her. Assuming that it is the fact that if there had been quite a depth at the place and that the line would have broken, or the bitt to which it was fastened pulled out, from the strain, especially considering the entrance of considerable water into her hold, it appears that the line was not subjected to the stress of holding the entire weight of the boat as she was resting on the bottom and sustained by it. The libellants' testimony in this connection consisted principally of a Mr. Cahill, a shipwright, with admittedly no experience which would entitle his opinion to much weight. He testified in conformity with the libellants' contention but his opinion is of little value. The master's claim was that he put out 15 or 20 feet of line forward running from the middle bitts on his boat to a pile on the dock and there was enough slack to allow for the fall of the tide. Hoefling said that when he saw the boat sunk the next morning, the line was tight between her starboard corner bitt, so tight that it was—

"as stiff as a crowbar. I carried a hickory stick with me to stir up the rats, and I hit this line to see whether it was taut and I could not make any impression; I even tried to slide on it, but I could not make any impression. Q. How did that line run up from the boat? A. Straight up and down; right to the pile. Q. Was the line short or long? A. Very short line. Q. Could you say about how long it was? A. I should say six or seven feet; eight feet."

Corcoran said she hung herself with the bow line and he remarked at the time "There is the line that done the trick." On cross-examination he said:

"When you were there with your boat was she lying on the bottom? A. No sir, never did. Q. How do you account for this boat lying on the bottom? A. The lines were too tight, and she hung herself, and her port hatch was open and as the tide was falling, of course she listed over, and I suppose the seas washed in and went through the hatch. * * * Q. Ten feet of water in all stages of the tide how could she get on the bottom by hanging herself; if she hung herself that would keep her up? A. She listed over, and her port hatches filled in with water, and she settled on the bottom and laid there. Q. What part of her was on the bottom? A. All of it. Q. How could she get on the bottom if she hung herself; the hanging would keep her up, wouldn't it? A. That is what we call hanging herself when the line is too tight and she turns around and gets a list, and fills with water and settles down."

Baker said he saw the bow line straight up and down taut; that the line should have had more slack. Golden also said that the bow line in the morning, a little after six o'clock, was straight up and down

and very taut; that he saw the master of the scow slack the line off about a quarter after eight o'clock.

The testimony with respect to the line is convincing that it was tight and held the boat's bow up at the starboard corner.

The bottom of the river was irregular at the dock and declined so as to make a greater depth a short distance away but this was not in any way the cause of the sinking, which resulted from a too tight line and the neglect of the master to lengthen it with the falling of the tide.

The libel is dismissed.

WEHNER v. BAUER.

(Circuit Court, N. D. California. March 2, 1908.)

No. 13,482.

1. ACTION—EQUITY—CAUSES OF ACTION—JOINDER.

Complainant contracted to furnish the material for and install for a specified consideration a hydraulic mining plant on certain claims for defendant and P. Defendant pledged to complainant certain corporate stock belonging to defendant to secure payment of the contract price. After complainant had partially installed the plant, and had incurred a large outlay, a new contract was made, by which, in consideration of complainant's turning over to defendant the partially installed plant and all materials, etc., defendant would repay complainant with interest to the amount expended by him with reasonable compensation for his time, and that the stock previously pledged should be held by complainant as security for the performance of the second agreement. *Held*, that a bill to enforce complainant's lien on the stock under such second agreement, and to have the proceeds thereof applied to the payment of such amount as was found due complainant thereunder, was a simple suit for the foreclosure of the lien, and was therefore not objectionable as joining two distinct causes of action, one at law to recover on a simple contract debt, and the other in equity to foreclose a pledge.

2. EQUITY—JURISDICTION—LEGAL QUESTIONS.

It is no objection to the jurisdiction of equity that legal questions are presented for consideration which might also arise in a court of law, since, if the controversy is one in which a court of equity only can afford adequate relief, its jurisdiction is not affected by the character of the questions involved.

3. PLEDGES—CONTRACTS—EVIDENCE.

After part performance of a contract to construct a mining plant, for the consideration of which defendant had pledged certain corporate stock, a new contract was made, by which for complainant's surrender of the plant in its then condition with the materials defendant agreed to pay the amount of complainant's expenditures and the value of his time. In the conversation leading up to the second contract defendant stated that complainant was well secured, and he replied, "Yes; I have good security." *Held* sufficient, in the absence of evidence to the contrary, to show that the stock was also pledged for the performance of the second agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, § 59.]

4. CONTRACTS—CERTAINTY.

Where a contract provided that in consideration of complainant's turning over to defendant a partially installed plant and the materials, etc., defendant would pay complainant with interest the amount complainant had expended, together with reasonable compensation for his time, such

agreement was not objectionable for indefiniteness and uncertainty because the precise amount expended by complainant under the original contract could not then be ascertained, the amount being capable of being made certain by reference to the complainant's vouchers and bills.

5. SAME—ALLOWANCE FOR SERVICES.

Where a contract in consideration of a rescission of a former contract provided that defendants should pay complainant a reasonable compensation for his time, the contract was not objectionable for uncertainty as to the amount to be paid therefor, complainant being entitled thereunder to the reasonable value of his services.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 16.]

6. SAME—REDUCTION TO WRITING.

Where a contract, certain in its terms, was definitely entered into, the fact that there was a purpose in the minds of the parties to reduce it to writing, which through defendant's failure was never carried out, did not affect its enforceability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 159.]

7. FRAUDS, STATUTE OF—EXECUTED CONTRACT.

The statute of frauds, making oral contracts not to be performed within a year unenforceable, has no application to a contract fully performed on one side.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 337.]

8. CONTRACTS—JOINT CONTRACTS—RESCISSION—ILLEGALITY.

Complainant being under contract to defendant and P. jointly to install a mining plant while carrying out such contract agreed with defendant alone to terminate the same, and turn over to defendant the plant in its unfinished state and all materials, in consideration of defendant paying the amount expended by complainant and compensation for his time. At the time the contract was made, defendant held a general power of attorney from P., which was not shown to have been revoked. *Held*, that such new contract would be presumed to have been authorized by P., and was therefore not illegal as permitting one of two joint contractors to terminate the contract without the other's consent.

9. PRINCIPAL AND AGENT—RATIFICATION.

The subsequent ratification by a principal of the acts of his agent is as efficient in law as express antecedent authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 662, 663.]

10. DISMISSAL—MOTION.

In order to sustain a motion to dismiss before trial, defendant is bound to make a case so free from doubt that the court can say there is no reasonable ground on which it can continue to entertain the case or put defendant to his defense.

Thomas, Gerstle, Frick & Beady, for complainant.
D. M. Delmas and Carl Westerfield, for defendant.

VAN FLEET, District Judge (orally). In this case, the complainant's testimony having been taken and returned, the defendant now moves the court to dismiss the bill upon several grounds, some of which arise on the face of the bill, and others upon the alleged insufficiency of the evidence in various respects. These grounds will be noticed in the order in which they have been presented.

It is first urged by defendant that the bill undertakes to unite two separate and distinct causes of action, one at law to recover on a simple contract of debt, and one in equity to foreclose a pledge; the ob-

jection being that this is contrary to the course of proceeding and jurisdiction of this court. I am of opinion that this objection involves a misapprehension of the effect of the facts stated in the bill. So far as material, they are, in substance, that in September, 1902, the complainant entered into a contract in writing with the defendant and one Peterson to furnish the material for and install, for the consideration therein provided, a hydraulic mining plant on certain placer claims owned by defendant and Peterson in the territory of Alaska; and that to secure the plaintiff against any loss that might accrue to him by reason of carrying out his contract there was pledged to him certain corporate stock belonging to the defendant; that after complainant had proceeded under his contract, and, at a large outlay, had partly installed the plant, the contract was, in June, 1903, abrogated and abandoned, and complainant relieved and discharged of all obligation to further perform the same, and thereupon a new contract was entered into between complainant and the defendant, whereby it was agreed that, in consideration of complainant turning over to the defendant the partially installed plant with all material, supplies, machinery, and tools then on hand and en route, the latter should repay the complainant, with 6 per cent. interest, the amount thus far expended by him in carrying out the original contract, together with reasonable compensation for his time; and that as a part of such new contract it was agreed by defendant that the corporate stock theretofore pledged to complainant under the first-mentioned contract should be held by him as security for the performance of the last. It is to recover upon the last-mentioned contract and to enforce his lien upon the stock so held as security for the payments therein provided, and which it is alleged have not been made, that this suit is brought; the prayer being that the stock be sold, and the proceeds applied to the payment of such amount as may be found to be due the complainant thereunder.

To my mind these facts constitute no more than a cause of action to enforce a pledge by foreclosing a lien upon property held as security for a debt created by contract—a case falling within one of the best-recognized heads of equity jurisdiction. The fact that, incidentally and as a feature of the contract, it is essential to establish the indebtedness for which the security is held, a feature which, standing alone and independently of the pledge, would be properly cognizable in a court of law, cannot affect the right of a court of equity to entertain the bill. It is not an objection to the jurisdiction of equity that legal questions are presented for consideration which might also arise in a court of law. If the controversy be one in which a court of equity only can afford the full relief prayed for, its jurisdiction is unaffected by the character of the questions involved. *Holland v. Challen*, 110 U. S. 24, 3 Sup. Ct. 495, 28 L. Ed. 52. Here a court of law would be quite powerless to give the relief asked as to the stock pledged; only a court of equity can do that, and this being so, and as equity does nothing piecemeal, its right to take the case for that purpose draws unto it jurisdiction to determine any question arising, legal or equitable. And the fact of the existence of such legal questions being disclosed by the allegations of the bill does not in such a case constitute a separate and distinct cause of action at law. The case is not within the principles of *Scott v. Neely*,

140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, mainly relied on by defendant, but is very clearly within the class of cases recognized by the court in that case as falling within the jurisdiction of a court of equity.

It is next objected that the complainant's evidence discloses no equity, because it fails to establish the fact that the stock pledged as security for the original contract was to remain as security for the performance of the present one. It is sufficient to say in this respect that, in the view I take of the evidence and what it tends to show, there is sufficient, in the absence of any countervailing proof, to enable the court to find that it was contemplated by the parties that the stock was to be so held; and that the lien thereon attached to the last-mentioned contract. It is true that there is to be found no statement in precise and definite terms that the stock was to be so held; but, in ascertaining what the parties intended, all the facts and circumstances surrounding a transaction must be taken into consideration, and what was said at the time of the negotiation of the contract in suit must necessarily be regarded in its relation to the circumstances in which the parties were then situated, and, in this view, the suggestion of Bauer to the complainant, when asking for better terms as to the time of making payment thereunder that, "You are well secured," or words to that effect, and the answer of the complainant, "Yes; I have good security," must be regarded, in view of the fact that the record is bald of any showing of other security than the stock mentioned, as having reference to that stock. This ground, therefore, in my judgment, cannot be sustained.

The next two grounds—that the contract proven is not the contract sued on, and that the contract sued on was never, as disclosed by the evidence, entered into—may be considered together, and I am satisfied that neither should be sustained. Taking the evidence for all it tends to prove, and standing as it does wholly undisputed, I think the contract alleged was sufficiently established in its material features, and in substantial accord with the terms as set forth in the bill. Those terms were simple, and, to a common certainty, definite. It is true that the precise amount that had been expended by the complainant under the original contract could not at the time be ascertained, because his vouchers and bills were all in San Francisco, at a long distance from the mine where the negotiations were had, but the mere ascertainment of that amount in no way rendered the contract uncertain or indefinite. That is certain in law which can be made certain, and the ascertainment of the amount expended by the complainant was a mere question of detail to be determined from the vouchers and other means by which such items are usually established. As to the allowance of something to complainant for his time, that under all the circumstances must be held to have been an agreement to pay him the reasonable value of such time, which was a question to be ascertained by any proper method, and was likewise entirely susceptible of being made certain. I think, therefore, that the evidence sufficiently shows not only that there was a contract certain in its terms, but that that contract was definitely entered into; and the fact that there was a purpose in the mind of the parties to reduce it to writing, which, through the failure of the defendant, was never carried out, is a circumstance which does not necessarily affect the question either of its certainty or its validity. The rule

I think, is correctly stated in 7 Am. & Eng. Ency. of Law (2d Ed.) 140, where it is said:

"Many cases occur where parties negotiating a contract contemplate that a formal agreement shall be drawn up and signed. The question arises, does such a contemporaneous understanding or agreement make the validity of the contract depend upon its being actually reduced to writing and signed? The rule may be stated in these words: Where the parties make the reduction of the agreement to writing, and its signature by them a condition precedent to its completion, it will not be a contract until that is done, and this is true although all the terms of the contract have been agreed upon. But where the parties have assented to all the terms of the contract, the mere reference to a future contract in writing will not negative the existence of a present contract."

The evidence, to my mind, brings the contract in suit clearly within the rule stated in the last paragraph of the quotation just made. The record discloses nothing from which it can be said that the carrying out of the contract was in the mind of either party thereto to be made to depend upon its being reduced to writing. That was more in the nature of a mere casual or tentative purpose. Nor do I think the objection well taken that the contract is void within the statute of frauds because not in writing, and one which by its terms was not to be performed within a year. The statute of frauds has no application to a contract which has been fully performed or executed by one of the parties thereto; and here the evidence shows that complainant had immediately and before the parties left the mine fully performed the contract on his part by turning over and delivering to the defendant all the machinery, stock, material, and tools in accordance with its terms. As to the sixth ground of the motion, that it appears upon the face of the bill and under the evidence that the contract sued on is based upon an illegal consideration, it is sufficient to say that I am unable to give this construction either to the pleading or to the evidence entered in support thereof. The proposition is that, complainant being under a contract to Bauer and Peterson jointly to install the plant under the original contract, the carrying out of this contract could not be waived by Bauer alone; and that, inasmuch as the contract sued on contemplated the abandonment of the entire work under the first, it was in effect a contract between Wehner and Bauer made without the presence or consent of Peterson to violate their obligation to the latter, which was a fraud upon him under the law and tainted the last-mentioned contract with invalidity. But whether this is so or not depends, under the authorities, upon the circumstances and the purpose of the parties in entering into the contract in question. There is evidence from which the court is justified in inferring not only that Bauer had authority to represent Peterson, but that both he and complainant acted upon that assumption, and that the contract entered into between them was believed by both to be as much in the interest of Peterson as of themselves. Bauer, at the time of the execution of the writing of 1902, held the general power of attorney of Peterson, and signed that contract in his behalf as his attorney in fact; and there is nothing to show that that power had ever been revoked, or that Bauer did not in fact at the time of making the contract in suit retain full authority to act for Peterson in the premises. Under such circumstances, and in the absence of any evidence to the

contrary, the court is, I think, quite at liberty to assume that Bauer's authority still existed, and that there was no purpose in the mind of either the plaintiff or the defendant to in any wise ignore or impair any right that Peterson had in the premises. The principle contended for by the defendant does not therefore apply. And even if there existed at that time no express authority of Bauer, there is nothing yet appearing in the case to negative the idea of subsequent ratification by Peterson, which would be as efficient under the law as express antecedent authority. There is certainly nothing in the record to indicate any objection by Peterson to the action taken by Bauer; and in this respect I think the case is fairly within the principle of *Bates v. Coronado Beach Co.*, 109 Cal. 160, 41 Pac. 855. In order to sustain a motion of this kind the defendant is bound to make a case so free from doubt that the court can say that there is no reasonable ground upon which it can continue to entertain the case or put the defendant to his defense. If there is any question of doubt left, the court is bound to leave the parties to their proof and final hearing. Of course, it is understood that this ruling rests solely upon the case as made by the bill and the evidence in behalf of the complainant alone. It may well be that when the defendant's evidence goes in it will put an entirely different aspect upon the case in several essential particulars. I will frankly say that there are one or two questions involved upon which my mind is not wholly at rest; but the objections made will all remain to the defendant at the final hearing, and may then be renewed in the light of all the evidence in the case, and thus enable the court to have a more complete and satisfactory understanding of the several questions as they bear upon each other, and determine upon the whole case the rights of the parties. And, of course, nothing that is here said is in any way conclusive upon the rights of the parties as they may appear in the light of all the evidence.

The motion will be denied.

FIRST NAT. BANK OF WILKES-BARRE v. BARNUM.

(District Court, M. D. Pennsylvania. March 9, 1908.)

No. 1.022, in Bankruptcy.

1. WORDS AND PHRASES—"WAGES"—"EARNINGS."

The term "wages," as distinguished from salary, is commonly understood to apply to compensation for manual labor, skilled or unskilled, paid at stated times, and measured by the day, week, month, season, or piece, but not by the job. The term does not include profits on the services of others, and it is not so broad as "earnings," which comprehends returns from skill and labor in whatever way acquired.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 8, pp. 7369-7373, 7646, 7831; vol. 3, pp. 2302-2304.]

2. SAME—"SALARY."

"Salary" refers to a superior grade of services and implies a position or office, and suggests something higher, larger, and more permanent than "wages."

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 7, pp. 6287-6291; vol. 8, pp. 7792, 7793.]

8. SAME—"HIRE."

The word "hire" is associated with the act of employment rather than reward for services, and in the latter connection is more on the plane of wages than of salary, though in a sense it comprehends both, and is also applied to engaging the use of property. One "hires" a coachman, a gardener, or a cook, or a carriage, and may be said to hire a superintendent, a bookkeeper, or a clerk, though it seems better in such instances to say engage or employ. The term is improperly applied to the securing of professional services—e. g., a lawyer's or a doctor's.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3309-3311; vol. 8, p. 7679.]

4. BANKRUPTCY—EXEMPTION FROM INVOLUNTARY PROCEEDINGS—WAGE-EARNER—MUSIC TEACHER NOT.

A music teacher giving lessons at so much an hour is not comprehended by the bankruptcy act provision that wage-earners whose compensation does not exceed \$1,500 a year shall not be subject to involuntary bankruptcy.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, p. 7365.

What persons are subject to bankruptcy law, see note to Mattoon Nat. Bank v. First Nat. Bank, 42 C. C. A. 4.]

5. BILLS AND NOTES—ALTERATION OF NOTE—RELEASE OF ACCOMMODATION INDORSER.

Under Act Pa. May 16, 1901, § 124 (P. L. 211), providing that where a negotiable instrument is materially altered without the assent of all parties liable thereon it is avoided, etc., and section 125 (P. L. 211), making any alteration which changes the place of payment a material alteration, where bankrupt, for the accommodation of his brother, indorsed blank notes which specified a certain bank as the place of payment, he could not thereafter object, as to a holder in due course, to the blanks having been filled out in whatever way his brother chose, and he must be held to have given his unqualified consent to the supplying of the essential terms. But he was released by his brother's unauthorized act in striking out the name of the bank where the notes were payable and inserting another, although the alteration was made in the brother's handwriting, the same as the rest of the written parts. The provision of section 124 that when a materially altered instrument is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor does not save the bankrupt's liability, because, under the express terms of section 52 (P. L. 202), having notice of the infirmity in the notes, the discounting banks cannot claim to be holders in due course.

In Bankruptcy. On certificate of referee.

W. S. McLean and Lawrence B. Jones, for petitioning creditors.
George H. Troutman, for alleged bankrupt.

ARCHBALD, District Judge. These are involuntary proceedings, and are resisted by the respondent on the grounds: (1) That he is a wage-earner; and (2) that the petitioners are not creditors. It appears, as to the first, that the respondent is a music teacher, giving lessons on the piano, organ, violin, and mandolin, at 50 cents an hour, earning from \$35 to \$40 a month, or a little less than \$500 a year, some pupils coming to his house for instruction, and others being taught at their own homes. This constitutes his livelihood, in addition to which, however, he has a summer cottage at Harvey's Lake, which he rents for \$175 a season, and another property from

which he gets \$150, besides which he has divided up certain land that he owns, and is selling it off in lots. The question is whether under these circumstances he is a wage-earner within the meaning of the law, so as not to be subject to involuntary bankruptcy.

A wage-earner is defined by the bankruptcy act as one "who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year." By this it is evidently intended to relieve from adverse proceedings those who, not being engaged in business or trade, depend for a living upon the result of individual labor or effort, without the aid of property or capital. But not all of this class are exempt, as is shown by the limit of \$1,500. And the work done must be such as is compensated by wages, salary, or hire, other earnings not being put in the same category. These terms mean much the same thing, and are no doubt collectively used in order to cover the different possible kinds of employment comprehended within the general idea. Wages, as distinguished from salary, are commonly understood to apply to the compensation for manual labor, skilled or unskilled, paid at stated times, and measured by the day, week, month, or season. *Commonwealth v. Butler*, 99 Pa. 535; *Lang v. Simmons*, 64 Wis. 525, 25 N. W. 650; *Campfield v. Lang* (C. C.) 25 Fed. 128; *Henry v. Fisher*, 2 Pa. Dist. R. 7; *Louisville, etc., R. R. v. Barnes*, 16 Ind. App. 312, 44 N. E. 1113; *Fidelity Ins. Co. v. Shenandoah Valley R. R.*, 86 Va. 1, 9 S. E. 759, 19 Am. St. Rep. 858; *State v. Haun*, 7 Kan. App. 509, 54 Pac. 130. And also by the piece. *Pennsylvania Coal Co. v. Costello*, 33 Pa. 241; *Swift Mfg. Co. v. Henderson*, 99 Ga. 136, 25 S. E. 27; *Ford v. St. Louis R. R.*, 54 Iowa, 728, 7 N. W. 126; *Seider's Appeal*, 46 Pa. 57; *Adcock v. Smith*, 97 Tenn. 373, 37 S. W. 91, 56 Am. St. Rep. 810. But not by the job. *Heebner v. Chave*, 5 Pa. 115; *Berkson v. Cox*, 73 Miss. 339, 18 South. 934, 55 Am. St. Rep. 539; *Morse v. Robertson*, 9 Hawaii, 195; *Henry v. Fisher*, 2 Pa. Dist. R. 7. Nor including profits on the services of others. *Smith v. Brooke*, 49 Pa. 147; *Sleeman v. Barrett*, 2 H. & C. 934; *Riley v. Warden*, 2 Exch. 59. Neither is it so broad a term as "earnings," which comprehend the returns from skill and labor in whatever way acquired. *People v. Remington*, 45 Hun (N. Y.) 338; *Matter of Stryker*, 73 Hun, 327, 26 N. Y. Supp. 209; *Id.*, 158 N. Y. 526, 53 N. E. 525, 70 Am. St. Rep. 489; *Jenks v. Dyer*, 102 Mass. 236; *Nuding v. Ulrich*, 169 Pa. 289, 32 Atl. 409; *Goodhart v. Pennsylvania R. R.*, 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705; *Hoyt v. White*, 46 N. H. 45. Indeed the act itself in exempting wage-earners recognizes that there are other kinds. Salary, on the other hand, has reference to a superior grade of services. *Hartman v. Nitzel*, 8 Pa. Super. Ct. 22. And implies a position or office. *Bell v. Indian Live Stock Co. (Tex.)* 11 S. W. 346. By contrast, therefore, "wages" indicate inconsiderable pay for a lower and less responsible character of employment. *South Alabama R. R. v. Falkner*, 49 Ala. 115; *Gordon v. Jennings*, 9 Q. B. Div. 45. Where salary is suggestive of something higher, larger, and more permanent. *Meyers v. N. Y.*, 69 Hun, 29, 23 N. Y. Supp. 484; *White v. Koehler*, 70 N. J. Law, 526, 57 Atl. 124; *State v. Duncan*, 1 Tenn. Ch. App.

334; *Palmer v. Marquette Rolling Mill*, 32 Mich. 274. The word "hire" is rather associated with the act of employment than the reward for services done; and in the latter connection is more on the plane of wages than of salary, although in a sense it comprehends both; and is also applied to engaging the use of property. We hire a coachman, a gardener, or a cook; or a carriage to take a ride. And may also be said to hire a superintendent, a bookkeeper, or a clerk, although it would seem more correct, in the latter instances, to say engage or employ. In some communities, a farm hand is called a hiring, without intending any reflection, although in general speech the term is one of reproach. As further defining its use, a laborer, according to Sacred Writ, is said to be worthy of his hire. And coming up from the people, as the word thus does, it is sometimes applied, out of place, to the securing of professional services, as where one is said to hire a lawyer, a doctor, or a person of that class.

The cases directly decided under the bankruptcy act confirm these views. Thus, it is held that a person doing hauling with his team by the day—which affords a good example of what may in strictness be termed a hiring—is a wage-earner. *In re Yoder* (D. C.) 11 Am. Bankr. Rep. 445, 127 Fed. 894. Although it is said that, in allowing the priority given to wages by the act, the amount due for the use of the team must be distinguished from that for the services of the person himself. *In re Winton Lumber Co.*, 17 Am. Bankr. Rep. 117. So money due for piece work, paid weekly, is held to be wages. *In re Gurewitz*, 10 Am. Bankr. Rep. 350, 121 Fed. 982, 58 C. C. A. 320. And a bookkeeper, in the employ of others, receiving a salary of \$65 or \$70 a month, is a wage-earner within the meaning of the law. *In re Pilger* (D. C.) 9 Am. Bankr. Rep. 244, 118 Fed. 206. And so, as we may assume—applying the same principle—would be the chorister of a church, paid a specified yearly sum for his services. *Catlin v. Ensign*, 29 Pa. 264. Or a traveling salesman receiving a percentage commission on the amount of his sales. *Hamberger v. Marcus*, 157 Pa. 133, 27 Atl. 681, 37 Am. St. Rep. 719. But not a factor or broker, engaged in the business of selling goods on commission. *Id.* Nor a millowner, who saws lumber for others at so much a thousand. *Campfield v. Lang* (C. C.) 25 Fed. 128. Nor one who builds a house or other structure, by contract, even though he does a part of the work himself. *Berkson v. Cox*, 73 Miss. 339, 18 South. 934, 55 Am. St. Rep. 539; *Henry v. Fisher*, 2 Pa. Dist. R. 7; *Morse v. Robertson*, 9 Hawaii, 195. Nor one who tows a canal boat. *Ryan v. Hook*, 34 Hun, 191. Or threshes out grain by the job. *Johnston v. Barrills*, 27 Or. 251, 41 Pac. 656, 50 Am. St. Rep. 717. Nor are the fees of lawyers, physicians, and the like to be classed as wages. *Vane v. Newcombe*, 132 U. S. 220, 10 Sup. Ct. 60, 33 L. Ed. 310; *People v. Myers* (Sup.) 11 N. Y. Supp. 217. Nor the debts due to a blacksmith from his customers for his services. *Tatum v. Zachry*, 86 Ga. 573, 12 S. E. 940. Nor is a school teacher a laborer or servant; however, we may speak of one, at times, as being hired. *School District v. Gautier*, 13 Okl. 194, 73 Pac. 954.

From these considerations, as it seems to me, but one conclusion can be drawn. A person, like the respondent, giving music lessons at so

much an hour, is not a wage-earner within the meaning of the act. Teaching is a profession, denoting a nicer relation and involving a finer character of work, and entitled, like that of the lawyer, doctor, the engineer, the architect, or the minister, to be regarded as upon a higher plane. His work is mental, not physical. He labors with his head, not his hands. And while that may not be distinctly conclusive, it has its weight. He is the tutor, or instructor, of his pupil, not his servant; his, of the two, being the master mind. This is not to say that one who works for a salary, like the teachers in our public schools, may not be wage-earners, within the meaning of the bankruptcy law. The fact of being under a salary makes a difference, and brings the case squarely within the act, although it may be noticed in passing that, in the school laws of the state, teachers are said to be appointed, not employed or hired. But the compensation received by the respondent, in the present instance, is certainly not a salary. Neither is it wages. And notwithstanding the misuse of the term, alluded to above, neither can he be said to work for hire. He is simply paid a stipulated sum or stipend in return for the instruction which he gives, which he holds himself out as competent to impart, being engaged so to do by his pupils or their parents, but not hired, any more than the lawyer, doctor, or others in professional life. The returns from his teachings may be earnings, which as we have seen is a comprehensive term, but not wage-earnings, and so not effective to exempt him from liability here.

The case turns, therefore, on whether the petitioners are creditors, as to which it appears that their claims are based on certain promissory notes, indorsed by the respondent, J. B. Barnum, for the accommodation of his brother, B. F. Barnum, the maker, for whom they were discounted by the petitioners, who are Wilkes-Barre banks. The genuineness of the respondent's indorsement is not contested, but he claims to be released, because, after it was affixed, the notes were materially altered without his authority, by changing the name of the bank where they were originally made payable. These notes were the last of a series of discounts at each of the banks involved, the course pursued by the respondent and his brother with regard to them being that every so often, as those which he had previously indorsed were supposed to be coming due, but without any real regard to that, he would indorse a number of others in blank which his brother would subsequently fill out and execute as he happened to need them. In each instance printed or engraved forms of notes were used, in terms made payable at the Second National Bank of Wilkes-Barre, as follows:

\$ _____ Wilkes-Barre, Pa., _____ 190
 _____ after date _____ promise to pay
 to the order of _____ /100 Dollars
 at the Second National Bank of Wilkes-Barre, Pa.
 Value received without defalcation.
 No. _____ Due _____

Taking the notes in that shape, his brother, as he had occasion to raise money upon them, would insert in each the date and amount, and the time within which it was to become payable; and, when it was to be discounted elsewhere than at the Second National Bank of Wilkes-

Barre, he would erase the name of that bank, and interline that of the one which was to do the discounting. This change having been made without the knowledge or consent of the respondent, he claims to be discharged thereby.

There is no question that a change in the place where a note is made payable is a material alteration which releases an indorser, unless it is done with his assent. Act Pa. May 16, 1901, §§ 124, 125 (P. L. 211). But it is sought to distinguish the present case, for the reason that, at the time the notes were indorsed by the respondent, they had not been executed by his brother, and, except in the merest outline, had been given no definite character or form. And that, having been indorsed and intrusted by the respondent to his brother in that shape, he committed himself to whatever was subsequently done with them, including such a change in the place of payment as appears. It is no doubt true that, to the extent that blanks were in fact left, the respondent could not now object, as against a holder in due course, to their being filled out in whatever way his brother chose. He could have made them payable in six months, instead of three, or to read for \$10,000 each, as readily as \$1,000. Nor, for that matter, does the respondent seem to have balked at amounts, having been shown to have indorsed 12 or 15 notes for his brother in a batch. To the supplying of the essential terms of what was so left incomplete, he must be held to have given his unqualified assent. 2 Cyc. 159, 162; 2 Am. & Eng. Encycl. Law, 253; *Simpson v. Bovard*, 74 Pa. 351; *Howie v. Lewis*, 14 Pa. Super. Ct. 232. But the implied authority to fill in blanks goes no further, in any case, than the insertion of that which is necessary to make the obligation speak according to its intended purpose and use. 2 Cyc. 161. And there are erasures and interlineations here. Did, then, the respondent also impliedly assent to this, by indorsing the notes in the condition in which they were at the time? Or can the mere skeleton of a note, which is in fact no note at all until it is filled out and signed, be said to have been altered in a material part, so as to discharge an indorsement, made when it is in that shape, by a change in certain of its printed terms?

The question is one of authority, as well as of the alteration of written instruments, with regard to which it is to be observed that, as is obvious, if by direct understanding with the respondent, his brother was at liberty to fix the place of payment, the changes which now appear could not be asserted by him in avoidance of his indorsement. It has also been held that, where a note is delivered with the date in blank, the implied authority to fill in the date which is so given (*Bechtel's Estate*, 133 Pa. 367, 19 Atl. 412) carries with it the authority to erase a date which has been written in and insert another in its place. *Michigan Bank v. Eldred*, 9 Wall. (U. S.) 544, 19 L. Ed. 763; *Hepler v. Mt. Carmel Savings Bank*, 97 Pa. 421, 39 Am. Rep. 813. So, also, where a note has been indorsed in which the place of payment is left blank, but the printed form of note used contains the word "at," importing that some place of payment was intended to be named, authority to add such place is thereby implied, and it does not avoid the instrument to do so. *Wessell v. Glenn*, 108 Pa. 104; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573; *Marshall v. Drescher*, 68 Ind. 359.

But, on the other hand, the mere omission of a place of payment, there being nothing in the frame of the instrument to indicate that the one which was subsequently inserted was intended, is not enough of itself to raise an inference of authority to do so, such a clause not being necessary to the completeness of the instrument. *McCoy v. Lockwood*, 71 Ind. 319; *Crotty v. Hodges*, 4 Man. & G. 561; *Toomer v. Rutland*, 57 Ala. 379, 29 Am. Rep. 722; *Bruce v. Wescott*, 3 Barb. (N. Y.) 374; *McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372. Much less does the implied authority to fill in blanks carry with it the right to erase what is written or printed and insert something else. *Angle v. Northwestern Mutual Life Ins. Co.*, 92 U. S. 330, 23 L. Ed. 556; *Mahaiwe Bank v. Douglass*, 31 Conn. 170, 180; *Adair v. England*, 58 Iowa, 314, 12 N. W. 277. In the present instance, according to the printed form used, the respondent committed himself to an indorsement of notes made payable at a specific place, which he may have thought, as he now asserts, was a certain measure of protection as to the amounts for which he would be obligated, and which might possibly have proved something of a check on the ability of his brother to negotiate them, by reason of their being presented at the one place for payment, one after the other in increasing numbers. But whether correct in that idea or not, he could not be bound otherwise than in the way to which he had given his express or implied assent, and having indorsed notes payable in terms at the Second National Bank of Wilkes-Barre, he cannot be held liable for those made payable by erasures and interlineations anywhere else. It is no answer to say that the changes were in the handwriting of the maker, the same as the rest of the written parts, dispelling suspicion, and doing away thereby with the necessity for inquiry. They were changes of the original terms nonetheless, in plain sight, on the face of the notes, in a material provision, and could not therefore be passed by without manifest risk. Having been made without authority, as it now turns out, the respondent is released, and the petitioners have thus no provable claims. Nor is this saved by the provision of the negotiable instruments act, by which, "when an instrument has been materially altered, and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." Act May 16, 1901, § 124 (P. L. 211). This only operates, as it will be noted, in favor of a holder in due course, which the petitioners, having notice of the infirmity in these notes, cannot claim to be. *Id.* § 52 (P. L. 202).

The proceedings are dismissed, with costs.

Ex parte LOUNG JUNE alias LEONG JUN.

(District Court, N. D. New York. March 14, 1908.)

1. JUDGMENT—RES ADJUDICATA—ADJUDICATION ON MERITS—NECESSITY FOR.

A judgment, to be res adjudicata, must be on the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1009.]

2. ALIENS—CHINESE—RIGHT TO ENTER—BURDEN OF PROOF.

Where the United States denied a Chinese person's right to enter, the burden was on him, to prove such right, to show that he was born in the

United States; there being no claim his alleged right rested on any other basis.

[Ed. Note.—Citizenship of the Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.]

3. SAME—PROCEEDING FOR DEPORTATION.

Where the United States seeks to deport a Chinese person found therein, the burden is on it to show that he is not a citizen and not of the exempt class; but the burden is met by showing that he is a Chinese person and not of the exempt class, and the rebuttable presumption then arises that he was not born in the United States and is not entitled to remain.

4. SAME—EVIDENCE—ADMISSIBILITY.

Where a Chinese person, in applying to an inspector for admission to the United States, relied on a commissioner's judgment discharging him on a former charge of having been unlawfully in the United States as conclusively showing his right to be therein, if evidence of annotations on the evidence taken by the commissioner tending to show that such person was discharged because of sickness was competent at all, it should have been given in his presence and that of his counsel before the inspector, since he had the right to controvert it.

5. JUDGMENT—CONCLUSIVENESS—CHINESE IMMIGRATION—EFFECT OF COMMISSIONER'S JUDGMENT.

A United States commissioner's judgment, made in 1903, on a hearing of a charge that a Chinese person was unlawfully in the United States, that upon a full hearing upon such charge such person was discharged on consent of the assistant United States attorney (a statement in the judgment that the commissioner found and adjudged that such person was not guilty and that he had a lawful right to remain in the United States being stricken out before the judgment was signed), is not on its face an adjudication that such person was born in the United States, and was therefore a citizen thereof and entitled to enter in 1907, since, as far as it appears, the judgment may have been based on the ground that he was "then" a member of the class exempt from deportation, and since the recital that he was discharged by consent implies that he was not discharged on a determination on the merits. The judgment was equivalent to a nonsuit, or to a dismissal by consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1000.]

Habeas Corpus. This is a petition by Loung June, a Chinese person, for such writ. His claim is that in 1903 he was arrested for deportation, had a hearing, gave evidence, and was thereupon discharged by the commissioner, and that such judgment of discharge is res adjudicata.

R. M. Moore, for petitioner.

Geo. B. Curtiss, H. E. Owen, Asst. U. S. Atty., and A. W. Cooley, Asst. Atty. Gen., for the United States.

RAY, District Judge. From the petition and return the following facts appear:

(1) Loung June, the petitioner, is a Chinese person, and on the 11th day of August, 1903, he applied for admission into the United States at the detention station at Malone, N. Y., where he was detained, and thereafter he was discharged from such station on a writ of habeas corpus, but not on the merits, and it was without prejudice to further proceedings.

(2) Thereafter he was arrested and detained in the detention house on the charge that he had unlawfully entered the United States and was then unlawfully within the United States. Upon such charge he was taken before Benjamin L. Wells, at Malone, N. Y., in the district where arrested, and on the 16th day of December, 1903, the testimony of one Fay Fong was put in evidence and submitted to the said commissioner as evidence and proof of the right of said Loung June to enter and remain in the United States. Thereafter, and on the 17th day of December, 1903, the said Benjamin L. Wells, as United States commissioner, and before whom the said proceeding was pending, discharged the said Loung June from custody, and then and there made and issued to him a judgment of discharge in the words and figures following, viz.:

United States Commissioner's Court, Northern District of New York.

United States of America v. Loung June, alias Leong Jun. (116.)

Before me, Benj. L. Wells, a commissioner of the District Court of the United States within and for said district, complaint was presented by F. W. Berkshire, of N. Y., N. Y., a Chinese inspector for said district, charging in substance that on or about the 11th day of August, 1903, at Burke, N. Y., in said district, one Loung June, in violation of the Chinese exclusion acts, statutes of the United States, did unlawfully come into and was found to be not lawfully in the United States, he being a Chinese person and laborer and not a diplomat or other officer of the Chinese or any other government, and without producing the certificate required of Chinese persons seeking to enter the United States; and on the 4th day of December, 1903, said defendant was brought before me, the said commissioner, and the proceedings adjourned from time to time, and upon a full hearing upon said charge Hon. H. E. Owen, the assistant district attorney of the United States of America, being present, Hon. R. M. Moore, appearing for defendant.

~~I now hereby find and adjudge that the said defendant was not guilty of said charge, and that he had a lawful right to be and remain within the United States.~~

And I hereby order and direct that said defendant be and he is hereby discharged; on consent of Assistant U. S. Attorney H. E. Owen.

I also certify that the photograph hereto annexed is a true likeness of said defendant.

Given under my hand and seal at Malone, in the Northern district of New York, this 17th day of December, 1903.

[Seal.]

[Signed] Benj. L. Wells,

United States Commissioner, Northern District of New York.

[Photograph.]

The words erased by a line, finding and adjudging that he was not guilty and that he had a right to be and remain in the United States, were erased before the judgment was signed.

(3) Thereafter, and on the 18th day of November, 1907, the said Loung June presented himself in person at the detention house at Malone, N. Y., and made application to enter the United States. He was given an opportunity by H. R. Sisson, the immigration officer in charge, to make such voluntary statements as he might desire to make relative to his right to be admitted and to produce witnesses. A full and fair hearing was offered and given. Said Loung June then and there produced and presented as evidence of such right the said judgment of discharge duly signed by said commissioner. He also produced witnesses, who were duly sworn and gave testimony as to his right to enter the United States. It was claimed that such judg-

ment was res adjudicata of his right to enter, to be and remain in, the United States, and that claim has been made at all times since, and is the main basis of the application for this writ.

(4) The said inspector denied the said Loung June admission, and he thereupon duly appealed from such holding to the Department of Commerce and Labor, where that decision was affirmed and the appeal dismissed.

(5) Said inspector holds and has held the petitioner in said detention house at Malone, N. Y., for convenience, it being regularly designated by the proper authorities of the United States, and for the purpose of returning him to China, whence he came, at the first opportunity, and for no other purpose. This is the unlawful imprisonment and detention complained of.

The evidence produced, aside from such judgment, the force and effect of which is to be considered later, is not sufficient to require a judgment that the petitioner has the right to enter the United States. It is not contended that it is sufficient. In behalf of the petitioner, however, it is contended that such judgment of the United States commissioner, made and signed after a full hearing, after the taking and submission of evidence in behalf of said Loung June, although on consent of the assistant United States attorney, is res adjudicata of his right to be in the United States, and consequently of his right to go and come and enter.

On the argument much was said to the effect that such judgment was made on consent of the United States because of sickness, and that is stated in communications sent the Department of Commerce and Labor. Whose sickness and what sickness is not stated. But there is nothing in the evidence before me, or in the return, or in the judgment itself, to show why he was discharged, or why the assistant United States attorney consented to such discharge. There is no mention of sickness in any paper, or any part of the record, except the letter referred to. It does not affirmatively appear that he was discharged for the reason the evidence established his right to be in the United States, unless the mere fact that he was discharged by the commissioner establishes that as a fact. Is that the legal presumption from the face of the judgment? This is not the case of a certificate issued by the commissioner, stating what he has done at some former time or on some prior occasion. It is a judgment the commissioner was authorized to pronounce. It was his duty to make some record of his action. The judgment itself is in evidence. Hence the decision of this court in *United States v. Lew Poy Dew* (D. C.) 119 Fed. 786, is not in point.

It is settled law that a judgment, to be res adjudicata, must be on the merits. *Cromwell v. County of Sac*, 94 U. S. 351, 352, 24 L. Ed. 195; *Hughes v. United States*, 4 Wall. (U. S.) 232-237, 18 L. Ed. 303; *Gould v. E., etc., R. R. Co.*, 91 U. S. 532, 533, 534, 23 L. Ed. 416; *U. S. v. C. B. W. R. Co. (C. C.)* 110 Fed. 864; *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214; *Clark v. Bernhard M. Co. (C. C.)* 82 Fed. 339; *Shaw v. Broadbent*, 129 N. Y. 114-123, 29 N. E. 238; *Ward v. Boyce*, 152 N. Y. 191, 201, 46 N. E. 180, 36 L. R. A. 549;

Foye v. Patch, 132 Mass. 105-110. The rule is well stated in Hughes v. United States, 4 Wall., at page 237, 18 L. Ed. 303, where it is said:

"In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits."

But what is the presumption where the judgment recites and determines, as this one does, that complaint was presented "charging in substance that on or about the 11th day of August, 1903, at Burke, N. Y., in said district, one Loung June, in violation of the Chinese exclusion acts, statutes of the United States, did unlawfully come into and was found to be not lawfully in the United States, he being a Chinese person and laborer and not," etc., "and on the 4th day of December, 1903, said defendant was brought before me, the said commissioner, and the proceedings adjourned from time to time, and upon a full hearing upon said charge, Hon. H. E. Owen, the assistant district attorney of the United States of America being present, Hon. R. M. Moore appearing for defendant, and I hereby order and direct that said defendant be and he is hereby discharged, on consent of Assistant U. S. Attorney H. E. Owen"? In short he was discharged on consent after a full hearing on the charge made against him. On the face of the judgment it does not necessarily purport to be made on the merits; but it does purport to be made after a full hearing and on the consent of the one making and prosecuting the charge. The judgment contains no provision that defendant is discharged without prejudice. Does it show on its face that the merits were not passed upon? It would have been easy for the government to show, if such was the fact, that the judgment was not pronounced on the merits.

Stress is laid on the fact that this judgment does not contain an affirmative finding or adjudication that the defendant was not guilty of the charge laid and that he had a lawful right to be and remain in the United States. In these proceedings, under the provisions of the act, mere accusation is sufficient to warrant deportation when it appears that the defendant is a Chinese person and that he does not belong to the exempt class. When these facts appear the burden is thrown on the defendant to show his right to enter, or to remain if already here. Hence, it is claimed, the necessity for an affirmative finding that he is not guilty and is entitled to enter, or remain, as the case may be. But if evidence of a right to enter is given, and he is already in the United States, as this defendant was, and he is discharged what is the natural and the necessary inference? If the defendant has not shown his right to enter, or to remain if already here, it is the duty of the commissioner to order him deported, and hold him until deported. When this order is not made, what is the necessary inference? Every officer, especially those discharging judicial or quasi judicial functions, is presumed to do his duty. Therefore, in the absence of evidence to the contrary, it is claimed the fair and the necessary inference and presumption is that the commissioner discharged the defendant legally, in the performance of this duty, and for the reason he was satisfied the defendant had the right to be in the United States. He discharged him on the consent of the assistant United

States attorney. What does that fact imply? It is asserted that the only fair implication or conclusion is that the assistant United States attorney consented for the reason the evidence was such that a judgment of deportation was not warranted under the evidence. There is no evidence here of any other reason for the consent. It might have been given for various reasons.

What was the issue framed here? The United States found a Chinese person at its borders, seeking to enter the United States and asserting a right to enter. It was plainly incumbent on him, to prove such right, to show that he was born in the United States; there being no claim his alleged right rested on any other basis. He had the affirmative of that issue; his right being denied. If he had been found in the United States, and his deportation had been sought, the issue would have been an allegation on the part of the United States that he was not a citizen, and not of the exempt class, and therefore subject to deportation. The answer would have been that he was a citizen, born in the United States, and therefore entitled to remain. On the first issue suggested clearly an affirmative adjudication is required that he is a citizen and entitled to enter. In the second case and on the second issue mentioned the affirmative is on the United States; but it meets the burden and makes its case by showing that the person is a Chinese person and not of the exempt class. Then the presumption of fact and law is that he was not born in the United States and not entitled to remain. This is not conclusive, but may be rebutted. Evidence is offered to overcome this presumption. It is not overcome. What is the judgment demanded? That he is not a citizen, was not born in the United States, and must be deported. Again, evidence is offered to overcome the presumption, and it is overcome. What is the judgment demanded? That the defendant be discharged. There may be a finding of fact in the judgment, or there may not be, that he was born in the United States; but is such a finding necessary to the validity of the judgment discharging the defendant? Such a finding and recital of a fact would be absolutely conclusive of what was found; but is it necessary? The judgment being there, is it not conclusively presumed, in the absence of proof to the contrary, that the fact was found, that being the essential one at issue, and that the judgment was based thereon?

The judgment put in evidence and claimed to be a bar to this proceeding was upon the last or second issue suggested above; that is, he was found and arrested in the United States and his deportation sought on the ground he had illegally entered and was illegally here, as (1) he was not of the exempt class, and (2) he was not a citizen of the United States. If he belonged to the exempt class he was entitled to remain, or if he was born in the United States he was entitled to remain. What is the significance and effect of the erasure of the words "I now hereby find and adjudge that the said defendant was not guilty of said charge, and that he had a lawful right to be and remain within the United States"? Were these words stricken out for the reason they were not essential to support the judgment? Were they stricken out for the reason that the commissioner did not pass on those questions? Were they stricken out for some other reason?

The government says they were stricken out for the reason the government consented to his discharge without a determination of the case on the merits—a passing on the issue. But does this follow? Is this a logical and a reasonable conclusion? The consent is absolute and unqualified, and without reservation. Is it not the fair and logical conclusion that the assistant United States attorney consented to the discharge for the reason that he was satisfied from the evidence the defendant was born in the United States and had a right to be and remain there, or that he belonged to the exempt class? This was the issue presented and upon which evidence had been given by the defendant. So far as appears, no other questions were before the commissioner. No ground or reason for the consent and discharge appears, except that on the evidence adduced and submitted by defendant the consent of the assistant United States attorney was given and the judgment entered.

I do not see how I can go outside the record and return made by the inspector. In the letter of the inspector to the Department of Commerce and Labor transmitting the papers, on appeal thereto, he says that by reference to annotations made by the commissioner of the evidence taken before him it appears the discharge was on account of sickness. But a copy of the evidence is annexed to the return, and no such annotations appear there, and it was not proved before the inspector, in presence of defendant, that there were any such annotations. No notice was given that the judgment of discharge would be impeached or modified in any way. No attempt was made to impeach it on the hearing. Such evidence should have been given, if competent at all, in the presence of the defendant and his counsel, before the inspector and on the hearings. The defendant had the right to controvert it, if offered. In short, there was no competent evidence or proof before the inspector, or the Department of Commerce and Labor, that the judgment of discharge was pronounced on account of sickness.

I think the case is reduced to this: A Chinese person is arrested in the United States on the charge that he is unlawfully therein, he not belonging to the exempt classes, for the purpose of deportation. He is taken before a United States commissioner having jurisdiction of the case, and he thereupon gives evidence tending to show that he was born in the United States, is a citizen thereof, and entitled to be and remain there. At this point the attorney for the United States consents that he be discharged, and he is discharged, and a judgment is entered by the commissioner, reciting the facts and adjudging that he be discharged on consent of the prosecutor, or United States. Is this judgment *res adjudicata* of the right of such person to be and remain in the United States? Can he be thereafter denied admission into the United States, he having temporarily departed therefrom, on the ground he is not a citizen? Of course he can be denied admission if he is not a citizen, or one of the exempt class; and hence the former adjudication, to be an adjudication of his right to enter, or of facts which entitle him to enter, must have been in legal effect that he is a citizen.

But he was not illegally in the United States if he belonged to the exempt class. If of that exempt class at that time, he had the right to be and remain here. The consent to his discharge may have been given, and the judgment for his discharge may have been made and entered, on the ground that the defendant, Loung June, was a member of the exempt class. There is nothing in the record or return to show this was not the fact. In short, he may have been discharged on either of two grounds: (1) That he, although a Chinese person, was a member of the exempt class, and therefore entitled to be and remain in the United States at that time; and (2) that he was born in the United States and was a citizen thereof, and hence entitled to remain. If the judgment of discharge was based on the first ground, it is not an adjudication of his citizenship. Is it presumed to have been based on both grounds? If not, is it for the United States to show it was based on a ground which will deprive it of its force as *res adjudicata* here? Or is it incumbent on the party setting up the former adjudication to show that the point he must rely upon here was in fact adjudicated in his favor in that proceeding? If he was of the exempt class in 1903, he was not illegally in the United States, and could not have been lawfully deported. The points at issue in the two cases are not identical.

I am of the opinion that the judgment of the commissioner, relied upon, and quoted in full, is not on its face an adjudication that the defendant, Loung June, was born in the United States, and is therefore a citizen thereof, and now entitled to enter. Under the New York practice and Code of Civil Procedure a judgment of dismissal, to constitute a bar, or *res adjudicata* of the questions involved, must state on its face that it was rendered on the merits. *Genet v. P. M. & C., etc.*, 170 N. Y. 278, 63 N. E. 350. In 23 Cyc. 1230, where many authorities are collected and cited, it is said:

"Judgment of Nonsuit or Dismissal.—A judgment of nonsuit is no bar to a second action upon the same claim or demand, neither is it conclusive upon the parties as to the issues which were or might have been involved in the action; and the same is true of a dismissal of the action, when brought about by the voluntary action of the party or ordered by the court on some preliminary or technical matter without a trial or hearing, except that it is conclusive as to the particular ground on which the dismissal was ordered. But a judgment dismissing a suit on the merits—that is, on a judicial consideration and determination of the ultimate facts in controversy, as distinguished from mere preliminary or technical issues—is conclusive to the same extent as if rendered on a verdict."

In *Haldeman et al. v. United States*, 91 U. S. 584, 23 L. Ed. 433, the court held:

"The words 'dismissed agreed,' entered as the judgment of a court, do not of themselves import an agreement to terminate the controversy, nor imply an intention to merge the cause of action in the judgment."

The court said:

"Suits are often dismissed by the parties, and a general entry is made to that effect, without incorporating in the record, or even placing on file, the agreement. It may settle nothing, or it may settle the entire dispute. If the latter, there must be a proper statement to that effect to render it available as a bar. But the general entry of the dismissal of a suit by agree-

ment is evidence of an intention, not to abandon the claim on which it is founded, but to preserve the right to bring a new suit thereon, if it becomes necessary. It is a withdrawal of a suit on terms, which may be more or less important."

Here the words, "be and he is hereby discharged on consent of Assistant U. S. Attorney H. E. Owen," import something quite different from a determination by the court against him on the merits. These words are equivalent to submitting voluntarily to a nonsuit. In *Durant v. Essex Company*, 7 Wall. 107, 109, 19 L. Ed. 154, it is held that in an equity case:

"Where words of qualification, such as 'without prejudice,' or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits."

There the judgment was, "Dismissed." But a bill "dismissed" on motion of complainant is not a bar to a subsequent bill for same cause. *Walden v. Bodley*, 14 Peters (U. S.) 156, 10 L. Ed. 398. So submission to a nonsuit is not a bar to a second suit for same cause. *Bucher v. C. R. Co.*, 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; *U. S. v. Parker*, 120 U. S. 89, 95, 7 Sup. Ct. 454, 30 L. Ed. 601; *Gardner v. Michigan C. R. Co.*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107; *Homer v. Brown*, 16 How. 354, 14 L. Ed. 970. Dismissal for want of parties is not *res adjudicata*. *St. Romes v. Levee S. C. P. Co.*, 127 U. S. 614, 8 Sup. Ct. 1335, 32 L. Ed. 289. Dismissal for want of jurisdiction is not *res adjudicata*. *Smith v. McNeal*, 109 U. S. 426, 3 Sup. Ct. 319, 27 L. Ed. 986. A judgment of nonsuit involuntary, is not *res adjudicata*. *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, 3 Sup. Ct. 99, 27 L. Ed. 878. In this last case the court says:

"A trial upon which nothing was determined cannot support a plea of *res adjudicata*, or have any weight as evidence at another trial."

Decrees by consent are not binding on the court. *Texas & P. R. Co. v. Southern, etc., R. Co.*, 137 U. S. 48, 56, 11 Sup. Ct. 10, 34 L. Ed. 614; *Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 552, 562, 11 Sup. Ct. 402, 34 L. Ed. 1005. Said the court (page 562 of 138 U. S., page 405 of 11 Sup. Ct. [34 L. Ed. 614]):

"The prior decree was the consequence of the consent, and not of the judgment of the court; and, this being so, the court had the right to decline to treat it as *res adjudicata*."

In *Ryan v. Seaboard, etc., R. R. Co.* (C. C.) 89 Fed. 397, 403, held:

"A judgment of dismissal because of the failure of the plaintiff to observe a rule of court does not render the matters involved in the suit *res adjudicata*."

So a dismissal by the agreement of the parties does not make the judgment *res adjudicata*. *Rincon, etc., v. Anaheim, etc.* (C. C.) 115 Fed. 543, 549.

In the case now before this court it affirmatively appears that the defendant was discharged by consent of the United States, and this plainly implies that he was not discharged by the decision or determination of the court on the merits. It is equivalent to submitting to

a nonsuit, or to a dismissal by consent. In *United States v. Parker*, supra, the court said:

"A judgment of nonsuit, whether rendered because of the failure of the plaintiff to appear and prosecute his action, or because upon the trial he fails to prove the particulars necessary to make good his action, or when rendered by consent upon an agreed statement of facts, is not conclusive as an estoppel, because it does not determine the rights of the parties. *Homer v. Brown*, 16 How. 354, 14 L. Ed. 970; *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, 3 Sup. Ct. 99, 27 L. Ed. 878; *Haldeman v. United States*, 91 U. S. 584, 23 L. Ed. 433."

In *Cromwell v. County of Sac*, 94 U. S. 351, at page 353 (24 L. Ed. 195), the court said:

"But, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

For these reasons I must hold that the judgment of the commissioner is not *res adjudicata* and does not establish the right of the defendant to enter the United States.

GILL v. LOUISVILLE & N. R. CO.

(Circuit Court, E. D. Tennessee, N. D. March 10, 1908.)

1 MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS.

A railroad being under no common-law duty to its servants to fence its tracks, a declaration alleging that plaintiff's intestate, a locomotive engineer employed by defendant, was killed by the derailment of his engine in a collision with a cow which had strayed on defendant's tracks owing to its negligence in failing to maintain sufficient fences along its right of way, etc., stated no cause of action against the railroad company at common law.

2 SAME—STATUTES.

Acts Tenn. 1891, p. 220, c. 101, § 2, makes all persons or corporations owning or operating railroads in Tennessee absolutely liable for all live stock killed or injured on or near their tracks by a moving train, subject to the defense of contributory negligence, and section 3 exempts railroad companies from such liability if the track is inclosed by a lawful fence and good and sufficient cattle guards. *Held*, that such act imposes no duty on railroad companies to employes to fence their tracks, and hence a cause of action for death of an engineer in a collision with a cow, which strayed on the track where it was unfenced, could not be predicated thereon.

Jno. W. Green, for plaintiff.

Cornick, Wright & Frantz, for defendant.

McCALL, District Judge. This case is before the court upon defendant's demurrer to the declaration. In substance, the declaration avers that plaintiff's intestate was an employé of the defendant as a locomotive engineer, and that while in the discharge of his duty as

an engine driver the engine was derailed and plaintiff's intestate was killed. It is averred that the derailment was caused by the engine colliding with a cow that had strayed upon defendant's unfenced railroad track, and that "his death was wholly due to the carelessness and negligence of the defendant in failing to erect and maintain a fence along its said track, so as to prevent live stock from going thereon," and that defendant "wholly failed to fence its track in Blount county [wherein the accident occurred], or to protect and guard its track, rails, and right of way in said county by fence or inclosure of any sort, in direct violation of law, and especially the fencing act, passed by the Legislature of Tennessee for the protection of life and property, both on the trains and upon the tracks."

The defendant demurs to the declaration and says:

"(1) There is no law or statute in force obligating or requiring the defendant to fence its tracks in the state of Tennessee for the protection of its employes, such as plaintiff's intestate, and it is not negligence to fail to so fence; and (2) because the plaintiff does not show or allege that the absence of such fence was not known, or by the exercise of ordinary care could not have been known to plaintiff's intestate, said James Gill, and the risk incident thereto, was assumed by him."

It is insisted in behalf of plaintiff that the declaration states a cause of action both at common law and under the statute of Tennessee. In so far as it is assumed that the declaration states a cause of action at common law, I am clearly of the opinion that the demurrer, to that extent, must be sustained. *Cowan v. Union Pacific (C. C.)* 35 Fed. 45; *Newsom, Adm'r, v. N. & W. R. R. Co. (C. C.)* 81 Fed. 133; *Henninger, Adm'r, v. Southern Ry. Co.* [oral charge to the jury]; Judge C. D. Clark, Knoxville, Tenn., March 21, 1899. The *Cowan Case*, supra, was decided by Judge Brewer, who said:

"Neither common nor statute law in Colorado requires that a railroad company fence its track to prevent cattle straying upon it, and, where there is no obligation, there is no liability."

In the *Newsom Case*, supra, the court said:

"At common law a railway company is not bound to maintain fences sufficient to keep cattle off its lines. Where there exists no statutory regulations defining the duties of railway companies in respect to fencing, they are under no obligations to make or maintain fences between their roads and the adjoining lands. They come within the common-law rule, and at common law the owner of the land is not obliged to fence against cattle of his neighbor."

The *Henninger Case*, supra, was decided by Judge Clark in this court, March 21, 1899, but was not reported. He says:

"The declaration is specifically based upon the statute, and it would be sufficient to authorize a recovery at common law, notwithstanding it is so predicated upon the statute, *if, under the common law, a right to recover existed, which it would, if the company was under an obligation to fence its track at common law. But it is not.*" (The italics are ours.)

Passing to the other question: Does the declaration state a cause of action under the laws of Tennessee?

The law of Tennessee, relating to the fencing of railroads, is found in Acts 1891, p. 220, c. 101. We quote sections 2 and 3 of said

act in full. The other sections thereof, not being deemed pertinent to the question under consideration, are omitted.

"Sec. 2. Be it further enacted that any person, company or corporation, or lessee or agent thereof, owning or operating any railroad within the state of Tennessee, shall be liable for the value of any horse, cow or other stock killed, and reasonable damages for any injury to such live stock, upon or near the track of any railroad in this state, whenever such killing or injury is caused by any moving train, or engine or cars upon such track, provided, that contributing negligence on the part of the plaintiff in any action or suit to recover damage for such killing or injury may be set up as a defense; but, provided, further, that the allowing of stock to run at large upon common unfenced range, or upon inclosed land owned or in possession of the owner of such stock, shall not be deemed or held to be such contributory negligence, provided, further, that in any such suit or action, proof of willful intent on the part of the plaintiff therein to procure the killing or injury of any such stock in the manner aforesaid, shall defeat the recovery of any damages for such killing or injury.

"Sec. 3. Be it further enacted that no person, company or corporation owning or operating any railroad in this state, shall be liable under the foregoing section of this act, for any damage for the killing or injury of any such live stock, when the track of said railroad is inclosed by a good and lawful fence and good and sufficient cattle-guards."

This language is clear and unambiguous. The third section of the act provides that no person, company, or corporation owning or operating any railroad in Tennessee shall be liable under the second section of the act for any damage for killing or injuring any live stock, when the track of such railroad is inclosed by a good and lawful fence, and good and sufficient cattle guards. From the plaintiff's view point, the most that can be said for this act is:

"That the object was to induce railroad companies to fence their track, primarily to the interest of the traveling public, and, secondarily, for the protection of live stock along the lines of travel." *Railroad v. Russell*, 92 Tenn. 110, 20 S. W. 784; *Railroad v. Thompson*, 101 Tenn. 201, 47 S. W. 151.

That, however, is far from holding that the act by express terms, or by intentment creates a right of action in favor of an employé who might be injured by the derailment of a train caused by a collision with stock that happened to stray upon an unfenced railroad.

What is the inducement offered? The second section of the act makes all persons, companies, or corporations owning or operating railroads in Tennessee, absolutely liable for all live stock killed or injured upon or near their tracks, when such killing or injury is caused by a moving train, provided that contributory negligence on the part of the plaintiff may be set up as a defense, and that proof of willful intent on the part of the plaintiff to procure the killing or injury of such stock shall defeat a recovery, but the allowing of stock to run at large upon common unfenced range, or upon inclosed land shall not be deemed to be such contributory negligence. The third section exempts such railroad company from such liability if the track of such railroad is inclosed by a good and lawful fence, and good and sufficient cattle guards. The only inducement to fence is, therefore, exemption from liability for killing or injuring live stock. Now, if it had been in the legislative mind to offer to railway companies other or greater inducements to inclose or fence their railroads, would they not have said as much? Had the legislators desired or intended to

make railroad companies liable for injuries to passengers or employes, when injured on any unfenced railroad, they certainly would have so written it in the act, and thereby offered a far greater inducement to fence. But the law is not so written.

It is insisted that, by a fair and proper construction of the act, it must appear that the Legislature not only intended to protect stock along the line of railways, but also the people who operated the moving trains, engines, and cars; and that since the act has this two-fold purpose, and the companies are made liable by express terms for killing and injuring stock on unfenced tracks, the protection of which is one purpose of the act, it must follow that like liability is necessarily implied for killing or injuring the other class, which the act was intended to protect.

Is the act in question susceptible of this construction? Sutherland upon Statutory Construction, § 290, says:

"The best construction of a statute is to construe it as near to the rule and reason of the common law as may be, and by the course which that observes in other cases."

Judge Severns, in announcing the opinion of the Circuit Court of Appeals for the Sixth Circuit, in *St. Louis & San Francisco R. R. Co. v. Delk* (March 3, 1908, not yet officially reported) 158 Fed. 931, said:

"One of the recognized rules of construction of statutes is that we are to look to the state of the law when the statute was enacted in order to see for what it was intended as a substitute, and another is that it is not to be presumed that the statute was intended to displace the former law, whether it be statute or common law, further than was fairly necessary to give it place and operation."

With these rules in mind, we will attempt to ascertain if the statute in question can be construed as is insisted upon by the plaintiff. The act under consideration is a substitute for former statutes of Tennessee, in force at the time of its enactment, in so far as it relates to liability for killing or injuring stock, which required railroad companies to keep some one upon the engine on the lookout ahead, and, whenever an object appeared upon the track, to ring the bell, sound the whistle, put down the brakes, and do everything possible to avoid the accident. And that when the companies complied with all these statutory requirements, it was exempted from liability. These statutes have time and again been held by the Supreme Court of Tennessee to be but declaratory of the common law. The change which the act of 1891 made in either the common law or statute law of Tennessee is in exempting railroad companies from liability for killing or injuring stock if its track is fenced, without regard to whether the statutory requirements, previously in force, were observed or not, and, therefore, whether the company was guilty of negligence or not. Prior to this enactment, plaintiff's intestate, at common law, would have been held to have assumed the risk incident to the employment under the facts as stated in the declaration. We are asked to read into this statute a clause which would relieve the employe of this assumed risk imposed at common law. This would be to change and enlarge the scope and purpose of the act. Indeed, the act in no particular relates to

the doctrine of assumed risk, but is expressly limited to making railroad companies liable for killing and injuring live stock by moving trains, engines, or cars on unfenced tracks, and exempting them from such liability on fenced tracks. To this extent the act is in derogation of the common law, and it cannot be fairly presumed that the act was intended to displace the common law further than is fairly necessary to give it place and operation, and this is accomplished when it is made liable for killing and injuring stock on unfenced tracks. Undoubtedly, the Legislature has the power by proper enactment to so enlarge the terms of the act as to relieve employes of any assumed risk incident to their employment when operating trains, engines, and cars upon unfenced tracks, and to make the railroad companies absolutely liable for killing or injuring its employes when so engaged on unfenced tracks, as is sought to be done in this case. So, also, the Legislature can, if it desires, relieve the railroad companies from all liability to its employes who are killed or injured while operating trains, engines, or cars upon a fenced railroad track. But it has not done so in the act in question, and we have no authority to enlarge it by judicial construction, so that the liability or nonliability of a railroad company for killing or injuring such an employe would turn upon whether the track was fenced or unfenced. Counsel for plaintiff relies upon an opinion in *Railroad v. Crider*, handed down by Judge Lurton, and reported in 91 Tenn. 494, 19 S. W. 618, to support his contention. The question here raised was not before the Supreme Court of Tennessee in that case, and I am satisfied that the learned judge who handed down the opinion never for a moment contemplated that it would be cited as an authority to support the proposition now contended for by plaintiff's counsel. No case has been called to our attention wherein the *Crider Case*, *supra*, has been held as authority to sustain such contention, nor are we able to gather from it the rule which counsel insists upon.

Upon the other hand, Judge Clark, in the unreported opinion in *Henninger v. Railroad*, *supra*, passed upon the exact question here presented, and with the *Crider Case* before him, said:

"This statute neither in its caption nor by any fair inference from anything found in its body has any application to persons at all. The state court, discussing this act before us, seem to have intimated a wider meaning in the effort to save the statute from constitutional objection, but in doing so have read into the statute terms and provisions not found in it, nor, by any fair implication, to be construed into it. To hold that the statute has such an application as that would violate another provision of the Constitution, which requires that the subject of every statute must be expressed in its title or in the body of the act; and the purpose to protect persons by this fencing is not found in the caption, nor by any fair implication, in the body of the act. No one reading it would suspect any such purpose on the part of the Legislature, and such an enlarged meaning of it is not germane to anything that is contained in the caption or the body of the act. It is absolutely foreign, and such a meaning can only be put into the statute by judicial legislation or what is commonly called 'judge law,' which is a species of legislation not constitutionally allowed in this country. The statute does not in terms, nor by any fair implication, impose on the railroad company the general imperative duty to fence its track. But to the defendant is held out a very strong motive for its doing so in the severe liability attached in case of a failure; so that whatever might be said of it, and with whatever reason, for an extension of

the meaning of this statute to the protection of the public at large, I am clearly of the opinion that it has no application as between master and servant. Other statutes very general in their meaning, such as those designed to protect human life on highways and thoroughfares, and which expressly include the public at large in their provision, have been held to have no application in their provision as between master and servant. For example, in the switchyards of a company, the signal statutes have no application, and the signals required of a train in motion on the general line of road at crossings, etc., have no application to the servants of the company, so that without further elaboration, I hold that this case is not controlled by the statute."

To the same effect is the holding of the Supreme Court of Tennessee in *L. H. Young v. C., N. O. & T. P. Ry. Co.* (unreported) in 1903 at Knoxville.

The cases cited in support of the declaration, construing New York, Wisconsin, and Missouri statutes, have no application here, for the reason that the fencing statutes in these states are quite different from those of Tennessee. It will be observed that in those cases where it has been held that a right of action would lie against a railroad company for injuries caused to passengers or employes by the company's failure to fence or maintain a fence along its line it was made a positive duty of the railroad company to fence its roadbed. No such statute law exists in Tennessee.

The second ground of demurrer presents the doctrine of assumed risk. Without citing or reviewing the authorities bearing on this question, we are satisfied that this ground of the demurrer is also well taken. The demurrer is sustained. The plaintiff is allowed 20 days to amend her declaration.

THE ABRAM F. SKIDMORE. THE CRESCENT. THE L. T. WHITMORE.

(District Court, S. D. New York. January 22, 1908.)

COLLISION—TUGS WITH TOWS MEETING—NARROW CHANNEL—RULE.

A tug with a scow in tow alongside held solely in fault for a collision in East river near Riker's Island between the scow and a schooner in tow of a meeting tug on a hawser, on the ground that she suddenly changed her course to port, and also that she was on the port side of the channel, in violation of the narrow-channel rule.

In Admiralty. Suit for collision.

MacFarland, Taylor & Costello, for Haskell and The L. T. Whitmore.

Hyland & Zabriskie, for The Abram F. Skidmore.

James J. Macklin, for The Crescent.

William J. Cleary, for William E. Cleary.

ADAMS, District Judge. These actions arose out of a collision which occurred about 2 o'clock p. m. on the 5th day of September, 1906, in the East River in the vicinity of Riker's Island, between the schooner *L. T. Whitmore* bound west, with her sails furled, in tow of the tug *Crescent* on a hawser of about 50 fathoms in length, and the scow *Ina*, belonging to William E. Cleary, bound east, in tow on the port side of the tug *Abram P. Skidmore*. The tide was ebb,

running west about 2 miles an hour in the center of the channel and about a half of a mile on the north shore. It was somewhat stronger on the south shore than the north shore."

The first action was brought by the master and part owner of the Whitmore, who alleged that she was directly behind the Crescent, that neither she nor the Crescent changed her course, and the Skidmore and the Ina came somewhat diagonally toward the schooner and collided with her bowsprit crushing in the schooner's port bow, etc., through improper navigation on the part of the Skidmore. The Skidmore answered the libel denying that there was any fault on her part and alleging that she and tow were proceeding through the channel about 100 feet from its northerly edge and saw the Crescent approaching about $1\frac{1}{2}$ to 2 points on the Skidmore's starboard bow and kept that course until she was a short distance away when she changed to pass to the port side of the Skidmore and in attempting to do so, brought the schooner's bow, partly through the latter's fault in failing to follow the Crescent, in contact with the bow of the Ina about two-thirds of the way to the port side. The Skidmore also filed a petition to bring the Crescent into the action. The Crescent duly answered the libel and petition, denying any fault on her part and alleging that the collision was caused solely through the fault of the Skidmore in suddenly changing her course toward the Whitmore so as to bring about the contact and also charged the Skidmore with fault in navigating upon the wrong side of the channel. Cleary then brought his action against all of the vessels to recover the damages to the Ina, alleging that the schooner suddenly ran into the Ina and that all the vessels were in fault, the tugs for not giving signals, etc., and the Whitmore for not following the Crescent. The allegations of the libel were duly denied by the other vessels. Other faults were alleged by all of the vessels but the litigation has principally proceeded on the question as to which of the tugs and tows, changed her course, and the remaining allegations of neglect may be disregarded.

The Whitmore, from an eastern port with a cargo of lumber under and on deck was bound to 65th Street, South Brooklyn. She had stopped at City Island early in the morning of the day of the collision. Her crew was then paid off excepting the master, the mate and the cook, who remained on board. After being taken in tow by the Crescent, the mate went to the wheel, the master was below, and the cook was on top of some of the lumber, looking around. He was not strictly doing duty as lookout but he had a good view in all directions. The mate's view ahead was obscured by the deck load.

The Ina, a scow about 100 feet long, was taken in tow on the port side of the Skidmore at Potts Cove, Astoria, bound for White-stone, Long Island. She had a square bow which was about 30 feet ahead of the bow of the tug. The tug was about 75 feet long. The tow left Potts Cove about 12:30 p. m. and proceeded through the channel between North Brother's Island and South Brother's Island and thence on the north side of the river, said by her witnesses about 100 feet from the northerly side of the channel.

As stated above, it is claimed by the Skidmore that while she was navigating on the northerly side of the channel, the Crescent and schooner approached on her starboard side and suddenly changed to cross her bow, while the Crescent and schooner claim that the vessels approached each other so as to pass port to port and would have cleared by 100 or 150 feet, had not the Skidmore suddenly changed to the port.

The weight of the testimony is decidedly with the contention of the Crescent, supported as it is not only by statements from those on the schooner but by two disinterested witnesses from the Night Hawk, a small gasoline launch, which followed and overtook the Skidmore, observing what she did. They said that the vessels were approaching, the Crescent and the schooner being nearer to the northerly side of the channel, so as to pass each other safely, clear water being seen between them, and they then heard the crash of the collision, and saw the schooner and scow in collision, the latter then heading to the northerly side of the channel, which their testimony indicates was brought about by a change to the northward. Some of the witnesses from the Crescent said that in passing the Skidmore, they observed that the steersman was leaning over the wheel as though he was asleep. It was argued therefrom that the Skidmore being of very weak power was turned to port by the strength of the current, which she was trying to overcome. There is some force in the argument but it is not necessary to adopt it as the other evidence is sufficient to support the Crescent's contention.

There is another feature of the case which would condemn the Skidmore, that is navigating on the wrong side of a narrow channel. While she was not within 100 feet of the northerly edge, as claimed by herself, she was undoubtedly on the port side of mid-channel and thereby violated Rule 25, which provides that "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fair way or mid-channel which lies on the starboard side of such vessel." Her power was not sufficient to enable her to make much, if any, progress with her tow in stemming the strength of the adverse current, hence she sought a part of the channel where she would not meet its full power, which was on the northerly side. In this particular she was also in fault.

The faults of the Skidmore are so marked and so plainly account for the collision that it is unnecessary to consider the further details of the navigation of the other vessels.

There will be a decree for the libellants Haskell and Cleary against the Skidmore, with orders of reference. The libels against the Crescent and the Whitmore will be dismissed.

RONEY v. CHASE, TALBOT & CO.

(District Court, S. D. New York. December 20, 1907.)

1. ADMIRALTY—PLEADING—SET-OFF.

A respondent in admiralty cannot set up an independent claim as a defense by way of set-off.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, § 327.]

2 SHIPPING—DEMURRAGE—UNAVOIDABLE DELAY IN DISCHARGING.

A consignee of cargo cannot be held liable for demurrage because of delay in discharging, due to the inability of the vessel to reach the dock designated for discharge, owing to obstruction by dredges engaged in improving the waterway, in the absence of a contract covering such situation, and where the obstruction was not known when the dock was designated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 576.]

In Admiralty.

Owen & Sturges, for libellant.

Hagen, Goodrich & Coughlan, for respondent.

ADAMS, District Judge. This action was brought by John C. Roney, the master of the schooner Hattie E. King, to recover from Chase, Talbot & Company, a corporation of New York, \$98.84, a balance of freight alleged to be due the libellant by virtue of the services of the schooner in transporting a cargo of lumber from Bangor, Maine, to New York, and for demurrage on the schooner in consequence of delay in discharging. The respondent claimed to be entitled to deduct \$10.13 commissions earned by it but there was no contract for the payment of commissions in this case and if they became due from previous transactions, they are not competent as a set-off here. It is well settled that a respondent cannot in the admiralty make a defence of an independent claim by way of set-off. Benedict's Adm. p. 264, § 465.

The remaining matter to be considered is that relating to demurrage. The agreement with respect thereto is set forth in the second article of the libel, admitted in the answer, as follows:

"Second. That heretofore and on or about the 15th day of May 1907 the Schooner Hattie E. King being in the Port of Bangor, Maine, and bound on a voyage to New York, Lowell & Engel shipped or caused to be shipped on board said Schooner a cargo of spruce lumber to be transported to New York at an agreed rate of freight and to be delivered to Chase, Talbot & Company the respondent herein. That the lay days should be at the rate of 20,000 feet per day (Sundays and legal holidays excepted) after forty eight hours for orders, after which demurrage at the rate of ten cents per register ton per day for vessels under 250 tons register, or 25,000 feet for vessels above 250 tons register. That a bill of lading for said cargo was duly signed and delivered the shipper to which the libellant prays leave to refer upon the trial of this action."

The only provision in the bill of lading relating to demurrage was as follows:

"No claim is to be made against shipper, in any event, for demurrage, or damages in the nature of demurrage, caused by detention, in the port of discharge; it being understood that nothing in this clause shall interfere with claim against cargo."

The parties have stipulated that the vessel arrived in the port of New York and reported her readiness to discharge at 9 a. m. June 3d; that she was ordered to deliver her cargo at a yard on the Gowanus Canal; that the vessel did not reach her dock until the 18th at 2:30 p. m. and did not work that day on account of the absence of stevedores whom the vessel was under an obligation to furnish; that the work of discharging commenced on the 19th of June and continued all day; that the discharging continued the 20th until about 11 o'clock when the stevedores threw up the job and no further work was done that day; that on the 21st nothing was done on account of the absence of stevedores until 1:30 p. m., when the discharging was resumed and continued for the balance of the day; that the 23d was Sunday and no work was done; that on the 24th, 25th and 26th, discharging was carried on and completed at 6 p. m. on the last named day; that the basis upon which demurrage is to be calculated is correctly set forth in the 2nd article of the libel, and that, therefore, the vessel should have been discharged on the 17th at 10 a. m. had there not been interference which prevented.

There was an admitted detention of one and a half days occasioned by the stevedores employed by the vessel. This time should be allowed to the respondent. The vessel was detained from June 17th at 10 a. m. to June 26th at 6 p. m., a period of ten days. Deducting the said day and a half, there was a period of 8½ days during which she was detained owing to no fault on her part.

The claim of demurrage is defended upon the ground that the detention at Gowanus Canal was caused by the use of dredges which were at work deepening a public water way, which was not known to the respondent prior to the arrangements having been made for the discharge and the vessel going to the place.

The libellant claims that the obstruction of the canal was of no importance as the delay attending such obstruction was upon the respondent and not upon the vessel.

In order to hold the respondent it should appear that it was under some obligation, express or implied, to receive a definite quantity per day, notwithstanding unavoidable detention caused by the acts of a third party in making a public improvement and making it responsible for such delay. I have been referred to no authority which would cover such a case and it seems to me that justice will be reached by permitting the loss to remain where it fell. The admission of the correctness of the allegations of the 2nd article of the libel does not suffice to establish a case against the respondent for demurrage under the circumstances.

There will be a decree for the libellant for \$98.84, with interest.

SMITH et al. v. KRAUSE et al.

(Circuit Court, S. D. New York. March 11, 1908.)

TRADE-MARKS—SUBJECTS—NOVELTY RIBBONS.

The words "Merrie Christmas" printed on or woven in ribbons at intervals are not the subject of a trade-mark, the words being an integral part of the ribbon, which was evidently designed for use in tying Christmas packages, and not merely a mark to identify the manufacturer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 1-12.

Arbitrary, descriptive, or fictitious character of trade-marks and trade-names, see note to Searle & Hereth Co. v. Warner, 50 O. C. A. 323.]

T. F. Bourne, for complainants.

Dickerson, Brown & Raegener (Louis C. Raegener and S. L. Moody, of counsel), for defendants.

HOLT, District Judge. This suit was brought to restrain the alleged infringement of a registered trade-mark. The statement filed in the United States Patent Office claiming a trade-mark states that the trade-mark, was registered May 8, 1906; that the trade-mark consists of the words "Merrie Christmas"; that the class of goods to which the trade-mark is appropriated is ribbons; and that the trade-mark is usually displayed by weaving it in the goods, and by placing on the sides of the rolls of ribbon and on the boxes in which the rolls of ribbon are packed printed copies of the same words. It appears that in 1905 complainants conceived the idea of manufacturing a ribbon, in the body of which were woven, at regular intervals, the words "Merrie Christmas," in a style of Old English script type. The ribbons were put up in packages of 10 yards in length, and the words "Merrie Christmas" were woven into the ribbon with an interval of about 2 inches between each repetition. On the side of each roll was also put a label containing the name of Smith & Kaufman, the complainants, and the words "Merrie Christmas" written in the same general style as the words on the ribbon, and the words "Ribbon No. 2." The defendants thereafter brought out a cheaper ribbon, on which the words "Merrie Christmas," written in similar Old English script, are printed at intervals along the whole length of the ribbon, with about the same space between each repetition as in the complainants' ribbon. The label put upon the side of the defendants' rolls of ribbon has printed on it the words "Holly Ribbon Design." There is nothing in the labels placed by the defendants on the sides of their rolls of ribbon or on their boxes which imitates the complainants' labels on their rolls or boxes, but the words "Merrie Christmas" woven or printed at intervals on the whole length of the ribbon itself are so similar as to justify the inference that the defendants planned to print the words on their ribbon with the intention to imitate as closely as possible the complainants' ribbon.

This suit is not brought on the ground of unfair competition in trade. If it had been, this court would have no jurisdiction, because the parties are all citizens of this state. It is therefore unnecessary to inquire whether the obvious imitation by the defendants of the com-

plainants' ribbon could be restrained on that ground. This suit is based exclusively on the theory that the defendants have infringed a trade-mark registered under the laws of the United States. The claim is that the words "Merrie Christmas," in an Old English style of type, and with the Old English spelling of the word "merry," placed at intervals upon a ribbon, constitute a trade-mark. I have no doubt that the term "Merrie Christmas" might be a trade-mark for a particular style of ribbon, and that, if the defendants had put a label on the rolls of ribbon, or on the boxes in which the ribbons were packed, containing the words "Merrie Christmas," and particularly if those words were such an exact imitation of the method of writing and spelling adopted by the complainants as the words upon the ribbon itself are, the defendants would be liable for infringement. But the defendants have not infringed in that way. The claim is that the words "Merrie Christmas," woven into the ribbon at intervals, are a trade-mark, and that the defendants and other people cannot be permitted to make a ribbon having those words woven into or printed upon it. But I do not think that such words put upon the ribbon itself, and constituting a part of it, are the subject of a trade-mark. A trade-mark ordinarily does not add anything to the value of the goods in the estimation of the buyer. It is simply a mark to identify the manufacturer of them. The evident object of putting upon the market a ribbon having the words "Merrie Christmas" on it was to enable persons desiring to send a Christmas gift to tie the package with a ribbon having a Christmas greeting upon it. Of course, a trade-mark is sometimes impressed upon the article sold, but I do not think that it ever properly constitutes an element of value in the thing itself. To the purchaser of such a ribbon, the fact that it has "Merrie Christmas" inscribed upon it adds a value to it over the value of a plain ribbon, for the purpose for which the purchaser wishes to use it, in putting it on a package containing a Christmas gift. No one would contend that the words "Merrie Christmas," placed upon boxes made to contain candy, to be sent as Christmas gifts, or placed upon a Christmas card, could be appropriated as a trade-mark by anybody, and I think that the right of anybody to place such words upon a ribbon is precisely analogous. When so placed, the ribbon becomes more valuable for the particular purpose of sending a Christmas gift. Anybody has the right to make such a ribbon, just as he has a right to make a Christmas box or a Christmas card, and, in my opinion, nobody, under the guise of adopting the words as a trade-mark, can obtain a monopoly for the manufacture of such goods. The truth is the words, when put on the ribbon, are not a trade-mark, but are an integral part of the ribbon, adding to its value. If it is possible for any one to get a monopoly of such a ribbon, it must be done by an application for a design patent; although, in my opinion, it is very doubtful whether such a patent would be valid. At all events, I am convinced that, under the guise of registering a trade-mark, no person can get a monopoly of the right to manufacture a ribbon with the words "Merrie Christmas" on it. It is claimed that the complainants can maintain the right to prevent the imitation of the peculiar antique style and spelling of the words, but neither the style nor the spelling adopted by the complainant, al-

though somewhat distinctive, is very peculiar or unusual. I have no doubt that the defendants intentionally imitated it, but that is immaterial, if such a use of a trade-mark is invalid. The question involved in this case seems to be novel. The only authority which has been called to my attention which seems to have any analogy to this case is the case of *Lalande v. Appel*, described in *Browne on Trade-Marks*, § 141. In that case it was held that tickets or labels composed and sold by a lithographic printer for general use by the purchasers, by being placed on bottles of liquors made by the purchasers, could not be considered as trade-marks. The court held that the tickets in question were the special objects of commerce, and therefore could not be regarded as trade-marks; that the mark itself cannot be an object of commerce; that as to a merchant using such a ticket by applying it to bottles containing the product of his manufacture, it may become a trade-mark, but as to the lithographers the tickets can be nothing but the special object of their industry.

My conclusion is that there should be a decree for the defendants, dismissing the bill on the merits, with costs.

PERKINS, GOODWIN & CO. v. UNITED STATES.

(Circuit Court, E. D. Pennsylvania. March 26, 1908.)

No. 52.

1. CUSTOMS DUTIES—WEIGHT—CHINA CLAY—ALLOWANCE FOR MOISTURE.

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 93, 30 Stat. 156 (U. S. Comp. St. 1901, p. 1632), making china clay dutiable by the ton, duty may properly be laid upon the actual weight of the clay and the moisture therein, if the moisture is not more than is ordinarily found; but duty should not be exacted on an abnormal amount of moisture.

2. SAME—ACTUAL WEIGHT—TRADE CUSTOM.

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 93, 30 Stat. 156 (U. S. Comp. St. 1901, p. 1632), making china clay dutiable by the ton, the duty on china clay in casks may properly be based on the actual weight of the importation, regardless of the custom of the trade to consider a cask as half a ton and to pay for it on that basis.

On Application for Review of a Decision by the Board of United States General Appraisers.

Comstock & Washburn (J. Stuart Tompkins, of counsel), for appellants.

Jasper Y. Brinton, Asst. U. S. Atty., and J. Whitaker Thompson, U. S. Atty.

J. B. McPHERSON, District Judge. The merchandise in question is china clay imported from England, and is dutiable under section 1, par. 93, of the Tariff Act of July 24, 1897, c. 11, Schedule B, 30 Stat. 156 (U. S. Comp. St. 1901, p. 1632), at \$2.50 per ton. The dispute is solely concerning the proper method of ascertaining the weight upon which the duty is to be laid. The clay is almost invariably imported in casks, and it appears clearly from the testimony before the

court that for 40 years at least it has been the custom of the trade to reckon two of these casks to a ton of 2,240 pounds, and to pay for the contents upon this basis. But in this connection a further statement must be made. The casks are so built that each is intended to hold 1,120 pounds of air-dry clay, so that after a cask has been filled it should ordinarily contain about half a ton of clay—if the material were bone dry, as it never is—plus a variable amount of moisture, which may be anywhere from 10 per cent. to 30 per cent., but which usually averages 10 per cent. or 12 per cent. The packages, therefore, comprising cask, clay, and moisture, may vary a good deal in weight, and, since the duty is laid upon the ton, there may be more or less difficulty in ascertaining the proper quantity of the dutiable merchandise. It is comparatively easy to eliminate the cask—and that has been done in the present case—but when it comes to the two remaining elements, there is room for dispute. In addition to the testimony taken by the importers, the parties have agreed upon the following stipulation:

"It is hereby stipulated by counsel for the respective parties in the above-entitled cause that the merchandise involved therein is correctly specified in the ten protests and entries referred to at the foot of the importers' petition (copy hereto annexed), and that the ten transcripts of the certificates from the surveyor's office herewith submitted represent the 'gross weights,' 'tares' and 'net weights' of the merchandise as found by the government's weighers, and that upon the 'net weights' duty was subsequently assessed, and that the tares therein stated represent the estimated weight of the casks, and have no reference to moisture contained in the contents of said casks, having been computed according to the government's contention either upon the basis of T. D. 27,698 declaring 72 pounds to be schedule tare, or upon actual weight of casks in cases where, under article 1658, Customs Regulations 1899, actual tare has been taken. The importers, however, dispute that the tares were determined in that manner, and claim that according to computations of the tare per cask made by dividing the total tare allowed on, by the total number of casks covered by, each entry, it appears that the weight allowed for each cask was in no case 72 pounds, but was for the ten entries embraced under this appeal as follows:

Entry No.	7,347	78	pounds.
"	15,002	73	"
"	22,504	83	"
"	20,068	74	"
"	6,881	78	"
"	4,063	76	"
"	4,483	73.54	"
"	6,379	74	"
"	9,204	78	"
"	7,624	73	"

"The importers further claim that inasmuch as in their returns pertaining to these entries, the weighers did not 'note at the head of the column of tares, whenever the tare returned by them is actual tare' (that is, weight ascertained by weighing emptied cask), as required by article 1656, Customs Regulations of 1899, the presumption is that the cask weights were merely estimated. But in any event, it is conceded by both parties that even where, by reason of excess moisture, the weight of casks was over the average of 72 pounds each, and even where tare of 83 pounds per cask was allowed, as on entry No. 22,504, no allowance or deduction was made on account of excessive moisture contained in the contents of the casks as distinguished from the casks themselves. No 'written notice of dissatisfaction with the allowance of tare,' attacking the correctness of the weight of the casks as found, was filed by the importers under the provisions of article 1658, Customs Regulations of 1899, because the importers have uniformly contended that, in ac-

cordance with the commercial transactions and the fact that each cask is made and bought and sold to contain 1,120 pounds air-dry clay with 12 per cent. moisture, duties should be charged on the basis of one-half ton or 1,120 pounds to the cask. Both parties concede that the word 'ton' as used in said paragraph 93 means a long ton of 2,240 pounds in accordance with the definition of the word 'ton' as set forth in section 2951, U. S. Rev. St."

The difficulty about the facts, whether they appear in the testimony or in the foregoing stipulation, is their failure to throw a satisfactory light upon the amount of moisture in the casks now in question. Obviously, if a particular shipment has been so much exposed, either before or during the voyage, that the clay has taken up an excessive amount of moisture, it would be unfair, and certainly against the intention of the statute, to require the importer to pay duty upon an abnormal quantity of water. But it is quite as obvious, that, if the clay in the ordinary commercial condition, and contains no more moisture than is invariably found in any shipment, the duty may properly be laid upon the actual weight of clay and moisture combined as it may be found to exist at the port of entry. It is just at this point that the present dispute arises. The actual gross weights of the packages in question were ascertained by the government's employes, and after a proper allowance had been made for the weight of the casks the duty was levied upon the net tons thus found to remain. But this remainder, although *prima facie* correct, did not agree with the importers' expectation. Instead of averaging 1,120 pounds of a mixture composed of theoretically bone-dry clay and 10 per cent. to 12 per cent. of moisture, the casks showed a greater average weight, and the contention is therefore made that the weight above half a ton must be water, and cannot be clay. The importers take the position that the duty should be levied in the same manner as the clay is customarily bought by the trade—that is, without actually weighing the packages—by assuming that each cask contains about half a ton of clay and 10 per cent. to 12 per cent. of moisture, thus making the dutiable weight of each cask vary from, say, 1,200 to 1,400 pounds. If the contents of a cask weigh more than about half a ton, more or less, it is argued that the excess must be water and should be disregarded.

The difficulty about this position is that it rests upon little more than presumption. For their own convenience, the trade reckon two casks to a ton of 2,240 pounds, and pay for the clay on that basis, without taking the trouble to weigh what they actually get, or to determine whether or not it is excessively wet. Sometimes they get more, and sometimes less, than half a ton of clay to a cask. But in all probability the discrepancies in weight even themselves up in the long run, and, if the government chose to levy its duty by the same method, something might be said for it on the score of convenience; but it is so plain that unscrupulous shippers and importers could easily avoid the duty upon an appreciable fraction of every ton if casks were merely counted and were not actually weighed, that it causes no surprise to find the government declining to adopt the method preferred by the importers, and adhering to the method of ascertaining as nearly as possible the exact amount of clay in each package.

No doubt this may sometimes result in imposing duty upon more than the ordinary commercial quantity of water; and, where this can be shown to be the case, a different question may be presented from the question now before the court. For I repeat that in the various importations that are now under consideration there is no testimony to show that more moisture was present than the quantity that is almost invariably found in air-dry clay, and as a consequence the importers' contention has no sufficient foundation of fact.

It is therefore plain that, even if the court were of opinion that the duties in controversy should be reliquidated, it would be impossible to determine with any accuracy what deduction should be made from the number of tons that were found and reported by the government weighers. This number is presumptively correct, and cannot be set aside except for legal cause. But without such cause I am now asked to say arbitrarily that as these shipments were bought and paid for upon the assumption that each cask contained half a ton of clay without reference to its actual weight, and as the importers have no objection to pay duty upon this assumption, whatever the fact may be, the government should be restricted to the amount that the importers are willing to pay. This, I think, is essentially what the argument comes to under the facts now in evidence, and, if I am right in so supposing, nothing more need be said to refute it.

The decision of the Board of General Appraisers is affirmed.

In re KINGSLEY.

(District Court, D. Vermont. March 30, 1908.)

1. GUARDIAN AND WARD—DISABILITY—NATURE AND EXTENT.

The disability of a person under guardianship is a creature of statute, and does not follow the ward when he removes to another state, but only affects the rights of parties within the territorial limits of the application of the statute under which the guardianship proceedings were had.

2. ADMINISTRATORS—FOREIGN ADMINISTRATOR—RIGHT TO SUE.

Courts will take no notice of the right of a foreign administrator to sue; but, before he can be recognized as the personal representative of the deceased, he must be clothed with authority from the laws of the state in whose courts he desires to appear.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 2330.]

3. GUARDIAN AND WARD—FOREIGN GUARDIAN—RIGHT TO SUE.

A foreign guardian cannot sue, unless authorized to do so by the laws of the state in whose courts the suit is brought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, § 570.]

4. BANKRUPTCY—VENUE—WARD—CHANGE OF DOMICILE.

Where a ward under guardianship in New Hampshire changed his domicile with the consent of the guardian to Vermont, and there resided for six months prior to the filing of his voluntary bankruptcy petition, the court of bankruptcy in Vermont had jurisdiction, notwithstanding the New Hampshire guardianship, and the fact that proceedings were there pending for the settlement of the bankrupt's estate in insolvency..

Cain & Benton, for petitioners.

Gibson & Waterman, Chase & Daley and A. P. Carpenter, for bankrupt.

MARTIN, District Judge. The bankrupt filed his voluntary petition in bankruptcy February 24, 1908, was adjudicated a bankrupt on the same day, and the case referred to Referee Cudworth. On March 10th the petitioners filed their petition, alleging in substance that said Brigham was duly appointed guardian of said bankrupt on June 16, 1905, by the honorable probate court in the county of Cheshire, in the state of New Hampshire; that he is now serving as such guardian; that said bankrupt was, at the time of said appointment of said guardian, a resident of the state of New Hampshire, and that his residence has remained there from thence hitherto; that said Cain & Benton are creditors of said Kingsley; that said probate court appointed a commissioner under the laws of New Hampshire for the purpose of allowing claims of the creditors of said Kingsley; that prior to the appointment of said commissioner several suits had been commenced against said Kingsley and were pending in the courts of New Hampshire at the time of the appointment of said guardian and commissioner, whereupon, by virtue of the statute of said New Hampshire, all said suits were discontinued, and the creditors' claims have been passed upon by said commissioner, who has filed his report in said probate court; and that the adjudication of bankruptcy should be vacated for want of jurisdiction of this court. On March 12th notice was given that the court would hear the parties and their evidence relating to the facts set forth in said petition at chambers, in Brattleboro, March 25, 1908, at 10 o'clock a. m., at which time and place the parties, with counsel and witnesses, appeared and were heard.

It appeared from the evidence that said Kingsley filed with the honorable probate court aforesaid his petition praying for the appointment of a guardian over himself "by reason of physical disability." The copy of said petition before me bears no date; but there is appended thereto a copy of the probate court's decree, under date of June 3, 1905, granting the prayer of the petition, whereupon the petitioner, Hosea W. Brigham, was appointed guardian of said Austin N. Kingsley under date of June 16, 1905, and in the letters of guardianship this language is found:

"You shall take care of the person and estate of your said ward," etc.

It appeared from the evidence that the guardian never made any attempt to control the person of his ward; that his ward, the bankrupt, left the state of New Hampshire, and came to Brattleboro, Vt., to reside, over a year before filing in this court his petition in bankruptcy, and has resided in said Brattleboro continuously ever since; that during his said residence in said Brattleboro, Vt., the said guardian has furnished his said ward, the bankrupt, funds for his living expenses, whenever applied to, without protest as to his ward's choice of residence.

It is claimed by the petitioners that a person under guardianship cannot change his residence, under any circumstances, during the continuance of the guardianship. The disability of a person under guardianship does not follow him when he removes to another state. Such disability is a creature of the statute, and cannot affect the rights of parties outside of the operation of the statute under which guardianship proceedings were had. *Hannah Hull v. John D. Gallup*, Ex'r, 49 Conn. 279; *Powers, Guardian, v. Mortee*, Fed. Cas. No. 11,362, 4 Am. Law Reg. (O. S.) 427; *Morrell v. Dickey*, 1 Johns. Ch. (N. Y.) 153; *Story on Conflict of Laws*, § 504.

In this country it is settled that our courts will take no notice of a foreign administrator, as conferring to him the right of action here. Before he can be recognized as the personal representative of the deceased, he must be clothed with authority from the laws of the state in whose courts he desires to appear. *Taylor v. Barron*, 35 N. H. 495. Authorities without number can be cited in support of this doctrine. The same principle applies to a guardian.

The guardianship proceedings were based upon the ward's application, which asserted physical disability. It appears that the only decree of the court shown by the records is in this language:

"Upon consideration of the foregoing petition, it is decreed that the prayer thereof be granted, and that letters of guardianship issue to the said Hosea W. Brigham accordingly."

Whether such a decree of the court would subject the person of the ward to the legal will of the guardian to the extent of a legal control of the domicile of his ward need not be passed upon, as the facts affirmatively show that the domicile of the ward was changed by the consent of the guardian. *Kirkland v. Whately*, 86 Mass. 462. A domicile of six months is sufficient to give a court jurisdiction in bankruptcy proceedings.

It is claimed by the guardian that he holds the property of the bankrupt under the insolvency laws of New Hampshire, which are not suspended by the bankruptcy enactments of Congress, and therefore this court of bankruptcy cannot administer upon the estate of his ward. It is unnecessary to discuss that question now. The real question is that of jurisdiction of the court in adjudging *Austin N. Kingsley* a bankrupt. Having been a resident of Vermont for a period of more than six months gives him a right to apply to the court of bankruptcy for relief from all of his creditors, whether they are within or without the jurisdiction of Vermont or New Hampshire. The fact that he is under guardianship in New Hampshire and proceedings are pending there in the probate court—a court that has no power to relieve an insolvent debtor, except as to creditors residing in that state or voluntarily coming within its jurisdiction—does not deprive the bankrupt of seeking the benefits of the national acts of bankruptcy in the federal court having jurisdiction of the district where the bankrupt has been domiciled for six months previous to the filing of his petition.

The administration of the assets of the bankrupt, now in the possession of the guardian in New Hampshire, is a matter to be settled hereafter in the court having jurisdiction of such questions.

The petition that the bankruptcy proceedings in this district be vacated is dismissed.

In re SANDERSON.

(District Court, D. Vermont. March 17, 1908.)

No. 1,336.

BANKRUPTCY—CLAIMS—FILING—TIME.

Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3444), provides that claims shall not be proved against the estate after a year from the adjudication, or if in litigation, and final judgment is rendered, then within 60 days after the rendition of judgment, except that the rights of infants and insane persons without guardians, without notice of the proceedings, may continue 6 months longer. *Held*, that the court had no power to permit proof of a claim after the expiration of the time so fixed, though the creditor's failure to make proof within the time specified arose solely through accident and mistake.

In Bankruptcy.

Alfred A. Hall, for petitioning creditors.

D. W. Steele, for alleged bankrupt.

MARTIN, District Judge. The date of the bankrupt's adjudication was June 3, 1904. On March 9, 1908, the day of the final meeting of creditors for the settlement of the trustee's account and for making final orders of distribution, the claimant presented a claim for \$47.36, of which \$14 is preferred. The referee reports that the claimant failed to make and file his claim within "the time allowed by law solely through accident and mistake," and that no objection was raised against the allowance of the claim. The referee submits to the court whether the court may not give the referee special authority to allow the claim.

There seems to be no question as to the merits of permitting the allowance of this claim. If Congress had left with the court any discretion in such a case, this court would be glad to exercise that discretion in allowing the claim. Observe the language of Act July 1, 1898, c. 541, § 57n, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3444]:

"Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are adjudicated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: Provided, that the right of infants and insane persons without guardians without notice of the proceedings may continue six months longer."

It is useless here to consider whether the court is not ordinarily vested with sufficient equity powers to grant relief where it is equity so to do, because this statute cuts out any common-law equity powers vested in the court for such allowance. The courts have construed this statute literally. The claim in question cannot be allowed, as it is barred by this statute. In re Stein (D. C.) 1 Am. Bankr. Rep. 662, 94

Fed. 124; *Bray v. Cobb* (D. C.) 3 Am. Bankr. Rep. 788, 100 Fed. 270; *In re Shaffer* (D. C.) 4 Am. Bankr. Rep. 728, 104 Fed. 982; *Hutchinson v. Otis*, 8 Am. Bankr. Rep. 382, 115 Fed. 937, 53 C. C. A. 419; *In re Moebius* (D. C.) 8 Am. Bankr. Rep. 590, 116 Fed. 47; *In re Hawk*, 8 Am. Bankr. Rep. 71, 114 Fed. 916, 52 C. C. A. 536; *In re Rosenberg* (D. C.) 16 Am. Bankr. Rep. 465, 144 Fed. 442.

Some courts have gone so far as to hold that a creditor not named in the schedule and having received no notice, directly or indirectly, is barred in one year from proving or having his claim allowed. *In re Muskoka Lumber Co.* (D. C.) 11 Am. Bankr. Rep. 761, 127 Fed. 886, and cases there cited.

UNITED STATES v. RUSCH & CO. TITUS BLATTER & CO. v. UNITED STATES. QUAINANCE v. SAME.

(Circuit Court, S. D. New York. March 2, 1908.)

Nos. 4,736, 5,090, 5,091.

CUSTOMS DUTIES—CLASSIFICATION—COTTON CLOTH WITH COLORED FIGURES.

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule I, para. 305-309, 30 Stat. 175-177 (U. S. Comp. St. 1901, pp. 1656-1658), providing for "colored" cotton cloths, the character of the fabrics as colored is determined by the condition of the warp and filling threads alone; and cottons having colored figures, but an uncolored foundation, are not "colored," within the meaning of the tariff act, though the figures may cover most of the foundation fabric and have on the eye the effect of a colored fabric.

On Application for Review of Decisions by the Board of United States General Appraisers.

For decisions below, see G. A. 6,492 (T. D. 27,762) and G. A. 6,670 (T. D. 28,447), relating to importations at the port of New York. The former reversed the assessment in the *Rusch Case*, and the latter affirmed the assessment in the *Blatter and Quainance Cases*.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

J. Osgood Nichols, Asst. U. S. Atty.

HOUGH, District Judge. The "countable clauses" of the cotton schedule of Tariff Act July 24, 1897, c. 11, § 1, 30 Stat. 175-177 (U. S. Comp. St. 1901, pp. 1656-1658)—Schedule I, pars. 305-309—provide a method of assessing duty on cotton cloth depending upon the number of threads therein to the square inch, whether the fabric is bleached or not, and whether or not the same is "dyed, colored, stained, painted or printed." Paragraph 310 defines the phrase "cotton cloth," making the test ability to count the warp and filling threads, whether the fabric be "figured, fancy or plain." Paragraph 313 provides additional duty for cloths in which other than the ordinary warp and filling threads have been introduced to form a figure, and declares that such duty shall be paid without regard to whether the cloth be unbleached, bleached, dyed, colored, stained, painted, or printed.

The merchandise here in question is certainly cotton cloth under paragraph 310, and it contains figures, introduced in the manner de-

scribed in paragraph 313; but the introduction of colored threads, and elaboration of ornamental designs thereby, has been carried so far that in some cases the warp and filling threads have become almost invisible, and the effect on the eye is that of a colored fabric. The board decisions under review are irreconcilable. In the *Rusch Case* the opinion follows *U. S. v. Beer* (C. C.) 143 Fed. 918, which supports *G. A. 2,934* (T. D. 15,834); and that decision laid down the general rule that:

"It is the body of the fabric, the warp and filling, that determines its character as cotton cloth, and brings it within the scope of the countable clauses of the tariff act of 1897."

From the *Beer Case* there was no appeal. But the doctrine of that decision the board finds it impossible to apply in the *Blatter and Quaintance Cases*, finding themselves confronted with very extreme instances of extraordinary colored threads covering most of the originally woven surface, and therefore holds the goods "colored" by such excessive ornamentation. Where is the line to be drawn? Just how much of the bleached or unbleached warp and filling must be visible, to prevent the additional threads being held to color the entire fabric for dutiable purposes? And what will be the result if ornamentation as excessive as any in colored threads be applied without color? And, again, if the extraordinary threads be held to color the cotton cloth, will they also subject the article to additional duty under paragraph 313?

To these queries I find no answer in the record, or on argument, except the suggestion that a reasonable interpretation must be given to the word "colored." This can only mean that some appraiser shall look at the cloth and judge whether it is or is not sufficiently covered with colored designs to be called "colored cotton cloth." Such a method of decision does not recommend itself. Yet I can see no logical standing ground between that method and the simple standard of the *Beer Case*.

The *Rusch* decision is affirmed, and the rulings on the protests of *Quaintance* and *Blatter* reversed.

MORIMURA BROS. v. UNITED STATES.

(Circuit Court, S. D. New York. March 2, 1908.)

No. 5,071.

CUSTOMS DUTIES—"CLERICAL ERROR"—CORRECTION.

The expression "clerical error" implies negligence or carelessness of a clerk, writer, or copyist, and assumes that the mistake, or negligence, or carelessness, is that of one engaged in the subordinate service of transcription, copying, or comparison; labor not requiring original thought. *Held* that, where a standard article was incorrectly invoiced at an excessive price, this was a clerical error of a kind of which correction is not harmful to the administration of customs laws, and relief from which should be granted.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 2, p. 1224.]

On Application for Review of a Decision by the Board of United States General Appraisers.

Kammerlohr & Duffy (John G. Duffy, of counsel), for importers.
J. Osgood Nichols, Asst. U. S. Atty.

HOUGH, District Judge. The petitioners imported certain goods from Japan, which were incorrectly invoiced at a greater number of sen than was the actual value thereof, and also greater than the price paid therefor. The error was observed by the appraiser examining the invoice, and it was shown that the goods thus overvalued were staple articles, long regularly imported by the petitioners, and obtained by them, and easily obtainable, at the correct and lower rate. The protest was for clerical error, and the board overruled the same on the ground that the excessive duties exacted were due to petitioners' negligence or carelessness.

Clerical error implies negligence or carelessness; but the question is: Whose is the negligence? If it is that of a "clerk, writer, or copyist," it is clerical error. Century Dictionary. The expression assumes that the mistake or negligence or carelessness is that of one engaged in the subordinate service of transcription, copying, or comparison; a labor not requiring original thought. It seems to me that the mistake in this case was clearly clerical, and, furthermore, that it is the sort of error correction of which is not harmful to the administration of the customs laws, and relief from which has been frequently granted by the board itself. T. D. 28,761 (abstract 18,167); T. D. 28,496 (abstract 17,270); T. D. 28,634 (abstract 17,763). If the mistake was clerical, then the summary relief allowed in United States v. Benjamin (C. C.) 72 Fed. 51, ought to have been granted.

Decision reversed.

MAGNUS & LAUER v. UNITED STATES.

(Circuit Court, S. D. New York. March 2, 1908.)

No. 4,972.

CUSTOMS DUTIES—CLERICAL ERROR—UNDERVALUATION—SHIPMENT OF WRONG GOODS.

An import was of a more expensive kind than that called for by the invoice, owing to an alleged error on the part of the shipper in failing to conform to an order for the cheaper kind. *Held*, that this was not a clerical error for which relief should be given, and that, owing to the facility with which such apparent errors might be fraudulently arranged by collusion between importer and shipper, it would be establishing a dangerous precedent to excuse an error of this kind.

On Application for Review of a Decision of the Board of United States General Appraisers.

For decision below, see G. A. 6,614 (T. D. 28,231), in which the Board of General Appraisers affirmed the assessment of duty by the collector of customs at the port of New York. On the ground of an alleged clerical error, the importers sought to be relieved from the payment of additional duties accruing for undervaluation, under Tariff

Act July 24, 1897, c. 11, § 32, 30 Stat. 211 (U. S. Comp. St. 1901, p. 1892), amending Customs Administrative Act June 10, 1890, c. 407, § 7, 26 Stat. 134 (U. S. Comp. St. 1901, p. 1892).

Kammerlohr & Duffy (John G. Duffy, of counsel), for importers.
J. Osgood Nichols, Asst. U. S. Atty.

HOUGH, District Judge. The petitioners are the agents of Spurway, of Cannes, France. They received from their principals an invoice describing 300 pounds of Turkish oil of geranium, which invoice set forth the value of this article at 5.50 francs per pound. This is a fair market price for Turkish oil. The appraiser discovered that the article imported was Algerian oil of geranium, which is worth twice as much as Turkish. It appears from the testimony that the principal had himself been in this country not long before the time of this importation, and had contracted for the sale and delivery of certain Turkish oil, and that he intended to ship Turkish in compliance with such contract, and by mistake Algerian was sent instead—by whose mistake can only be inferred, presumably that of some employé of Spurway & Co. in Cannes.

It is asserted that this is a clerical error against which the Board of General Appraisers should have afforded relief. The board's decision declares that the remedy of these petitioners was not to receive or accept the merchandise, and the argument on this appeal is largely devoted to showing that as soon as the goods had arrived in this country the petitioners' liability for duty had attached, and that therefore the remedy suggested by the board was not open to them. No opinion is expressed on this point. In the Case of Morimura (C. C.) 160 Fed. 280, just decided, I have stated my understanding of the phrase "clerical error." It has also been defined as an error "visible to the eye or obvious to the understanding." G. A. 184 (T. D. 10,534). Under any definition of "clerical error," I do not see how this mistake can be excused; and it is so obvious that, by arrangement between shipper and importer, "clerical errors" of this sort can be made to suit many cases of undervaluation or fraudulent invoicing, that I think it clear the board was right in refusing relief, in order not to establish a most dangerous precedent.

Decision affirmed.

THE PARK CITY.

(District Court, D. Connecticut. March 25, 1908.)

No. 1,428.

COLLISION—DAMAGES—REPORT OF COMMISSIONER.

The finding of a commissioner fixing the damages resulting to a dredge from collision, considered and affirmed.

In Admiralty. On exceptions to report of commissioner.
See 144 Fed. 527.

James A. Marr, for libellant.

Howard H. Knapp and Thomas J. Ritch, for claimant.

PLATT, District Judge. From the beginning this case has been peculiar, and for that reason an interesting one. At the hearing on the merits it appeared that just before the collision the Park City had slowed down so much that she barely hit the dredge. This fact is confirmed by the commissioner's finding. She did hit her, however, and I found her in fault for doing so. The dipper handle and one spud were broken because of the blow, due undoubtedly to the position in which they happened to be at the moment. Such a jar must have wrenched things considerably.

Before going to the commissioner the libelants increased their demand from \$5,500 to \$10,000, and then told a wondrous tale about the damage. Among the various ways in which the claimant undertook to counteract the impression which that tale was likely to make upon the mind of the commissioner was that of introducing Mr. Drake as an expert to tell how cheaply the stern bucking piece and the parts connected therewith could be put in as good condition as they were before the accident. It would be natural for Mr. Drake to reach a reasonably low conclusion as to the amount of damage. The commissioner accepted his figures with substantial exactness.

The proctor who conducted the hearing has been unable to follow the report on account of his lack of health. The Park City runs between Bridgeport, Conn., and Port Jefferson, Long Island. The Bridgeport proctor is the incapacitated one. Now a Port Jefferson proctor takes up the report. He lauds the commissioner to the skies for his sagacity and skill. Incidentally he finds fault with each final conclusion at which the commissioner arrived. He files four exceptions, and the commissioner has found only four elements of damage. He wants the court to hunt for the minimum, but in truth the commissioner has accepted the lowest figures which the proctor representing the Park City dared present. This chipping off chunks of damage by installments does not commend itself to the conscience of the court.

Those in charge of the dredge complained of its hurt at the time of the accident. They invited the captain of the Park City to come on board and examine. The captain was so positive that his boat was not responsible for the damage that he refused to even look at the injuries. The libelants then treated the matter in their own way and from their own standpoint. Now the claimants think that in all fairness the libelants ought to have given them the broken dipper handle. It seems to me that the libelants made reasonable efforts to turn the broken handle into money; but, finding that it would cost more to reduce it to fragments small enough to handle than could be gotten for the old metal, they did the only thing left for them to do, which was to let it sink of its own weight and join the lost articles which probably incumber the bottom of the sound. The parties who refused to look at it ought not to berate them for that.

With regard to repairs to the stern, the words of the commissioner are not as forceful as the evidence warrants. I think that the evidence, studied in the light most favorable to the claimants, shows plainly that the amount of damage found in that respect is necessary

in order to make the dredge as good as it was before the accident. The same is true of the piping and boiler.

Let the exceptions be overruled, the report accepted, and a decree entered for the amount found by the commissioner, with costs.

J. S. PLUMMER & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. December 13, 1907.)

No. 4,217.

CUSTOMS DUTIES—APPEAL—ADDITIONAL EVIDENCE—INADMISSIBILITY.

At their hearing before the Board of General Appraisers importers introduced evidence as to only a portion of the items contained in the importations in question. *Held* that, on appeal from the board, they were not entitled, with regard to the items respecting which they had presented no evidence to the board, to resort to the privilege of additional evidence in the circuit, provided in Customs Administrative Act June 10, 1890, c. 407, § 15, 26 Stat. 138 (U. S. Comp. St. 1901, p. 1933).

¶ On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below affirmed the assessment of duty by the collector of customs at the port of New York. The importers applied for a review of that decision as prescribed in Customs Administrative Act June 10, 1890, c. 407, § 15, 26 Stat. 138 (U. S. Comp. St. 1901, p. 1933), and an *ex parte* order for additional evidence was procured in their behalf under the following provision in said section: "The court may, upon the application of * * * the importer, refer [the case] to one of said general appraisers, as an officer of the court, to take and return to the court such further evidence as may be offered, * * * in such order and under such rules as the court may prescribe. * * *" Under this order the importers took evidence as to items of the merchandise in respect to which no samples or evidence of any kind had been produced before the Board of General Appraisers; but offered none as to the items passed upon by the board. The government reserved the objection that the evidence was inadmissible, and at the hearing in the case argued in support of this objection.

This argument, as outlined in the government's brief, is that it was the duty of the importers, on appealing from the collector's assessment of duty, to submit evidence in support of their contentions to the board, and not to seek to litigate in the present court, for the first time, some of the questions of fact involved in the case; that there would be no hardship in requiring importers to first submit their cases to the board in the manner provided by law; and that a contrary practice would be farcical, resulting in making the proceedings before the board a useless informality, and in a nullification of the statutory provision for speedy resort to the board in order that the issue should at once be investigated when the proof is available and accessible, and the matter fresh in the minds of those in charge of it. The case of *United States v. China & Japan Trading Co.*, 71 Fed. 864, 18 C. O. A. 335, was cited as a controlling authority. In this case it was stated by the Circuit Court of Appeals, Second Circuit: "The whole scheme of the customs administrative act would be defeated, if the importer who complains of the action of the collector obtained a review of that action by the Circuit Court without first resorting to the Board of General Appraisers and obtaining its decision upon the facts and the law of the case."

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

J. Osgood Nichols, Asst. U. S. Atty.

MARTIN, District Judge. The merchandise in question consists of certain braids, and was assessed for duty at the rate of 60 per cent. ad valorem under the provisions of paragraphs 339 and 390 of the act of July 24, 1897, c. 11, § 1, Schedules J and L, 30 Stat. 181, 187 (U. S. Comp. St. 1901, pp. 1662, 1670).

Paragraph 339 provides for different articles, including "embroideries and all trimmings, including braids * * * all the foregoing composed wholly or in chief value of flax, cotton or other vegetable fiber * * * sixty per centum ad valorem."

Paragraph 390 provides for braids "made of silk or of which silk is the component material of chief value, sixty per centum ad valorem."

The importers claim that said merchandise is properly dutiable at 30 per centum ad valorem under paragraph 449 of said act, which relates to manufactures of chip, grass, straw, etc. It was returned by the Board of General Appraisers as vegetable fiber and chip braid. If the merchandise in question had been assessed in chief value either of silk or of vegetable fiber it was properly classified under paragraphs 339 and 390, and dutiable at 60 per cent. ad valorem.

The question presented to the Board of Appraisers was one of fact as to the component material of chief value. The importer there produced samples of portions of the merchandise covered by the protest, and, as I understand the case, the decision of the board was adverse to the importer as to those samples so produced, and no appeal was taken as to the portion of the merchandise covered by those samples; and this appeal relates to other invoice items in the same importation, of which no samples were produced before the board but which for the first time were produced in this court. The government claims that no evidence was offered before the board as to the items of merchandise involved here. The importer claims that the evidence offered relative to the other items should be construed as covering all the items of the invoice. Counsel for both sides stated that this was practically a new question.

I think the contention of the government is correct, and therefore affirm the decision of the Board of General Appraisers.

FIEGEL v. UNITED STATES.

(Circuit Court, S. D. New York. March 2, 1908.)

No. 4,659.

CUSTOMS DUTIES—CLASSIFICATION—"CREPE PAPER."

In Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 397, 30 Stat. 188 (U. S. Comp. St. 1901, p. 1671), providing for "crepe paper," the term quoted is a descriptive term referring to the process of manufacture, and paper which has been subjected to a creping process is within the provision.

On Application for Review of a Decision by the Board of United States General Appraisers.

For decision below, see G. A. 6,471 (T. D. 27,683).

Comstock & Washburn (Albert H. Washburn, of counsel), for importer.

J. Osgood Nichols, Asst. U. S. Atty.

HOUGH, District Judge. Paragraph 397 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule M, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1671]) provides for (inter alia) "crepe paper." The corresponding paragraphs of the act of 1894 (Act Aug. 27, 1894, c. 349, § 1, Schedule M, par. 307, 28 Stat. 532) and 1890 (Act Oct. 1, 1890, c. 1244, § 1, Schedule L, par. 419, 26 Stat. 599), contained no reference to crepe paper, and that phrase appears first in the act now in force. The importation under consideration is "paper," in the sense that it is clearly made of paper stock. It weighs, before creping or crinkling, about 50 pounds to the ream. It is partially, at all events, waterproof, and is used largely, if not principally, for the purpose of ornamentally covering flower pots or other receptacles for flowers sold by florists, and usually rather damp. It is not denied that this paper has been creped or crinkled by a machine similar in construction and operation to that producing crepe tissue paper, or crepe tissue, such as has been long known to the trade.

The importation has been assessed under paragraph 397, and appellant alleges that it is dutiable only as paper not otherwise provided for, under paragraph 402. The importer relies upon the principle of *Loeb & Schoenfeld v. United States*, 150 Fed. 327, 80 C. C. A. 211, asserting that crepe paper was a well-known commercial term when the act of 1897 was passed, and that there is nothing in the phraseology of the act indicating that Congress intended by the phrase "crepe paper" anything else but the particular article then known to the trade by that name. In other words, the question is whether "crepe paper" is a descriptive term or a trade term. The phrase is also said to be a commercial designation, because it seems to have been inserted in paragraph 397 to meet the decision in *Dennison Manufacturing Co. v. United States*, 72 Fed. 258, 18 C. C. A. 543.

If that be true, it appears to me that, from the description of the article there under consideration, as reported in 72 Fed., at page 260, 18 C. C. A. 543, the paper now before the court very much resembles in weight, manufacture, and probable appearance the thing considered in the *Dennison Case*. That decision held no more than that an article weighing up to about 48 pounds to the ream, made of much tougher and stronger stock than tissue paper, and known as "crepe paper," and incapable of manufacture upon a tissue paper machine, could not be assessed as tissue paper. So far, therefore, as that case goes, it appears to me to hold against the petitioner (appellant). From the evidence I am left in doubt whether the article under consideration is or is not commercially known as "crepe paper." The decision of the board is that it is so known. The presumption in favor of this finding of fact, therefore, prevents a disturbance of it. I am also of opinion that the phrase "crepe paper," as used in the paragraphs referred to, is properly a descriptive term, referring to the method of manufacture, and is not a trade term at all.

Decision affirmed.

WEBSTER MFG. CO. v. TRUSTEES OF UNIVERSITY OF PENNSYLVANIA.

(Circuit Court, D. Pennsylvania. March 27, 1908.)

No. 59.

1. PLEADING—AFFIDAVIT OF DEFENSE.

An affidavit of defense in an action on a contract made by correspondence held sufficient to prevent a summary judgment.

On Motion for Judgment for Want of Sufficient Affidavit of Defense.

Vale & Mann, for plaintiff.

Francis V. Lloyd and H. Gordon McCouch, for defendants.

J. B. McPHERSON, District Judge. I think the affidavit of defense in this case is sufficient to prevent a summary judgment. It may not be improper to add, for the information of the parties, that in my opinion the whole series of letters having to do with the proposed installation of machinery must be considered before the court can put together satisfactorily all the details of the contract. As it seems to me, this is a necessary conclusion from the plaintiff's own letter of July 5th, in which certain items specified therein are spoken of as "changes and additions"; for this, I think, implies that something had already been agreed to, and compels a reference to the whole of the preceding correspondence in order to discover what was changed or added on July 5th. No doubt there had been propositions and counter propositions between the parties, but a review of all the communications that passed makes it plain to my mind that the contract does not rest altogether upon the plaintiff's letter of July 5th and the defendants' reply of July 8th. Indeed, it is impossible fully to understand the plaintiff's letter without reading all that went before it.

The rule for judgment is discharged.

ECKSTEIN v. UNITED STATES.

(Circuit Court, S. D. New York. March 2, 1908.)

No. 4,835.

1. CUSTOMS DUTIES—CLASSIFICATION—ARTIFICIAL HORSEHAIR—SIMILITUDE—"COTTON YARN."

Artificial horsehair, not being a yarn, cannot be classified as "cotton yarn" by similitude, under Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 302, 30 Stat. 175 (U. S. Comp. St. 1901, p. 1655), but is dutiable under section 6, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), as an unenumerated manufactured article.

2. SAME—WORDS AND PHRASES—"YARN."

Artificial horsehair is not a "yarn," because it has no twist, and is not composed of twisted or spun filaments.

On Application for Review of a Decision by the Board of United States General Appraisers.

For decision below, see G. A. 6,387 (T. D. 27,442), reversing the assessment of duty by the collector of customs at the port of New York on merchandise imported by Albert Eckstein. The importer contends here for a lower rate than that allowed by the Board of General Appraisers.

Comstock & Washburn (Albert H. Washburn, of counsel), for importer.

J. Osgood Nichols, Asst. U. S. Atty.

HOUGH, District Judge. Artificial horsehair is a substance composed of nearly pure cellulose, and made into a continuous, threadlike form, resembling both to sight and touch the hair of a horse's tail or mane. This result is effected by forcing the liquid cellulose through apertures of proper size, while treating it, as and when so forced, with appropriate chemicals. When completed it is a solid, incapable of separation into any component filaments. The Board of Appraisers has assessed duty on this article under Tariff Act, July 24, 1897, c. 11, § 6, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), as a manufactured article not otherwise provided for. The importers claim that it is dutiable under paragraph 302 as a cotton yarn by similitude, relying upon *Hardt & Co. v. United States*, 146 Fed. 61, 76 C. C. A. 638, as conclusive authority in their favor.

That case finds, first, that the article there considered is a "yarn." That is assumed, and the only question discussed is whether it more resembles a silk yarn or a cotton yarn. Inasmuch as the material composing it was cellulose, which is almost the sole constituent of cotton, and is not found in silk, the artificial yarn then in question was held dutiable under paragraph 302, as more nearly resembling cotton than silk; the material of which the importation was composed being held to turn the scale. The material composing artificial horsehair is also cellulose; but the horsehair is not a yarn, because it has no twist, and is not composed of twisted or spun filaments. This, I think, is established by the trade testimony, and the evidence of the commercial witnesses accords with the accepted definitions of yarn. Since this importation is not a yarn, it cannot be assessed by similitude with cotton yarn, or yarn of any other kind.

Decision affirmed.

THE ESPARTA.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1908.)

No. 1,723.

COLLISION—STEAM VESSELS MEETING ON MISSISSIPPI—VIOLATION OF RULES.

The United States lighthouse tender *Magnolia*, proceeding down the Mississippi from New Orleans at night with the President on board, when 60 miles below the city, came into collision with the steamer *Esparta*, coming up. When at about Sixty-Mile Point, on the west bank, the *Magnolia* saw the green and range lights of the *Esparta* at Dick Wright's Point on the east side, 3 miles distant, and gave her a signal of two whistles, which was not heard. Receiving no answer, the *Magnolia* repeated the signal which was heard, and answered by the same signal, although the answer was not heard by the master of the *Magnolia*, and was misunderstood by some of the other officers. After the vessels had approached to within perhaps a quarter of a mile of each other, the *Esparta*, then showing both her side lights, the *Magnolia* gave a signal of one whistle and ported her helm. The *Esparta* answered by two whistles and starboarded, and both immediately reversed and sounded alarm whistles, but the collision occurred almost immediately, the vessels being close to the west bank. There is a bend in the river between the two points, and it was the custom, known to all parties, for vessels going down to keep in the middle of the stream, and for vessels coming up to cross over to the west side at Dick Wright's Point to avoid the current, and to follow the curving west bank until passing Sixty-Mile Point. This course was followed by the *Esparta* to the time of collision. When the first two signals were given the *Magnolia* was near the middle of the river, but in some manner worked over to the west side. Held, that the vessels were not approaching head on so as to render the rule for passing port to port applicable; that the first signals of the *Magnolia* were proper, and that she was in fault for crossing them, and also for getting out of her proper course, and for not slowing to steerageway as required by rule 3 of the pilot rules, when, as he testified, her master became uncertain as to the course of the *Esparta*; that upon the evidence from the *Magnolia* alone the *Esparta* was not in fault, but kept her proper course, and could not have avoided the collision.

[Ed. Note.—Signals of meeting vessels, see note to *The New York*, 80 C. C. A. 630.]

Appeal from the District Court of the United States for the Eastern District of Louisiana, in Admiralty.

The following is the opinion of SAUNDERS, District Judge, in the District Court:

This is a suit for damages caused by a collision that took place on October 28, 1905, between the steamship *Esparta* and the lighthouse tender *Magnolia*, owned by the libellant, at that time carrying the President of the United States from New Orleans to the mouth of the river.

1. The libel avers that on October 28, 1905, at about 10:50 p. m., the *Magnolia*, being then properly officered, manned, and equipped in every respect and properly navigated, was proceeding down the Mississippi river at a speed of about 13½ miles an hour; that the night was dark but clear; that, at a point about 60 miles below New Orleans, the *Magnolia* was running near the middle of the river, but a little nearer the right or west bank, with all her lights properly set and burning in the positions required by law, and with her master, first and second officers, and quartermaster on deck, and an experienced sailor on the lookout on the forward deck; that, at said point, the officers of the *Magnolia* sighted a steamer (subsequently ascertained to be the *Esparta*) about 2½ miles off, coming up the river; that said steamer was about two points on the starboard bow of the *Magnolia*, and her green and

range lights were visible to the Magnolia; that there was a bend in the river at this particular point, and that it was a pilot custom for ascending boats to cross to the right bank, at this point; that the master of the Magnolia caused two loud blasts of her steam whistle to be sounded, to indicate his intention of passing to starboard (i. e., on the east side of the Esparta), and, receiving no answer, after a short interval, repeated said signal, still without answer; that "the ships having rapidly approached each other, and being at this time only several hundred yards off, and the lights of the said ship Esparta indicating that she was dead ahead and coming almost head on, the master of said ship Magnolia blew one blast of his steam whistle, ported the helm and stopped the engines, and, not hearing any answer, sounded the danger signal, or four blasts, which was answered by two blasts, and reversed his engines full speed astern, endeavoring to avoid the collision"; that the Esparta "instead of putting her helm to port, as was her duty, and as had been indicated by the signals exchanged, on the contrary put her helm astarboard, and ran into and collided with the Magnolia, with great force and violence," and thereby caused the damage herein complained of; "that said collision was caused solely by the gross carelessness and negligence of the master and crew of the said ship Esparta in not keeping the proper lookout, and in not answering promptly whistle signals given by the ship Magnolia; and in not putting her helm apart in order to avoid the collision, and in other respects not complying with the laws and rules governing navigation on the said Mississippi river at said point; that immediately preceding said collision and at the time, there was no one on the deck of the Esparta competent to navigate her, and that there was no licensed officer in charge; that those at the wheel directing her course were reckless, negligent, and arbitrarily refused to answer such signals as were given by the ship Magnolia; that the pilot on board the said ship Esparta was not authorized by law to pilot her up the Mississippi; that she did not promptly stop and back her engine in order to avoid said collision; and that she was in fact unmanageable at the time."

The answer of the claimant, the Tropical Fruit Steamship Company, the owner of the Esparta, denies all charges of negligence and incompetence in the navigation of the Esparta, and avers that she was properly manned, equipped, and navigated, and was in charge of a duly licensed and experienced pilot. The answer further avers that, when the ships were about one-half mile apart, the Magnolia gave a signal of two blasts, indicating thereby that she would pass on the starboard (or east) side of the Esparta; that the Esparta promptly answered this signal of the Magnolia by sounding two loud and distinct blasts on her whistle, thereby indicating that she would pass on the starboard (or west) side of the Magnolia; that the Esparta was then close in to the west bank, where it is usual and customary for ascending vessels to be, but that the Magnolia was not at that time in the usual and customary place for descending ships; that shortly after having exchanged signals as above stated, "and when said vessels were dangerously near each other, the Magnolia, without justification, and in violation of all rules and customs, blew one blast of her whistle, indicating that she would change her course and attempt to pass to the port side of the Esparta, and put her helm hard apart. The Esparta at once replied with two blasts, and immediately followed with the danger signal, reversed her engines full speed astern, starboarded her helm, and edged in as close to the bank as possible in order to avoid or minimize the collision, for the Esparta being a deeply laden and single screw vessel, had she attempted to follow said cross-signal of the Magnolia, could not have changed her course sufficiently to have avoided the collision, but on the contrary would have struck the Magnolia near her stern, and would have injured her engines and boilers, and probably sunk her. During all the interval between the first exchange of signals and the cross-signal by the Magnolia, the position of said vessels was such that it would have been impossible for the Magnolia to have passed between the Esparta and the bank. "In the meantime the Esparta had worked in so close to the west bank that when the vessels came in collision she was actually grounding, and after striking the Magnolia near her stem, moved forward but a short distance before she grounded hard and fast."

The answer claims that the collision was due to the negligence of the officers of the Magnolia; that the Magnolia was not in the proper and customary part of the river for descending vessels; that, after signaling that she would pass on the starboard side of the Esparta, the Magnolia should have stopped if she got no reply, and should have passed to starboard, if she did hear the reply of the Esparta; that she had no right to signal, by one blast, that she would pass to the port of the Esparta when the vessels were so near that they could not stop before they met; that the Esparta was so near the west bank that it was impossible for the Magnolia to pass between her and the west bank; that when the Esparta answered, with two blasts, the one blast of the Magnolia it was the duty of the Magnolia to go to starboard, as she had originally agreed to do, and as the Esparta, by her two blasts, notified her she should still do.

2. Not only the averments of the libel and answer, but the overwhelming preponderance of the evidence, shows that the proper and usual course for the Esparta coming up the river was to cross over from Dick Wright's Point, on the east bank, to the west bank under Sixty-Mile Point, and come up under that bank close to shore. And, as the libel alleges that this was the proper course for the Esparta to take, it tacitly admits that the master of the Magnolia either had actual and personal knowledge of this fact, or was chargeable with such knowledge, if he did not have it. The evidence conclusively shows that the Esparta did, in fact, follow, up to the moment of the collision, this course, which it was customary and proper and to be expected that she would follow. Capt. Field, master of the Magnolia, says that when he first saw the Esparta her lights indicated "that she was at an angle," "she was on our starboard bow," indicating "that she was coming up the river or going across the river to the bank; the natural tendency, if she had kept on her course she would have struck Sixty-Mile Point on the west bank." A. C. Nieman, first mate of the Magnolia, says that when he first saw the Esparta she "was coming around Dick Wright's Point [on the east side of the river]; that the Magnolia then blew a signal of two whistles, and received no answer, after going a little further, blew another signal of two whistles; that at that time (i. e., when the second signal was given) I should judge she [the Esparta] was over on the west bank," that "according to the general rule," when vessels are ascending the river at that locality "from Dick Wright's Point, they cross over to the west side." Nieman was asked how close the Esparta was to the west bank:

"Q. How close do you judge the Esparta was to the west bank? A. I could not say. Q. Well, couldn't you form some idea? A. No, sir; I could not, because that is only customary to go over to the west bank. I couldn't know how near she was. Q. You knew she was going to keep right under that west bank? A. She ought to have. Q. They go as close in there as they can to avoid the current? A. Yes, sir; that is the custom."

Cæsar F. d'Almboe, the second mate of the Magnolia, was extremely vague in all his testimony. He was reluctant to commit himself to any definite and exact statement on any point. He says that at the time of the second signal, the Esparta "was about in the middle of the river." He further states that the vessels collided "very near the middle of the river," "not quite in the middle of the river, a little more to the west bank, but a good ways off from the bank." This latter statement, as to the location of the vessels when they collided, is certainly incorrect; the collision took place very close to the west bank. As d'Almboe fixed the position of the Esparta at the time of the collision to be near the middle of the river, when in fact it was near the west bank, it is fair to infer that she was in the same position relative to the west bank at the time of the second signal, when he thought she was in the middle or near the middle of the river. In any case, d'Almboe's testimony is so vague and widely conjectural on all points, that I can attribute but little value to it. Paul Bjorvig, quartermaster of the Magnolia, says that when he first saw the Esparta "I had her on the starboard bow." And when the collision occurred, "we were more over to the starboard land for us. Mr. Bjorvig also testified: "I don't know that river so much;" and as regards his observation of the lights of the Esparta, as showing her position, he frankly said: "I didn't take no notice of it, there were so many officers around me.

I only looked at the wheel; the captain told me only to watch the wheel; that is all you have to do." I took notice of the wheel; I looked out for the wheel so there would be nothing wrong on my side." He did not even notice how far the vessels were apart when Capt. Field gave him the final order to port the wheel. Solely on the libellant's testimony, taken in its entirety, I should be forced to conclude that the Esparta actually took the course which custom and usage entitled her to take in that reach of the river, and that when the collision occurred she was in the precise path which it was her right, and, under the custom, her duty to take. The claimant's evidence puts this conclusion beyond question.

Capt. Arroyo, the pilot on the Esparta, testifies that when he got to Dick Wright's Point (on the east side of the river), "I crossed over under Sixty-Mile Point (on the west side of the river). That is the customary course of all vessels;" and as he was coming up under Sixty-Mile Point, the Esparta was running about 200 or 300 feet from the water's edge; when he got over under Sixty-Mile Point, "I straightened up and continued my course along the bank, like I always did." When the collision occurred, the Esparta was, he should judge, within 50 feet of the bank. Capt. W. M. Rose, master of the Esparta, says that his ship passed the Ivy just below Dick Wright's Point, and then he went to his cabin to read; he heard the Magnolia give a signal of two whistles; thereupon he rose and went on deck; "he [Capt. Arroyo] responded immediately after he heard the other signal and while he was blowing I was coming out; I was on my way out when the signal was given by the Esparta." "We had crossed over the river in the meantime, following along the west bank." Harry Long, boatswain, doing second mate's duty on the Esparta that night, says that the Esparta was not very far from the west bank, was trying to get around the point (Sixty-Mile Point) and was running straight with the bank. C. Oscar, the seaman of the Esparta on the lookout, says that the Esparta was running very close to the west bank when the Magnolia blew the first and second signals (two whistles), and was right alongside the bank when the collision took place. The above testimony establishes, I think, beyond any reasonable controversy that the Esparta, from the time she came in sight of the Magnolia, up to and at the moment of the collision, was at all times actually and clearly following the course prescribed by custom, and which the officers of the Magnolia were bound to anticipate, and did anticipate, she would follow.

3. The evidence shows with equal certainty that the customary and proper course for the Magnolia to have pursued was down the middle of the river, and that she was in the middle of the river when she first sighted the Magnolia, and continued in the middle of the river until a short time before the collision occurred. The position in the river of the Magnolia, and her course, can be most satisfactorily determined from the testimony of her own officers. Capt. Field was on deck with Nieman, his first mate, and d'Almboe, his second mate. The quartermaster, Bjorvig, was in the pilot house, at the wheel. These four men certainly knew the position and course of the Magnolia better than any one else. Capt. Field testifies that, as soon as the Esparta came in sight, he gave a signal of two whistles, to which the Esparta gave no answer. The vessels were then three miles apart. After waiting a few seconds, he gave a second signal of two whistles. The vessels were then two miles apart. That is, the distance between the vessels had diminished by one mile. The speed of the Esparta was $10\frac{1}{4}$ miles an hour, and the speed of the Magnolia was $13\frac{1}{2}$ miles an hour. The Magnolia had, therefore, traveled approximately $\frac{7}{12}$ of a mile between the point where the first signal was given and the point where the second signal was given. As regards the position in the river of the Magnolia at each of these points, Capt. Field testifies as follows:

"Q. What was the Magnolia's position in the river as regards the two banks at the time you blew the first signal of two whistles? A. As near as I could judge near the middle; in the middle, as near as I could judge. Q. What was her position at the time you blew the second signal of two blasts? A. Same position."

Nieman, the first mate, agrees on this point with Capt. Field. Nieman's testimony is as follows:

"Q. Were you nearer the east bank or the west bank, when you blew this first signal of two blasts, just above Harris Bayou light? A. We were about right in the middle of the river—as near as I could judge. Q. What was your position when you blew the second signal of two blasts? A. Still about in the middle of the river."

Nieman further shows that it was proper and customary for descending ships to keep in the middle of the river:

"Q. And at that particular time the Magnolia was about in the middle of the river? A. Yes, sir. Q. Is it customary for a descending boat at that point to come up as near over to the east bank as she can, to run the bend? A. No; not necessarily. Q. They always keep well out in the middle of the river? A. Yes, sir; in the middle of the river, to get the best effect of the current running down. Q. And keep away from the west bank? A. Yes, sir."

D'Almboe says that, when the ships first came in sight, "She [the Magnolia] was right in the middle of the river. Going down, you know, a boat makes the best time by keeping in the middle of the river." Bjorvig makes no statement, one way or the other, as to the Magnolia's position. The testimony of the captain and of the first and second mates of the Magnolia thus demonstrates that, when the vessels came in sight, the Magnolia was on her proper and customary course, and that she thereafter continued on that course for over half a mile, and after she had given two signals to inform the Esparta that she (the Magnolia) intended to continue in said course.

4. The evidence thus showing that each of the vessels, when they first came in sight of each other, was in its proper position and pursuing its proper and customary course; that the signals to continue in these courses were given by the Magnolia herself; that the Esparta continued in her proper course till the collision; but that the Magnolia got out of her course and into the course of the Esparta, and there came in collision with the Esparta—the inquiry inevitably suggests itself, when, why, and how did the Magnolia get out of her own course and come in collision with the Esparta, while the latter vessel was pursuing its proper course? Capt. Field's testimony is that, when the Magnolia reached Sixty-Mile Point, he saw the Esparta opposite Dick Wright's Point, three miles down the river. He immediately gave the signal of two whistles, indicating thereby that the Magnolia would go to the starboard of the Esparta—that is, would pass between the Esparta and the east bank of the river. He says this signal was not answered, so, after waiting a few seconds, he repeated the two whistle signal, when, in his judgment, the vessels were two miles apart. And he says that his second signal was not answered by the Esparta. Although the Magnolia had not, Capt. Field declares, received any answer to either of her two signals, nevertheless she kept on until a few minutes later, she found herself, Capt. Field thought, confronting the Esparta, head on, and in the Esparta's own course. The vessels were then within a short distance of each other. At different times Capt. Field estimated the distance separating the vessels, when he supposed he found they were coming at each other head on in the same course, at one-quarter, one-half, and three-quarters of a mile. These divergent estimates only show that Capt. Field has no fixed and certain opinion as to the distance the ships were apart, when he concluded they were coming at each other head on. They were so near that there was imminent and alarming danger of a collision, and he had no time, or was not in a sufficiently cool frame of mind, to estimate, with any approach to accuracy, the then distance between the vessels. Finding himself in this perilous position, he gave the signal of one blast, which announced that he intended to pass the Esparta on her port side—that is, that he would try to pass between the Esparta and the west bank—and he put her helm hard aport. The Esparta answered with two whistles, and put his helm to starboard, and the vessels ran together in a few seconds.

As there is conflict between the account of the matter which Capt. Field gives and that which his officers give, I will cite the material part of this testimony in the words of the witnesses. He begins by giving a brief epitome of the whole occurrence: "We left the wharf at 7:30 p. m., and proceeded down the river. We passed several vessels in the river, and at about 11:10 p. m. we sighted the lights of a steamer at about Dick Wright's Point or at

Dick Wright's Point. Now, we were then at Sixty-Mile Point, abreast the light. I sighted her green light, and blew two whistles to pass him on his starboard side. Receiving no answer, I blew two more whistles. Still receiving no answer, and the vessels changing their positions to head on, I blew one whistle, and ported my helm to pass him to port and stopped my engines. Right after blowing four whistles, I stopped and backed, receiving two from him. Soon after collided with this steamer, which struck me about 27 feet from the stem on the port bow, turning the Magnolia completely up stream, when I headed for the bank and forced the Magnolia up on the bank, under the steamer's stern, said steamer proving to be the Esparta. That is as near as I can get at it." Distance separating vessels when first signal was given: "Q. How far apart were these two ships when you first sighted these lights? A. As near as I can judge, they were about three miles. Q. Was that at the time you blew two whistles? A. Yes, sir." Distance separating vessels when second signal was given: "Q. How far apart were these two boats, the Magnolia and Esparta, when you blew the second signal of two whistles? A. I should judge they were about two miles." Distance separating vessels when third signal (of one blast) was given: "Q. How far apart were the two boats when you blew the signal of one blast? A. I should judge they were about three-quarters of a mile, as near as I could tell. Q. How long after blowing your signal of one blast was it before you blew the danger signal? A. I did not blow any danger signal. Q. Well, for the moment we will call it an alarm signal, or a signal of four blasts? A. I should not think it was over two seconds. * * * Q. How far was the Magnolia from the Esparta at the time you blew your signal of four blasts? A. Not over a quarter of a mile; that is as near as I could judge." Capt. Field's statement that not over two seconds elapsed between the blowing of the one blast signal and the blowing of the four blasts as an alarm or danger signal is corroborated by Nleman, who says: "You couldn't hardly tell the difference between the one blast and the danger signal; it was right on top of it; it was so quick." The distance between the vessels was then, within a few feet at most, the same when the one-blast signal was given, as when the four-blast danger signal was given, and Capt. Field here estimates that distance at not over a quarter of a mile. The next citation from Capt. Field's testimony shows that he himself regarded the distance between the vessels as being the same when the one blast signal and when the four blast signal was given:

"Q. I understood from your answer a few moments ago, you stated at the time the signal of one blast was given, you were not more than one-quarter of a mile from the Esparta? A. Yes, sir. Q. That is what you testified to? A. Yes, sir. Q. Now, I call your attention to your testimony before the local board of inspectors, given on the 15th day of November, 1905, during which you were asked this question: 'And about how far apart when the one blast was given? A. Half a mile.' Which of your statements is correct? A. That answer would be correct. Q. Which answer there? A. That one there—'Half a mile.'"

Capt. Field thus appears to have stated at different times that when the last signal—one blast—was given, the ships were one-quarter of a mile apart, that they were half a mile apart, and that they were three-quarters of a mile apart. I can only conclude that his ideas as to the distance the vessels were apart when the one blast signal was given are utterly vague, and the merest and loosest guess work. I cannot therefore regard Capt. Field's testimony on this point as of any serious value in helping to ascertain the distance apart of the vessels when the last signal was given. Capt. Field's failure to hear any answer to the first two signals given by the Magnolia:

"Q. Captain, at the time you blew the first signal of two whistles, what answer did you get? A. None that I heard. Q. At the time you blew the second two whistles, what answer did you get? A. None that I heard. Did you get any reply? (To the first signal.) A. No, sir; not to my hearing. Q. Did you get any reply to that signal? (The second.) A. No, sir, not to my knowledge; I did not hear any. Q. Now, I understand that you testified that you got no reply to your first and second signals? A. I heard no reply. Q. Your hearing defective in any way? A. Not that I know of. Q. Ever been treated for your eyes? A. No, sir. Q. For your ears? A. No, sir."

Capt. Field's statement that he did not inquire of the officers near him whether they had heard any reply to the signals and did not remark on the failure to reply. If Capt. Field heard no reply to either of the first two signals, it is hardly conceivable that he would not have turned to one or both of the officers standing by him and ask if they had heard a reply or at any rate have made some remark on such an extraordinary omission. But he says he did not. His officers and the quartermaster, in substance, contradict him.

Capt. Field: "Q. Did you ask any one aboard whether they heard any answer from the Esparta? A. I did not. * * * Q. Now, then, you say you heard no response? A. No, sir. Q. Did you ask anybody in the pilot house whether they heard any? A. No, sir. Q. You made no inquiries of the other two officers? A. No, sir. Q. Or the quartermaster? A. No, sir. Q. Did you say anything to the quartermaster, or to the other two officers standing there, about not hearing the signals? A. Not that I remember. Q. I understood your testimony to be that, although, you gave two signals of two blasts each, waited a reasonable time after each of these signals and hearing no reply, you made no inquiries of any of your officers or crew whether they heard any reply? A. I made no inquiries. Q. Do you recall the fact that Mr. Nieman, immediately after you had blown your second signal of two whistles called out to you, 'Cross-signal; look out'? A. No; I do not recall him saying that. I do not remember hearing it. I think he stated that in his testimony before the local inspectors." The testimony of the mates, Nieman and d'Almboe, and of the quartermaster, Bjorvig, tends to show very conclusively that Capt. Field's memory was at fault when he gave the testimony just cited.

Nieman: "Q. Did the Esparta answer those two blasts (of the Magnolia's second signal)? A. They answered with one. Q. You mean you only heard one? A. That is all I heard. Q. Did you make any comment on that fact? A. I told the captain right away: 'You got a cross-signal; look out.' Q. Did the captain ask you after the first signal of two blasts whether you heard any answer from the Esparta? A. No; he had not any time to ask, as soon as I heard it, I reported it to him. Q. No; I mean the first signal of two blasts you gave the Esparta and got no response, so you say; did you call the captain's attention to the fact that you got no response? A. Yes, sir. Q. What did the captain say when you said, 'Cross-signal; look out'? A. He was then standing in the pilot house at the time, and he went right to the whistle string and blew one whistle, and then four short blasts, and stopped the engine and reversed them as soon as he could."

D'Almboe: "Q. Did the captain ask you whether you heard an answer to his first signal? A. No; he asked the chief mate. Q. What did the chief mate tell him? A. He said he did not hear any answer."

Bjorvig: "Q. Just tell the board what you know about it? A. Well, I was standing at the wheel, and I saw a steamer coming up the river, and I saw his topmast headlight and his green light, and I had her on the starboard bow, and the captain told me to take him a little closer, and he blew two whistles for him, and I heard the captain say, 'You hear the answer;' and I said, 'No, sir;' and he said, 'I will give him two blasts more,' and then I heard the Esparta's whistle, and I can't exactly say whether it was one or two—and I heard the second mate say, 'What is the matter with that boat, he gave us only one blast?'—and then the captain came to the pilot house, and blew one whistle for him, and told me to port [the] wheel, and then I got the Esparta right ahead, and we got port wheel and his green light came over on the port bow, and then I heard four whistles—four short whistles—four from us and four from the Esparta, and then she came right to us. That is all I can say."

Capt. Field's conjecture as to how the Magnolia got out of her course: The evidence shows that when the Magnolia gave her first and second signals, each of two blasts, she was in her proper course in the middle of the river. If she had simply pursued this course, there would have been no collision nor danger of collision. But somehow she got out of her course and went over to the west and into or dangerously near the rightful path of the Esparta. This deviation by the Magnolia to the west was not intentional, for Nieman testifies that the proper and customary course of the Esparta was on the west side of the river, and this testimony is strongly corroborated by several other wit-

nesses, and scarcely called in question by Capt. Field. Capt. Field was asked if he knew of the custom for vessels coming up the river to run the points, and for vessels descending to keep in the middle? The captain was decidedly evasive in his reply.

"Q. What is the custom in regard to navigating the Mississippi river where there is a bend? A. Now, that is a peculiar question which requires a peculiar answer. Small vessels usually follow the bend in going down; also they cross from one point to another point coming up. While some large vessels follow this custom, others keep right straight course, going across from point to point, while others keep to the center of the river. Q. Does it depend upon the pilot who is on the ship? A. It depends a great deal on the pilot; it depends on the current, and it depends on the size of the boat and the speed of the vessel. Q. Then, I take it there is no invariable custom? A. No, sir."

The libel alleged that "there was a bend in the river at this particular point, and it was a pilot custom for ascending boats to cross to the right bank at this point," etc. The defendant, therefore, objected to Capt. Field's testimony as being in conflict with the averments of the libel. Capt. Field made a report of the collision to the local inspectors, and in that report among other things, he said: " * * * then he (the Esparta) was at a point known to river men as Dick Wright's, and as it was the custom for ascending steamers to cross the river from that point to the west bank, I blew two whistles to pass to starboard and astern of him, which signal he did not answer." The captain, then, by his own admission unquestionably knew the custom as to the course of ascending steamers from Dick Wright's Point to Sixty-Mile Point, even though he may have had no knowledge of the general custom all the way up. The only essential thing is that he did know and admits he knew the custom governing the Esparta's course in the reach where the collision occurred. Knowing that custom, he would naturally assume and expect, particularly as it fixed the path of least resistance for the Esparta's course, that the Esparta would follow her custom-fixed and convenient course, until and unless she indicated a contrary intention. This she never did. How, then, did the Magnolia come to find herself out of her own course and over to the west in the course of the Esparta? Capt. Field was asked to explain this change of his vessel's position in the river. To steer the vessel to the west side of the river, it was necessary to port the helm. After the captain had stated several times that he never ported the helm of his ship until after his last signal of one blast, the examination proceeded:

"Q. How is it then that your ship, between the time you blew your first signal of two blasts, and the time you blew your third signal of one blast, had worked over to the west bank? A. That is easily understood. You can't in the nighttime tell whether you are in the center of the river or not. She worked over by the time I blew her." This won't do; as all the libellant's exculpatory testimony is based on the assumption that the night was clear enough to enable the witnesses to say where the ships were at various times. And the captain had already testified that he could go down the river on a dark clear night and tell where he was all the time. "Q. You mean at the time you blew your two whistles? A. No; I mean from the time I blew the one whistle to the time when she struck, that she had time to work over to the bank." This answer was obviously given without reflection, for after the signal of one blast the helm was put hard aport, and this ship was purposely steered to the west bank. "Q. How is it she worked over from the middle of the river to about one-third of the distance of the west bank, between the time you blew the first signal of two blasts and the time you blew the third signal of one blast? A. That might have been done by bad steering. Q. Who was steering at the time? A. The quartermaster." When Capt. Field attributed to bad steering the working of his vessel to the west, he tacitly abandoned his first suggestion that it was due to the darkness of the night. Not only the libel alleges, but several witnesses testify, that it was a clear night, with no moon shining. The principal, if not the exclusive, explanation of his ship's departure from her course on which Capt. Field rests is that she was badly steered. This explanation admits fault in the navigation of the Magnolia. This fault was all the greater as Capt. Field seems to imply that, not-

withstanding the fact that he heard no answer to his two first signals, he still expected that the *Esparta* would pursue the customary course of vessels coming up the river.

"Q. Now, when you blew your first signal of two blasts and got no reply as you say from the *Esparta*, what did you think the intentions of the *Esparta* were? A. My thoughts of his intentions were he was going to keep up the same as he was going. Q. Keep up the same as he was going? A. Yes, sir. Q. You mean he was going to continue in the same direction he was pointed? A. Exactly. Q. You had no doubt as to what he was going to do? A. No, sir: I had no doubt. He should have answered my signal and kept on his course. Q. As he did not answer your signal, what did you think about it? A. Then I blew my second signal. Q. No, what did you think about it, when he did not answer your signal? A. I thought he had not heard it. Q. Then, you did not know what he was going to do—how he was going to answer? A. I supposed he would answer the same. Q. But you did not know it? A. I did not know it; no, sir. Q. When you blew your second signal of two blasts and you got no reply, what did you think he was going to do? A. I could not tell what he was going to do. Q. You did not know what he was going to do? A. I did not know what he was going to do then."

While Capt. Field might not know what the *Esparta* was going to do, after he failed to hear a reply to his signals, he had absolutely no ground for assuming that she was going to deviate from her course, or pursue some course other and more difficult than that which was usual and customary for vessels ascending the river, and which he and his first officer, Nieman, had observed that the *Esparta* was actually pursuing. The obvious inference from the *Esparta*'s silence, if she was silent, was that she had not heard the *Magnolia*'s signals and that she would follow the usual path of vessels coming up the river. Assuming that the testimony of libellant's witnesses—that the *Magnolia* was in the middle of the river when the second signal of two blasts was given—is true, it follows that, after the giving of this signal, the *Magnolia*, through bad steering, and not in obedience to any wish or purpose of the captain, but contrary to his wish and purpose, worked out of her course and went to the west into or very near to the path of the *Esparta*. This brings us to the consideration of the last problem in the case.

5. The *Magnolia* having given two signals to indicate that she was going down the middle or east bank of the river, and then having through bad steering; carelessly worked out of her actual and signal-announced course, and having come up suddenly in front or nearly in front of the *Esparta*, could the collision that ensued have nevertheless been avoided by proper navigation on the part of the *Esparta*? In other words, though the danger of collision arose through the negligence and fault of the *Magnolia*, would that collision have been avoided if the *Esparta* had even then obeyed the rules of navigation? If the *Esparta* could, notwithstanding the situation brought about by the negligence of the *Magnolia*, have avoided collision after the situation became apparent to her officers by proper and skillful navigation, she would be liable for a collision resulting from her failure to use such proper and skillful seamanship. It makes no difference how or by whom a dangerous situation is created, it is still the duty of every one perceiving that situation, and acting with reference to it, to avoid it if he has time and means to avoid it. Say the Supreme Court: "This court has repeatedly held the fault, or even the gross fault, of one vessel does not absolve the other from the use of such precautions as good judgment and accomplished seamanship require." *The Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751. Before attempting to apply this principle, we must first ascertain as accurately as possible the exact situation in point of physical fact when the *Magnolia* gave her last signal, indicating that she proposed to change her course from the course indicated by her first two signals and to pass the *Esparta* on her port, or west side.

Position of the Vessels. Capt. Field says that, when the one blast signal was given, the *Esparta* was head on or nearly so; she was showing "all her lights, red, green, and two masthead lights." He had already stated that the vessels were three miles apart when he gave his first signal—two blasts—and the *Esparta* was showing her green light; that they were two miles apart

when he gave his second signal—two blasts, and the Esparta was then still showing her green light and was not showing her red light; and that they were one-quarter, one-half, or three-quarters of a mile apart when he gave his third signal—one blast. Capt. Field thus makes the distance from the point where the second signal was given to the point when the third signal was given seven-twelfths of $1\frac{1}{4}$ miles, or seven-twelfths of $1\frac{1}{2}$ miles, or seven-twelfths of $1\frac{3}{4}$ miles—according to the calculation that his ship traveled about seven-twelfths of the lessened distance between the vessels. In any case, he makes a considerable distance between the point at which the second signal was given and the point at which the third signal was given. Nieman gives a very different account. He says when the first signal was given the vessels were about three miles apart, and the Esparta was showing then her green light; that when the second signal—two blasts—was given, the vessels were about $\frac{1}{2}$ mile apart, and the Esparta was then showing both red and green lights, and answered with one blast, and thereupon Capt. Field at once answered with one blast and the danger signal of four blasts. The conflict between the testimony of these two witnesses can be best appreciated by placing their ipsissima verba in juxtaposition.

Lights Showing on Esparta When Second Signal was Given. Capt. Field: "Q. What lights were showing on the Esparta when you blew the second signal of two whistles? A. Showing the same lights, the green light was showing with a masthead light and range light. Q. Was the red light showing? A. No, sir." Of course the vessels could not be dead ahead or head on, or nearly so, if only the green light of the Esparta was showing.

Nieman: Says the Magnolia was at Harris Bayou light when the Esparta was first sighted coming round Dick Wright's Point about 3 miles off. Then, "the first signal of two blasts was given by the Magnolia immediately on seeing the Esparta."

So far Nieman and Field agree, the ships were three miles apart when the first signal of two blasts was given, and the Esparta was then showing only her green light. Now, as to the second signal of two blasts.

Nieman: "A. We blew the first signal of two whistles. Q. Did you get an answer from the Esparta? A. No, sir; not to the first signal. Q. What was done on the Magnolia, then? A. We waited the usual time, and then blew again two whistles. Q. Did you get an answer to that one? A. Yes, sir; it was answered with one. Q. What was the position of the two ships at this time? A. We saw both the Esparta's green and red lights, also the masthead light. Q. About how far apart were the two vessels? A. Well, then, I should judge about half a mile. Q. Then, they were apparently dead ahead? The Esparta was apparently dead ahead? A. Yes, sir. * * * Q. What lights did you see on the Esparta? A. I saw both red and green lights and mast-head lights. Q. What was done on the Magnolia after this? A. The captain blew him one whistle and four quick toots on top of it, and ported his helm."

According to Nieman, the vessels were dead ahead, and the Esparta was showing both her red and green lights when the second signal was given. According to Field, the Esparta was then showing only her green light. According to Nieman, when the second signal was given, the vessels were only half a mile apart; according to Field, they were then two miles apart. According to Nieman, when the Magnolia gave her second signal of two whistles, the Esparta answered with only one whistle, and thereupon the Magnolia blew one whistle, and ported her helm. According to Field, the Esparta did not answer the second signal at all, and he continued his course a considerable distance, and then gave a signal of one whistle. Both Nieman and Field agree that when the Magnolia blew the signal of one whistle the Esparta promptly replied with a signal of two whistles.

D'Almboe, the second mate, agrees substantially with Nieman as to the order in which the signals were given: "Q. Were there any signals exchanged at that time? (When the ships first came in sight of each other.) A. Yes, sir; I came up there, and when I saw the lights, the captain ordered the chief mate to blow two blasts of the whistle. Q. On the Magnolia? A. Yes, sir. Q. Were those two blasts blown? A. Two blasts on the Magnolia were blown, yes, sir; I heard them distinctly. The captain blew two blasts, but then we

did not get any answer, and then the captain ordered the mate to blow two blasts more, and then the other vessel blew one blast—the approaching vessel blew one blast. Q. How far were those two vessels apart at the time the other vessel blew one blast? A. I could not say. * * * Q. What lights were visible on the Esparta at that time? A. I saw her masthead light and green light. Q. At the time the Esparta blew one blast? A. Yes, sir. Q. What was done on the Magnolia? A. The Esparta blew one blast, as I tell you, then the Magnolia, then the captain of the Magnolia, blew one blast himself on the Magnolia, then the Esparta answered that with two blasts, and, of course, then the captain of the Magnolia, he blew the danger signal—that is, four short blasts, and stopped both engines, and reversed them full speed astern, both engines. Q. Well, now, what lights did you see on the Esparta at the moment she blew this signal of one blast in response to the second signal of the Magnolia of two blasts—what light was she showing to you? A. I saw all the lights, then. Q. Of the Esparta? A. Yes, sir. Q. You mean both side lights? A. I saw all the lights." As d'Almboe says, the Esparta was then in the middle of the river, he places her where she must have been going straight against the swiftest part of the current, which was certainly a singular course for the Esparta to take. Concerning the lights visible on the Esparta at the time she answered with one blast, d'Almboe first says he saw the green light, then says he saw all the lights.

Bjorvig's account is extremely general, but he seems to give the signals in the same order as Nieman and d'Almboe. He says: "I was standing at the wheel, and I saw a steamer coming up the river, and I saw his topmast head-light and his green light, and I had her on the starboard bow, and the captain told me to take him a little closer, and he blew two whistles for him; and I heard the captain say, 'You hear the answer?' and I said, 'No, sir,' and he said, 'I will give him two blasts more,' and then I heard the Esparta's whistle, and I can't exactly say whether it was one or two; and I heard the second mate say, 'What is the matter with that boat; he gave us only one blast?' and then the captain came to the pilot house and blew one whistle for him, and told me, 'Port wheel,' and then I got the Esparta right ahead, and we got port wheel and his green light came over on the port bow, and then I heard four whistles—four short whistles—four from us and four from the Esparta, and then she came right to us. That is all I can say."

Williams, the engineer of the Magnolia, declares unequivocally that, when the Magnolia gave her signal of two whistles, he heard a reply of two whistles. He seems not to know anything of the Magnolia's first signal. But he did hear the Magnolia give one signal of two whistles, the Esparta reply with two whistles, and then the Magnolia rejoin with one whistle. "Q. Did you hear the Magnolia when she first signaled this ship, which afterwards turned out to be the Esparta? A. I did. Q. What signal did she give? A. Two. Q. Did you hear the Esparta answer that signal? A. I did, she gave an answer of two signals. Q. Did you hear the Magnolia give any other answering signals? A. One."

According to Capt. Field, the order of the whistles and the distances of the vessels from each other were as follows: First Signal: 1. Ships 3 miles apart. a. From Magnolia—Two whistles. b. From Esparta—No answer. Esparta to starboard of Magnolia. Second Signal: 2. Ships 2 miles apart. a. From Magnolia—Two whistles. b. From Esparta—No answer. Esparta still to starboard of Magnolia. Third Signal: 3. Ships either $\frac{1}{4}$, $\frac{1}{2}$, or $\frac{3}{4}$ of a mile apart. a. From Magnolia—One whistle. b. From Esparta—Two whistles. c. From Magnolia—Four whistles. Collision. Esparta head on with Magnolia.

According to Nieman, the above table should be as follows: First Signal: 1. Ships 3 miles apart. a. From Magnolia—Two whistles. b. From Esparta—No answer. Esparta to starboard of Magnolia. Second Signal: 2. Ships $\frac{1}{2}$ mile apart. a. From Magnolia—Two whistles. b. From Esparta—One whistle. Esparta head on with Magnolia. Third Signal: 3. Ship practically same distance as in 2. a. From Magnolia—One whistle. b. From Esparta—Two whistles. Esparta head on with Magnolia.

D'Almboe would agree with Nieman's table except as to distances, about

which he is widely conjectural, and except his two contradictory statements as to the Esparta's position at the time of the second signal. Bjorvig, too, would agree with Nieman's table with the distances eliminated, and with the modification that the ships were not head on until after he had ported his helm after the Magnolia had given her third signal of one whistle. Now, which of these discrepant stories am I to believe? When the Magnolia gave her second signal, were the ships two miles apart, as Field says? or, were they one-half a mile apart as Nieman says, with faint corroboration from d'Almboe? Did no answer come from the Esparta to the Magnolia's second signal, as Field says? or, was there an answer of one whistle, as Nieman and d'Almboe, say? or, an answer of two whistles, as Bjorvig seems inclined to admit, and as Williams positively asserts? When the Magnolia blew her second signal, were the ships still to the starboard each of the other, as Field says? or, were they then head on as Nieman says with D'Almboe's half self-contradicted acquiescence? or, were the ships not head on to each other, until after the Magnolia had given her third signal of one blast, and after her helm had been ported, as Bjorvig says? Did the Magnolia's signal of one whistle follow in immediate sequence on her second signal of two whistles, and the Esparta's answer thereto of one whistle or two whistles, so that these signals were practically one continuous interchange, consisting of two whistles from the Magnolia, one whistle from the Esparta (or two) and lastly one whistle from the Magnolia, as Nieman, d'Almboe, and Bjorvig say? or did the Magnolia, after giving its second signal of two whistles, then go two-thirds or three-fourths of a mile down the river, before giving her third signal of one whistle, as Field says? Finally, how far apart were the ships when the Magnolia gave the one whistle signal? Was the distance one-fourth of a mile (1,320 feet) as Field says in one place? or one-half a mile, as he says in another place? or three-fourths of a mile, as he says in still another place? or is it possible for me to determine from the evidence, with even the smallest degree of certainty, how far the ships were then apart? As far as I know, each of these witnesses is equally reliable and honest, and they all had the same opportunities for observing the facts about which they testify. They were practically in the same position on board the Magnolia. They were all naturally under a strong bias to exculpate themselves from the charge of negligence in navigating the ship in which the President was traveling in their charge. I can only say that from the conflicting testimony of the witnesses for the libellant, I am unable to determine the situation immediately preceding the collision, with such certainty as to conclude that in that situation the collision could and should have been avoided by proper navigation on the part of the Esparta. The negligence and fault of the Magnolia having led to a situation of danger, and one likely to bring about a collision, it was incumbent on the Magnolia, clearly to prove that, notwithstanding this negligence on her part, it was still possible for the Esparta to have averted the collision. The libellant has furnished no such proof; every act and every fact in the situation is left in doubt.

6. If Capt. Field was correct in his statement that the Esparta did not answer either of the first two signals, and that, after she failed to answer his second signal, "he did not know what she was going to do," then he seems clearly to have violated rule 3, of the pilot rules. "If," says rule 3, "when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle; and, if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerageway until the proper signals are given, answered and understood, or until the vessels shall have passed each other." Capt. Field says that, when the Esparta did not answer his second signal, "he did not know," "he could not tell," what she was going to do. Yet he did not, either immediately or at any time, give the signals required by rule 3, to elicit a signal from the approaching ship, and agree upon a course with her, but proceeded down the river without slackening his speed. His omission to give the signals required by rule 3 was negligence or recklessness on his part. Had he promptly complied with that rule, he would no doubt have elicited at

once an unmistakable answer from the Esparta, and the collision would never have occurred. And if, at the time of the second signal, the ships were within half a mile of each other, as Nieman and d'Almboe say they were, then it was further incumbent on Capt. Field to slow down to a speed "barely sufficient for steerageway." I think it very probable, from the preponderance of libellant's own evidence, that the distance separating the ships was then less than half a mile. Capt. Field should therefore have slowed up his boat until he had received a proper signal in reply to his. This, at any rate, was the obvious and imperative dictate of prudence in the situation. He could not possibly be very certain of the distance on a dark night. Experience teaches us all, landsmen as well as seamen, that there is nothing so difficult or rather so almost impossible as to estimate with any degree of accuracy the distance from us of a light in the dark. Articles 27 and 29 of Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 327, 328 (U. S. Comp. St. 1901, p. 2871), expressly impose upon masters the obligation to pay due regard to the exigencies of each particular case.

"Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

"Art. 29. Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the consequences of any neglect to keep a proper lookout, or, of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

By their own terms, the rules are not so ironclad that literal compliance with them always exempts from liability, nor does a departure from them always entail liability. The action of a master is controlled by the special circumstances of the case as well as by the rules. Now, in the present case, the Esparta, as Nieman knew and admits, and as I think Field and Bjorvig and d'Almboe also knew, was coming up around the west bank; that is, she was following an arc of a circle. Every one of the officers of the Magnolia knew this fact. Her general position and course was to the starboard and west of the Magnolia. But the Esparta was hugging the west bank, and therefore her course was not a straight line, but was an arc parallel to the arc of the west bank. In following this course, she was bound to reach a point in her course, where, for a brief time, she would show both her lights to a boat further out in the river than she was. But Capt. Field ought to have known that this exhibition of two lights by the Esparta was merely an incident in her following a circular course around the west bank, and did not indicate any change of course by the Esparta. If the Esparta had been approaching him on a straight course, in which she exhibited only her green light, and had suddenly exhibited both lights, he would have been justified in inferring that the Esparta had changed her course and intended to cross his course on the port side, but in the existing situation under the "special circumstances" of this case, such change of lights by the Esparta was only what was certain to occur at some point in her course around the point, and did not warrant Capt. Field in supposing that the Esparta was changing her course and crossing him on his port side. Yet, he seems rashly to have jumped at this conclusion, and precipitately to have changed his own course, and plunged across the course of the Esparta; although that course was really to his starboard, as he ought to have known and properly did generally know. In other words, the Esparta was pursuing a course to the starboard and west of the Magnolia, but in this course there was a short space in which the Esparta would, while following the course still necessarily, exhibit both lights. The fact, no doubt, was that the Magnolia had for some reason drifted far out of her intended course in the middle of the river, and had gotten much nearer the Esparta than the officers of the Magnolia were aware. While the Esparta exhibited only her green light, the officers of the Magnolia felt no apprehension, and paid no special attention, but when the Esparta reached that portion of her circular course where she exhibited both lights, then she loomed on the vision of the officers of the Magnolia 'big as an ocean liner,' as Capt. Field expresses it, and for a moment they forgot that the exhibition of two lights by the Esparta

was a necessity somewhere in her circular course, with the Magnolia drifting steadily to the westward, and did not in the existing circumstances indicate any change of course by her. This mistake was probably confirmed by the fact that Capt. Field thought he heard only one whistle from the Esparta, and such a signal would have indicated that the Esparta had changed her course and intended to pass on his port side, but as Bjorvig recognized, and Williams, the engineer of the Magnolia, admits, and as the witnesses for the Esparta abundantly prove, the signal of the Esparta had been two whistles and not one. The evidence, therefore, does not, in my opinion, establish that the Esparta's course ever was dead ahead with the course of the Magnolia, until the Magnolia purposely changed her course from starboard to port, and rushed suddenly across the course of the Esparta, which the facts of the collision show must then have been much nearer to the Magnolia than the officers of the Magnolia realized.

Having reached this conclusion, I necessarily find that the situation of the ships did not require or justify the application of rule 1, which requires vessels "approaching" each other head to head, or nearly so, to give one whistle, and each to pass to the port side of the other. The evidence does not show that, when the Magnolia gave one whistle and ported her helm, the Esparta was "approaching" her head to head or nearly so. The evidence and inference fairly to be based thereon, show only: (1) That the Esparta was pursuing her proper course along the west bank, following the arc of a circle. (2) That at some point in this course, and while strictly following it, the Esparta would exhibit both her red and green lights, without departing from her course, but as the necessary consequence of curving with the course. (3) That the officers of the Magnolia ought to have known this fact, but seem to have forgotten it. (4) That the officers of the Magnolia forgetting the real cause and significance of the appearance of two lights on the Esparta, and incorrectly attributing their appearance to a change of course by the Esparta, assumed the Esparta was "approaching" head on, and acted under this misapprehension. I am satisfied, therefore, that the evidence of the libellant shows that the collision was brought about solely by the fault of the Magnolia. This conclusion is strengthened when the evidence on behalf of the Esparta is further considered. It is evident that no one on the Esparta heard the Magnolia's first signal of two whistles, given when the vessels were three miles apart. All the witnesses on the Esparta testify that they heard: (1) Two blasts from the Magnolia. (2) Two blasts from the Esparta, in immediate reply. (3) One blast from the Magnolia.

The Esparta was being piloted by Capt. Patrick F. Arroyo, a licensed river pilot of long experience, and thoroughly familiar with the river between New Orleans and the Jetties. He has made several thousand trips as pilot between those points. He says: "The Magnolia blew me two whistles." "I immediately answered with two whistles." "I should judge, about two minutes afterwards, she blew me one whistle and I answered her again with two whistles." "I immediately blew the danger signal; I stopped and reversed my engines; I starboarded my helm, to keep her (the Esparta) in the bank—to keep her from running into her as much as I could, to give her the whole river." The captain thinks the ships were one mile apart when the signal of two whistles was blown, and about 1,000 feet apart when the Magnolia blew her signal of one whistle. If the Magnolia was going $13\frac{1}{2}$ miles an hour she was going 1,177 feet per minute. And, if the Esparta was going $10\frac{1}{4}$ miles an hour, she was going 895 feet per minute. In 30 seconds, the Magnolia would advance toward the Esparta 588 feet; and the Esparta would advance toward the Magnolia 447, and in 30 seconds it would seem to be hardly possible to stop and reverse so as to effect any serious diminution in the speed of either vessel. So, that, if the ships were 1,000 feet apart, despite all they could do, they would probably be together in 40 or 45 seconds at most. Every witness in this case testifies that the Magnolia's second signal was that she would pass to the starboard of the Esparta. All the witnesses for the Esparta, Capt. Arroyo, Capt. Rose, C. Oscar, Dr. Preis and Harry Long, testify that the Magnolia gave a signal of two blasts, and the Esparta immediately answered with two blasts, and then the Magnolia gave a signal of one blast, and that led to

the disaster. It is also shown by the testimony of the Esparta's witnesses that she was running about as close as she could get to the west bank.

The testimony is far from showing that if the Esparta had agreed to the change of course proposed by the Magnolia's one blast at the last moment the collision would have been avoided. Proof of this is obviously impossible, where, as in this case, all the data are so largely conjectural. Though the evidence scarcely warrants a very positive opinion, I am strongly inclined to believe that Capt. Arroyo acted with good judgment in throwing the Esparta hard to starboard. If he had not done so, I believe the Magnolia would have been struck nearer the stern and probably sunk. At any rate, the Esparta was in her proper course, and the Magnolia had signaled her to keep it, and she had properly replied to that signal. Then, without justification, and when the vessels were almost on each other, the Magnolia signaled that she intended to go to port instead of to starboard as agreed. The Esparta at once replied, refusing to change the previously agreed course, as she clearly had the right to do. And the evidence convinces me that she not only had the right, but, all things considered, it was the safest thing she could do. It was then the duty of the Magnolia to herself adhere to the agreed and customary course, but she persisted in attempting to cross on the course to which she had unwarrantably changed at the last moment. The Esparta is not to blame if the Magnolia, through bad steering, drifted from the agreed course into or dangerously near the course of the Esparta, and mistook the Esparta's signals and course. The Esparta committed no fault so far as the evidence shows, and she cannot be held liable on the mere unproved hypothesis that if she had done something other than what she did the collision might not have occurred.

The libel must therefore be dismissed, with costs.

Rufus E. Foster, U. S. Atty.

W. B. Spencer and Charles P. Cocke, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. On full consideration of the evidence, we reach the same conclusions as the District Judge, as set forth in his opinion found in the transcript.

The decree of the District Court is affirmed.

TOMPKINS et al. v. CREIGHTON-McSHANE OIL CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 10, 1908. On Rehearing. April 3, 1908.)

No. 1,734.

1. EVIDENCE—EXTRINSIC EVIDENCE TO EXPLAIN DEED—IDENTIFICATION OF SUBJECT-MATTER.

Where a deed made in 1840 purporting to convey land certificates issued by the Land Commissioners of a Texas county was inexact and ambiguous in its description, external evidence was admissible to identify a certificate intended to be conveyed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2116, 2117.]

2. PUBLIC LANDS—DISPOSAL OF TEXAS LANDS—VALIDITY OF GRANT.

The Texas statute of August 28, 1856 (Pen. Code 1857, art. 244), prohibiting any district surveyor from "being concerned in the purchase of any right, title or interest in any public land in his own name or in the

name of any other person" under penalty of removal from office, a fine, and exclusion from subsequently holding office, did not invalidate the title to lands so acquired by a surveyor in violation of its provisions.

3. ADVERSE POSSESSION—TITLE BY PRESCRIPTION—TEXAS STATUTE.

Under Rev. St. Tex. 1870, art. 3198, actual and visible possession of land only can afford a basis for title by prescription.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 77-81, 123.]

4. EXECUTION—SALE—CONVEYANCE TO PURCHASER—CONSTRUCTION AND EFFECT.

A sheriff's deed executed in 1848 purporting to be based on a judgment, execution, levy, and sale, and to convey a Texas land certificate, may be received in evidence as proof of title, although the record of the suit has been lost or destroyed, and is presumptive evidence of the regularity of the proceedings, and under the decisions of the Supreme Court of the state passes title to the certificate if such title could have been conveyed by the judgment defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, §§ 935-939.

Conclusiveness of judgment between federal and state courts, see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union Planters' Bank v. City of Memphis, 49 C. C. A. 468.]

5. SAME—TEXAS LAND CERTIFICATE—NONDELIVERY—SALE ON EXECUTION AGAINST VENDOR.

Under the law of Texas a land certificate issued by authority of the state until located is personal property which may be transferred, and, where a purchaser of such a certificate left it in the possession of his vendor, a levy upon and sale of the same as the property of such vendor eight years afterward passed title thereto as against the prior purchaser.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

6. TRESPASS TO TRY TITLE—EVIDENCE OF TITLE—QUESTIONS FOR JURY.

Evidence introduced by both plaintiff and defendants in an action of trespass to try title considered, and *held* such as to require the submission of the question of title to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass to Try Title, § 66.]

In Error to the Circuit Court of the United States for the Eastern District of Texas.

D. F. Rowe and H. N. Atkinson, for plaintiffs in error.

Stuart R. Smith, Walter J. Crawford, and Leon Sonfield, for defendants in error.

Before PARDEE, Circuit Judge, and NEWMAN and SAUNDERS, District Judges.

SAUNDERS, District Judge. 1. This is an action in trespass to try title to a tract of land. The suit was originally brought by John A. McShane and John A. Creighton against J. G. Tompkins et al., as heirs of one A. N. B. Tompkins. Pending the suit the original plaintiffs transferred their title to the Creighton-McShane Oil Company, and that company is, by substitution for the original plaintiffs, now the sole plaintiff. For brevity, the Creighton-McShane Oil Company, plaintiff in the court below, will hereafter be designated simply as the oil company, or as the plaintiff, and the defendants will be

collectively designated as the Tompkins heirs, or simply as the defendant, and the land in controversy, which is situated in Hardin county, Tex., and is minutely described by metes and bounds in the petition, will be designated as the Hawkins survey. Hardin county, in which the land in dispute is situated, was formerly a part of Liberty County.

2. The petition after naming the oil company as plaintiff, and the several Tompkins heirs as defendants, avers that on July 1, 1905, "the plaintiff was in possession of and owned in fee simple" the said Hawkins survey, and "that while so owning and being in possession of said land defendants and each of them unlawfully and by force of arms entered upon said premises and ousted and dispossessed plaintiff therefrom, and still unlawfully and wrongfully and forcibly withhold the possession thereof from the plaintiff, to their damage in the sum of \$10,000." The prayer is for citation of defendants "and that, on a final hearing hereof, plaintiff have judgment for said land and its damages, for the restitution thereof; for costs of court," etc. The answer, first, specifically denies that the defendants "are guilty of the wrongs, injuries, or trespasses laid to their charge, or any or either of them as complained of in plaintiff's petition"; then, generally, denies all the allegations of the petition, and, finally, "by way of cross-action," avers that the defendants are the owners of the land in controversy under titles that are now good by prescription, whether they were or were not originally valid.

3. The record shows the following facts: (a) The board of land commissioners of the several counties in the Republic of Texas issued certificates to persons named therein, declaring said persons to be entitled to select and locate a stated quantity of land, and when the proper quantity of land had been so selected, located, and surveyed, the Land Office issued patents therefor. These certificates were sometimes held for years before they were located and patents obtained thereunder to specifically described tracts of land. It was also common for the original certificatee to assign and sell the unlocated certificate, and a number of transfers of the certificate might follow, each successive purchaser acquiring the same right, which the original certificatee had, to locate the quantity of land called for by the certificate and get a patent therefor. The right of the holder of the certificate to select, locate, and demand a patent for the quantity of land called for by the certificate is personal property, and the certificate itself is the evidence of that right. *Shifflet v. Morelle*, 68 Tex. 391, 4 S. W. 843. Where the original certificatee had assigned and sold the certificate, but the assignment was not filed in the Land Office, the patent would issue to the original certificatee, "his heirs or assigns," though the land was claimed by an assignee. The records of the Office also show to whom the patent was sent.

(b) On February 19, 1838, the board of land commissioners of Jasper county issued to one Benjamin H. Hawkins, certificate No. 140, entitling him to locate and get a patent for one league and labor of land. This original certificate has been lost or destroyed, though it was filed in the Land Office in 1862 and was probably there

in 1868, or even as late as 1878, when the Land Office records have an entry dated February 25, 1878, stating that a duplicate of the original certificate to B. H. Hawkins, that had been issued on the theory that the original was lost, was canceled, "the original certificate having been returned and patented." Both the oil company and the Tompkins heirs set up chains of title running back to one Joseph Criswell, who, as assignee of Hawkins, claimed the certificate. The oil company takes inconsistent and contradictory positions with regard to the assignment of this certificate by Hawkins to Criswell. First, it insists that, as there is no direct proof of, and in its opinion not sufficient circumstantial evidence to prove, the assignment by Hawkins to Criswell, the title of the Tompkins heirs must fail because it does not show even a beginning from Hawkins, whom all parties admit to have been the original certificatee. But this contention is inconsistent with the fact that the oil company itself sets up a title purporting to be derived from Criswell, and necessarily therefore postulating an assignment by Hawkins to Criswell. Moreover, the title that was first bought by McShane and Creighton, who formed the oil company and transferred their rights to it, was the Criswell title, supported by a quitclaim of his interest by one of the Hawkins heirs. It is not a matter of inference that the oil company even now relies upon its Criswell title. Their counsel say so in their brief:

"* * * On the 28th day of October, 1840, Joseph Criswell transferred in writing the said certificate to Wm. Hart, through whom defendant in error claims title by valid transfers of said certificate and the land patented thereunder."

And again they say:

"Joseph Criswell, under whom both plaintiffs in error and defendants in error claim title to the land certificate," etc.

Further, the oil company claims partly under a deed from Silas N. Johnson, and, to show how Johnson acquired his interest in the certificate, the oil company offered the deed under which Johnson acquired from John Mackechney, and this deed recites "that John Mackechney is entitled to this land as the only heir at law of Gilbert Mackechney, deceased, said Gilbert Mackechney having bought said lands from Wm. Hart, and Wm. Hart from Joseph Criswell, assignee of the certificate." The oil company offered this deed without qualification or restriction of any sort, and thereby unequivocally committed itself to the assertion that Criswell was the assignee of the certificate. Apart from the fact that the oil company is thus estopped by the title which it asserts itself as coming from Criswell, by the recitals of the deed which it offered in evidence, and by the declarations of its own counsel in their printed brief to deny that there was an assignment by Hawkins to Criswell, the recitals in deeds offered by the Tompkins heirs strongly confirm, if they do not positively establish, the conclusion that Hawkins did assign the certificate to Criswell. In 1840, Criswell, representing himself as owner of the certificate, sold it to Hart, and the oil company's title, through a long series of intermediate conveyances, all purporting to transfer the certificate, descends from this sale of Criswell to Hart.

Again, in 1848, under an execution issued against Criswell, the sheriff seized, and sold to one Fitzgerald, the certificate itself, and annexed it to his deed. There were a number of successive sales under this Fitzgerald title, most of them mentioning the accompanying presence of the certificate, until it was finally purchased by A. N. B. Tompkins, the ancestor of the present defendants, and he returned it to the Land Office, as shown by the above-cited extract of date February 25, 1878, from the Land Office records, and there it seems to have been in existence till 1868 or 1878. Finally, when the original certificate was located, the entire quantity of land called for by the certificate was given under three separate surveys, and the field notes of two of them, now in the Land Office records, show that they were made "for Joseph Criswell, assignee of B. H. Hawkins." The evidence, then, overwhelmingly demonstrates that Criswell was the assignee of the certificate, and that he was, at least as early as 1840, in possession of the certificate and dealt with it as owner. After this lapse of time, and in view of the admitted loss or destruction of the certificate and the burning of the records of Liberty county and the facts just stated, and as there is no evidence tending in the slightest degree to cast suspicion upon the truth of the numerous references in old deeds and documents to the fact of an assignment to Criswell, it must now be taken that his ownership, as assignee, of the certificate, is satisfactorily, though perhaps not directly, shown, particularly as both plaintiff and defendants assert title based on Criswell's ownership. For the purposes of the case, and in testing the titles of both parties, Criswell must, then, be treated as the owner of the certificate by assignment from Hawkins.

It will be as well here to notice the contention of the oil company that it acquired the legal title to the survey from the heirs of Benj. H. Hawkins, and relies upon the title so acquired as the paramount legal title. The evidence shows that John R. Mackechney purchased from John Mackechney, and John Mackechney inherited as sole heir from Gilbert Mackechney whatever rights Gilbert Mackechney acquired under the sale to him by Wm. Hart in 1846. But the entire evidence in the case, whether offered by the defendant, or by the plaintiff in opening his case, or by the plaintiff on rebuttal, now shows as just pointed out that Benj. H. Hawkins had assigned the certificate to Jos. Criswell. Therefore Hawkins' heirs inherited from him no rights in or to the certificate, and conveyed no rights in or to it by their deeds of sale to John R. Mackechney, of date July 10, 1888, and to Brown-Creighton, of date October 22, 1901. It makes no difference at what stage of the trial, nor by whom, the evidence showing that B. H. Hawkins had assigned to Jos. Criswell was offered. Nor does it matter that this evidence is wholly or largely circumstantial. That evidence is now in the record, and must be given all the weight to which it is entitled, and must have all the consequences which properly result therefrom upon the rights of the parties. As then this evidence shows that the Hawkins heirs had no title of any kind to the certificate, the deeds from these heirs could not and did not convey to the oil company or its authors the paramount legal title, nor any title whatsoever

thereto. The deeds from the Hawkins heirs to the authors of the oil company's title must therefore be wholly laid out of the case, and the oil company must establish, if it can, that it now owns, through successive transfers running back to Criswell, the title to the certificate and to the lands patented thereunder. The inquiry is thus reduced to the determination of the question.

In whom is the Criswell title to the certificate and to the land patented thereunder now vested? Is it in the oil company? Or is it in the Tompkins heirs? To answer this question, the two chains of title coming from Criswell must now be investigated and compared. For convenience, the chain under which the oil company claims may be referred to as the Criswell-Hart-Mackechney chain; and the chain under which the Tompkins heirs claim, as the Criswell-Fitzgerald-Tompkins chain.

1. Criswell-Hart-Mackechney Chain of Title. On October 28, 1840, for a stated consideration of \$5,000, Criswell sold a number of land claims to one William Hart. Among them was one described as "the headright of H. B. Hawkins for one league and labor of land." These words certainly do not in themselves describe the certificate No. 140 issued by the board of land commissioners of Jasper county on February 19, 1838, to B. H. Hawkins. But the oil company contends that "H. B." is merely a transposition of "B. H." and "head-right" is the equivalent of "certificate," and that the records show that "but one land certificate was issued by the board of land commissioners of Jasper county, Tex., and that was No. 140, to Benj. H. Hawkins, and that no league and labor certificate of the first class was ever issued by the state to H. B. Hawkins." This incident in the sale from Criswell to Hart only shows, as most of the other deeds in this record also show, how loose and inexact in those times were the descriptions of the thing sold, and how it may become necessary to resort to external facts to correct or supplement the description as given in the deed so as to identify the thing. In view of the facts external to the deed, and despite the ambiguous and inaccurate description in the deed itself, there is no doubt but that what Hart sold was, as counsel for the oil company contend, in fact certificate No. 140 issued to B. H. Hawkins on February 19, 1838.

In this deed from Criswell to Hart there is no statement that Criswell delivers to Hart the certificates, or deeds to the certificates, which he purports to sell. It is entirely consistent with the terms of the act to infer that the certificates or deeds therefor were not delivered to Hart. This deed from Criswell to Hart was never recorded.

On August 1, 1846, Wm. Hart sold to Gilbert Mackechney a number of land claims, and among them "the headright of H. B. Hawkins for one league and labor of land." The remarks in the foregoing paragraph upon the description of the thing sold apply with equal force to the description in this deed. Recordation of this deed was made in several counties; in Sabine county on October 7, 1863; in Bee county on September 5, 1877; and in Hardin county on March 5, 1878. In the latter part of 1853, Gilbert Mackechney seems to have become aware that he did not have in his possession either

the certificate to B. H. Hawkins, or any deed therefor. He thereupon proceeded to advertise this certificate as lost, and, after the advertisement had been made, he then made an affidavit averring the loss of the certificate and his advertisement therefor, and on the basis of this advertisement and affidavit he applied for and obtained from the Land Office a duplicate certificate in lieu of the lost original. The advertisement includes certificates of other claims, also acquired under the above deed from Hart. The advertisement, so far as it relates to the Hawkins certificate, is as follows:

"Lost Land Certificates.

"The headright certificate of B. H. Hawkins for one league and labor of land, No. 140 dated February 19, 1838, issued by the board of land commissioners for Jasper county, * * * which, if not found within 90 days from this date, I shall make application to the proper authorities for duplicates.

"Oct. 6, '53.

Gilbert Mackechney."

The affidavit reads thus:

"Gilbert Mackechney being duly and regularly sworn on oath declares that he was the just owner of the following land claims, viz.: the headright certificate of B. H. Hawkins for one league and labor of land, No. 140, dated February 19, 1838, issued by the board of commissioners of Jasper county * * * ; that he has never sold, alienated, or transferred the same in any manner; that they have been lost, and that, since lost, he has neither known or heard of the same; and that he has caused notice of the loss of said certificates to be published in the San Augustine Herald, a newspaper published in San Augustine county, and the one nearest the residence of this affiant, for the time required by law.

"Sworn to December 14, 1853.

Gilbert Mackechney."

On filing the above advertisement and affidavit in the Land Office, a duplicate certificate was, on May 8, 1854, issued to Gilbert Mackechney, declaring him to be thereunder entitled "to all the benefits granted in said original certificate." It will be observed that Mackechney nowhere asserts, either in his advertisement or in his affidavit, that he ever did have possession of the certificate, or that he lost it. He merely says that the certificate has been lost; he does not say by whom. After obtaining this duplicate certificate Gilbert Mackechney took no action upon it for more than 20 years. Then, on November 7, 1874, he procured the survey of a tract of land in Bee county. He filed this survey, and demanded a patent, and this demand by him for a patent to the land covered by his survey developed the fact that the original certificate had been returned to the Land Office in 1862, and that three patents had issued for three tracts of land in satisfaction of the original certificate; one in 1862, one in 1863, and one in 1868. Thereupon Mackechney's duplicate certificate was marked across the face, "Canceled, the original having been returned and patented February 25, 1878." The records of the Land Office showed then, as they show now, that the patents issued under the original certificate had been sent, at the date of their issuance, to A. N. B. Tompkins, and, as he was a district surveyor, Mackechney could easily have reached him and ascertained from him who it was that claimed the title to the original certificate and to the lands patented under the original certificate.

Gilbert Mackechney died in the early part of 1877, and by his will, offered for probate on April 2, 1877, and probated May 21, 1877, he made his brother John X. Mackechney his sole legatee. On December 21, 1887, more than 10 years after he had probated his brother's will, more than 33 years after the duplicate certificate had issued, and nearly 10 years after that duplicate certificate had been canceled, John Mackechney appointed Silas M. Johnson his attorney in fact "to clear the title to the B. H. Hawkins headright of one league and one labor of land situated in Hardin and Liberty counties, Texas," to which John Mackechney declares he is entitled "as the only heir at law of Gilbert Mackechney, deceased, said Gilbert Mackechney having bought said lands from Wm. Hart and Wm. Hart from Joseph Criswell, assignee of the certificate." And, in consideration of the services to be rendered by Johnson (in clearing the title), John Mackechney conveyed to him one-third undivided interest in the said Hawkins league. This appointment of Mr. Johnson "to clear the title to the B. H. Hawkins headright" shows that Mr. Mackechney knew that his title was not clear, but that it was, on the contrary, in dispute, and that it was claimed by the person, whoever it was, that had located and patented the original survey. The record does not show that Mr. Johnson ever took any steps whatsoever "to clear the title" except by procuring a quitclaim from Peter M. Hawkins, one of the grandchildren and heirs of Benjamin H. Hawkins, to his interest in the Hawkins survey. This step was inconsistent with the title as given in the deed to Johnson himself, wherein it is declared that John Mackechney, who conveyed to Johnson, claimed title as the sole heir of Gilbert Mackechney who "bought said land from William Hart, and William Hart from Joseph Criswell, assignee of the certificate." This transfer from Hawkins, so far from clearing the title, tended to involve it in still greater obscurity by casting suspicion upon the very title which Johnson himself had taken.

Johnson and John Mackechney, on February 7, 1888, conveyed their interest to John R. Mackechney. This deed was recorded on February 11, 1888, in Hardin county. John R. Mackechney seems to have reconveyed on February 9, 1888, a one-third undivided interest to Silas M. Johnson by deed recorded February 11, 1888, and, by two deeds executed on February 27, 1890, John R. Mackechney and Silas M. Johnson conveyed their entire interest in the matter to P. S. Watts and John P. Irvine. These latter conveyed their interests to John A. Creighton, Herman Kountze, and John A. McShane, by deed executed October 6, 1894. During all this time nothing had been done or attempted towards "clearing the title" claimed by the heirs of Gilbert Mackechney. McShane, Kountze, and Creighton, by a series of conveyances, finally transferred the property to the Creighton-McShane Oil Company on April 3, 1906. So much for the Criswell-Hart-Mackechney title on which the oil company relies. It remains to examine the Criswell-Fitzgerald-Tompkins title, on which the Thompkins heirs rely.

2. Criswell-Fitzgerald-Thompkins Chain of Title. On November 18, 1848, W. L. Rogers, sheriff of Nueces county, executed an official deed of sale wherein he declared that under a judgment of a jus-

tice's court against Jos. Criswell he had seized and sold to one Edward Fitzgerald "a certain certificate for land pointed out by the plaintiff as the property of Joseph Criswell, which is hereafter described and set forth * * * said land certificate herein described and set forth, containing one league and one labor of land, issued by the board of land commissioners of Jasper county on the 19th of February A. D. 1838, to Joseph Criswell, assignee of Benj. H. Hawkins, and numbered 140, which is hereto attached and made part of this instrument by reference. * * *" The above description is erroneous in stating that the certificate was issued to Joseph Criswell; it was in fact issued to Benj. H. Hawkins, and, after being so issued, it was then assigned by Benj. H. Hawkins to Joseph Criswell. But all the other items of the description are correct, and fully identify the certificate as the one issued to B. H. Hawkins. The admission which the counsel for the oil company offered to cure, the incorrect description of the certificate in the sale from Criswell to Hart, and in the sale from Hart to Gilbert Mackechney, serves equally to correct the description in the sheriff's deed to Fitzgerald, and to identify the certificate as the Hawkins certificate. There are wax marks in the margin of this sheriff's deed which show that a paper was once attached thereto. This was probably the certificate which the deed declares was attached. Fitzgerald sold one-half of the certificate to Manning, and Manning sold it to Durst, and Durst to E. A. and R. I. Palmer. Then the Palmers sold the entire certificate to Nevill, and Nevill sold it to A. N. B. Tompkins, who was the father or grandfather of the defendants. It does not appear how the Palmers came to own the entire certificate, but it is shown that Manning by suit compelled Fitzgerald, or his heirs, to transfer to him the entire certificate. A. N. B. Tompkins acquired the certificate on March 23, 1859. He proceeded at once to cause surveys to be made for three tracts of land, in the aggregate covering the amount of land called for by the certificate. The survey for the tract now in controversy was made on April 21, 1859, less than a month after Tompkins had purchased the certificate. But he does not seem to have filed this survey in the Land Office till May 12, 1862. On this survey and on the surrender of the certificate a patent issued on June 30, 1862, "to Benjamin H. Hawkins his heirs or assigns." As Benjamin H. Hawkins had assigned the certificate to Jos. Criswell, neither he nor his heirs took anything under the patent, which necessarily inured to the benefit of Criswell and his assigns. With the issuance of the patent, the legal situation changed. The certificate was merged in the patent, and a tract of land was conveyed and delivered by the state in discharge of its obligation and promise in the certificate. Tompkins no longer held the state's promise to give land; he held the land itself. He was in possession claiming to be owner, and his claim was based upon ownership and possession in good faith of the Hawkins certificate. There is not the slightest evidence tending to show that Tompkins suspected or had any reason to suspect that his title to the certificate was not perfect. The oil company contends that the deed to Tompkins was a mere nullity because of a provision

in a Texas statute of date August 28, 1856, which forbids district surveyors from "being concerned in the purchase of any right, title or interest in any public land, in his own name or in the name of any other person," under penalty of removal from office, and fine not exceeding \$500, and exclusion from subsequently holding any other office under the state. Pen. Code 1857, art. 244. The statute does not annul the title acquired by the district surveyor, but only subjects the surveyor to severe penalties in case he acquires title to any public land. The title of Tompkins cannot then be regarded as void on this ground.

Tompkins having thus, as he supposed, transformed the certificate entitling him to land into the land itself, we must now see what he did in the matter of taking possession of the land patented under the certificate. The evidence on this point is meager. In regard to the taxes it is shown that the Hawkins survey was assessed or rendered for taxes to A. N. B. Tompkins for the years 1860 to 1872, both inclusive, and for the year 1876. And there is testimony going to show that Tompkins paid the taxes for some of these years at least, possibly for all. One of the heirs remembers having seen receipts for taxes on the property, but he does not remember how many. One witness, Morgan Rye, testifies that in 1868 A. N. B. Tompkins offered to sell him this tract of land. He went with Mr. Tompkins and looked at the land, but did not like to locate on it. He says, "It was heavily timbered in some places, and in others it was marshy, with a pin-oak growth of timber." He also testifies that "in 1877 A. N. B. Tompkins came to me and wanted to borrow some money. He claimed to own this land and other tracts, and wanted to mortgage them to me and borrow some money." J. G. Tompkins, a son of A. N. B. Tompkins, testifies that his father claimed to be the owner of the Hawkins survey ever since he could remember. He says that he and his father were on the land when he was 12 or 13 years old, and his father pointed out to him some of the corners and told him that that was the Hawkins tract and that he owned it. He has heard his father say a number of times that he owned the Hawkins land. O. J. Delano, another witness, states that he knew that Tompkins claimed to own the Hawkins survey in 1876, and at that time Tompkins sold him and his sister, Mrs. Haralson, a part of this survey containing 320 acres for \$320. He says:

"When I bought the land I did not go to the records to see whether I had title to it. Mr. Tompkins asserted title to the land, and told me it was his; and that is all I know about it."

The deed from A. N. B. Tompkins to O. J. Delano and his sister, Mrs. Eliza Haralson, duly recorded for 320 acres of the Hawkins survey, was offered in evidence. Mrs. Haralson sold her half of the 320 acres to Dr. W. P. Callen, who still has it. He says he has claimed the land ever since he had it. A witness for the plaintiffs testifies that he knew A. N. B. Tompkins and his children well, and never heard them claim title to the land until lately; "that country was a pretty wild country until late years. There was no occasion to know who were the landowners. At that time the land was not

regarded as valuable for a long time." He also adds that "he did not know who owned large tracts of land in the country. I did not know anything about the ownership of land, and did not care anything about it. For the past 4 or 5 years it has been pretty well known who owned land in that country." Another witness for the plaintiffs, W. W. McConnico, sheriff and tax collector for Hardin County, testifies regarding the land as follows:

"I hunted over that survey from 1868 to 1881. No one had lived on the land up to 1881. The Hawkins survey is the biggest part of the 'Big Thicket.' I do not think fifty acres could be found on the whole survey that could be cultivated."

Several witnesses prove that the heirs of A. N. B. Tompkins have claimed to be the owners of the land since his death. In 1904 these heirs placed one Lott in possession as tenant, and he is still in possession of the land. It was unoccupied and had been unoccupied for several years at the time that Lott went on it in 1904.

The land covered by the Hawkins survey seems to have been marshy and uncleared, and, for the most part, uninhabitable. The timber on it had no value, and the land seems to have had no appreciable value for any purpose. Tompkins did not clear the land, nor did he inclose it, nor did he put a tenant upon it. All that he did was to speak of the land as his own, to sell a part of it, to have the tract assessed to him on the assessment rolls of the county, and to pay the taxes on it. His heirs put no one in possession of the land until the year 1904. In the meantime the plaintiffs had put a tenant on the land in 1901, who occupied it for 12 or 18 months and then voluntarily abandoned it. Under these circumstances the defendants cannot claim title by prescription. There was no such "actual and visible appropriation of the land," as was required under article 3198 of the Revised Statutes of Texas (1879), to set the statute in motion so as to give rise to a prescriptive title. It is also well settled in Texas that "an adverse possession of the certificate, no matter how long continued, does not operate as an assignment of the certificate or of the right to the land of which it is the evidence." Sayles' Real Estate Laws of Texas, vol. 1, art. 293, and authorities there cited. Tompkins, therefore, cannot claim ownership of the certificate under a prescriptive title.

Putting out of consideration the defendants' claim to title by prescription, we must next determine whether the defendants have title to the land in controversy, or had title to the certificate, in any other way. As we have seen, the Tompkins title comes from an alleged sheriff's sale of the certificate itself in 1848. It is admitted that the record of the suit in which the sheriff's sale took place has been lost or destroyed. All that remains of that suit is the sheriff's deed to the certificate. The sheriff's deed, under these circumstances, may be offered without offering the judgment and the writ of execution issued thereunder in support of the deed. A party cannot be bound to produce what has confessedly been lost or destroyed, and after the lapse of so long a time the case is a proper one for the application of the maxim "*omnia præsumentur rite acta.*" It may therefore be

assumed that the judgment was regularly obtained, and that execution regularly issued thereunder. The sheriff's deed shows that under this execution the original certificate "was pointed out to me as the property of Joseph Criswell." The deed does not state who pointed out the certificate, nor does it state that the certificate was in the possession of Criswell when it was pointed out to the sheriff. As it would have been irregular for the sheriff to seize property belonging to any one but the defendant Criswell, and as in the ordinary course of business the defendant's property was most likely to be in his own possession, it may be assumed that the certificate was so situated with respect to possession and apparent ownership, as to justify the sheriff in seizing it as the property of Criswell, the defendant in execution.

Under the presumption of the maxim "as to the regularity of judicial proceedings," we thus have an apparently regular judicial sale of the certificate as the property of Criswell. The case of *Barker v. Swenson*, 66 Tex. 407-411, 1 S. W. 117, the Supreme Court of Texas say:

"It is said that a land certificate may be sold under execution, or in course of an administration, and that the right to acquire land under it will pass to the purchaser, and this is true; but it is upon the theory that the certificate symbolizes the right, which is the thing sold in such cases, as is it when the owner of such certificate makes a voluntary sale."

There is no evidence which positively shows, either that the certificate did get back into Criswell's possession, or how it got back into his possession. But in view of the fact that, eight years after he had ostensibly sold it, it was seized as his property, it may fairly be presumed that it was in his possession when seized. This may be so if we assume that Hart did not actually take possession of the certificate when he purchased it from Criswell, but that he left it in Criswell's possession. And he might have been willing to leave it in Criswell's possession for a number of reasons. Just such a case seems to have occurred in *Baggett v. McKenzie*, 28 Tex. 581. Baggett acquired a certificate from Watson but left it in Watson's possession, and Watson sold it to McKenzie. The Supreme Court of Texas say (page 583 of 28 Tex.):

"He [Baggett] left the certificate subject to the control of Watson, and cannot complain if thereby he has lost interest in it, which he might otherwise have asserted. If his title bond gave Baggett an interest in the certificate, had he exercised the slightest diligence or reasonable prudence, he would have had it duly authenticated and deposited in the General Land Office, with the field notes of the survey, and thus have prevented Watson from lifting it from the land, or procuring the unlocated balance of the certificate which he sold to McKenzie. Having failed to do this, he must be postponed to the subsequent purchaser, who in good faith has acquired the better right to the certificate."

As the law assumes fair and honest dealing until the contrary is proven, it is fair to presume that Criswell's possession of the certificate was with the consent of his vendee. In this situation the vendee, having left the certificate in the possession of the vendor, and that possession having continued more than two years, the voluntary sale by the vendor himself or the forced sale by a creditor of the vendor,

would carry the title to the certificate. We therefore consider that the title to the certificate passed at the sheriff's sale. And this assumption is justified by the long inaction of Gilbert Mackechney, who then had the adverse title to the certificate. He purchased the certificate in 1846. It is not shown that he ever had actual possession thereof. He advertised it as lost in 1853, and procured a duplicate certificate in 1854. Instead of at once locating this duplicate certificate, he lay by and did nothing for over 20 years, and neither he nor his heir or assignee did anything to develop or attack the adverse title of the Tompkins heirs during the next 25 years. This long delay casts a serious suspicion upon the validity of the Mackechney title. On the other hand, the comparative promptness with which the opposing title was asserted by Tompkins indicates that the holders of that title were confident in its validity, and did everything that was likely to challenge contest by any opposing claimant.

All of these facts should have been submitted to the jury, and as the record is now before us under a peremptory instruction to the jury to find for the plaintiff, we hold that these facts establish the title in the defendant. The case should have been submitted to the jury under proper instruction, and coming to us on the entire record we find that the verdict should unquestionably have been for the defendants.

The judgment must therefore be reversed, and the case remanded for a new trial, with instructions to the lower court to proceed in accordance with the views herein expressed.

On Rehearing.

PER CURIAM. The last two paragraphs of our opinion in this case filed March 10, 1908, are stricken and withdrawn, and in lieu thereof the following is substituted:

On the trial in the court below the trial judge of his own motion gave a peremptory instruction to the jury to find in favor of the plaintiffs. This, under our view of the evidence and the legitimate conclusions to be drawn therefrom, was clearly erroneous. The case should have been submitted to the jury under instructions covering the legitimate presumptions which arise on the facts developed by the evidence and as outlined in this opinion.

The judgment of the Circuit Court is reversed and the cause is remanded, with instructions to award a new trial and thereafter proceed in accordance with law and the views herein expressed.

And as thus amended we are satisfied with our decision of the case. The petition for rehearing is denied.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. KELLY.

(Circuit Court of Appeals, Sixth Circuit. March 17, 1908.)

No. 1,741.

1. TELEGRAPHS AND TELEPHONES—QUASI PUBLIC CORPORATIONS—DISCRIMINATION.

Both telephone and telegraph companies are engaged in a quasi public service, and hence, without regard to statute, are required to serve the public without partiality or discrimination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 21.]

2. SAME—STATE STATUTES.

Acts Tenn. 1885, p. 122, c. 66, § 11, provides that every general telephone company doing business within the state, shall supply all applicants for telephone facilities, without discrimination or partiality, provided they comply with the reasonable regulations of the company, which shall not impose any condition or restriction on any such applicant not imposed impartially upon all persons or companies in like situations, nor shall such company discriminate against any individual or company engaged in lawful business, by requiring, as a condition for furnishing such facilities, that they shall not be used in the business of the applicant or otherwise, under penalty of \$100 for each day the company continues such discrimination and refuses such facilities, after compliance or offer to comply with the reasonable regulations, and time to furnish the same has elapsed. *Held*, that such act is directed only against discrimination, giving a new remedy, and imposing severe penalties, and was merely declaratory of the common law.

3. STATUTES—CONSTRUCTION.

Where a statute in general terms is merely declarative of the common law, or an affirmation thereof, it should be construed as near to the rule and reason of the common law as may be, and by the course which the common law observes in other cases.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 301.]

4. TELEPHONES—DISCRIMINATION—PENALTIES.

Where, in an action for statutory penalties against a telephone company for discrimination, prohibited by Acts Tenn. 1885, p. 122, c. 66, § 11, the court charged that, in determining whether discrimination existed as against plaintiff in the territory where he was situated, the jury could only look to the situation in that locality, and determine whether the company furnished other men on application for service, when their cable lines were filled, and that the company could not exercise its discretion to furnish one class of citizens or one citizen, and deny others, an instruction that if two applicants for service were in the same business, and one was granted service and the other not, that would constitute discrimination, was objectionable, in that it was not also based on the assumption that the applicants were "similarly situated."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, §§ 16, 18, 21.]

5. SAME—CHARACTER OF SERVICE.

Defendant telephone company, being required to place its wires in the business portion of a city in conduits, maintained direct and party line service, the wires being carried in cables from the central exchange to different division points in the city, and thence on poles to the various telephones with which they were connected. When the wires carried in each cable were all in use, new patrons could not be supplied with direct service until another cable could be constructed and carried to a point of distribution, or until some pair of wires in the cable became vacant by the telephone being given up. The practice of the company was also to serve

applicants in the order of their application. *Held* that, where the cable leading to plaintiff's district was full when plaintiff applied for direct service, the fact that other patrons for party line service in plaintiff's district were furnished service prior to plaintiff, did not constitute a discrimination against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, §§ 16, 18, 21.]

6. SAME—ENLARGEMENT OF PLANT.

Telephone companies are under a general common-law obligation to supply reasonably adequate facilities, which obligation may be enforced by compelling the enlargement of the plant, but this duty is not so far applicable to Acts Tenn. 1885, p. 122, c. 66, § 11, requiring telephone companies to furnish facilities without discrimination and imposing severe penalties, as to require a departure from the company's usual custom in the service of patrons, and an increase of the company's cables for the purpose of serving an applicant whose application could not be immediately complied with because the company's cable running to his district was full.

7. SAME—SPECIAL CONNECTIONS.

Where a telephone company's cable, leading to plaintiff's district, was full, so far as direct service was concerned, at the time plaintiff applied therefor, the telephone company was not chargeable with discrimination for failing to give plaintiff service by indirect and exceptional means, contrary to custom, and only resorted to in case of urgent necessity on a special application, plaintiff not having brought himself within the conditions under which such connections were allowed.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

This was an action to recover statutory penalties under chapter 66, § 11, p. 122, Acts Tenn. 1885. That act is one granting certain privileges to telegraph and telephone companies "and prohibiting discrimination between patrons." The eleventh section is in these words:

"Every telephone company doing business within this state, and engaged in a general telephone business, shall supply all applicants for telephone connection and facilities without discrimination or partiality, provided such applicants comply or offer to comply with the reasonable regulations of the company, and no such company shall impose any condition or restriction upon any such applicant that are not imposed impartially upon all persons or companies in like situations, nor shall such company discriminate against any individual or company engaged in lawful business by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant or otherwise, under penalty of one hundred dollars for each day such company continues such discrimination and refuses such facilities after compliance or offer to comply with the reasonable regulations, and time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused."

The plaintiff below set out this section and averred that the defendant was a corporation carrying on a telephone business in the city of Memphis; that he resided in said city; that he applied for a direct connection at his residence, and signed an application agreeing to comply with the terms and regulations of the company on September 8, 1905; and that his application was accepted on same day. He then averred that the defendant had violated the said provision of the Tennessee Act of 1885, "in that it failed to give him telephone connection and facilities and furnished others in the same class and in like condition as himself with telephone connection and facilities, thereby violating the above law and discriminating against him." He then averred that the discrimination continued until November 28, 1905, and that the time within which such connection could have been supplied was 78 days; he therefore sued for the penalty prescribed by the statute for the said 78 days, making an aggregate penalty of \$7,800. The defendant pleaded

the general issue and a special plea in these words: "And for further plea in its behalf, defendant avers that, at the time that the plaintiff herein requested the installation of a telephone at his residence, the defendant company did not have, and could not by any due diligence have had, sufficient line and wire equipment for the installation of a telephone service at that time; and that it could not have installed said telephone any sooner than it did; and this it is ready to verify."

There was a verdict for the full amount of \$7,800. The defendant has assigned error, and sued out this writ.

E. E. Wright, for plaintiff in error.

George Harsh, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge (after stating the facts as above). The analogy between the principle which determines the duties and responsibilities of telephone and telegraph companies and those which apply to common carriers of goods and persons is so strong that it is often said of them that they are "common carriers of news." The description is more applicable to telegraph companies than to telephone companies, for the one receives and sends a message, the other merely supplies the facilities by which the user may extend the compass of his own voice. Nevertheless, both telephone and telegraph companies are engaged in a quasi public service and are endowed with some of the sovereign powers of the state. Therefore it is well settled that, without regard to statute, both kinds of companies must serve the public without partiality or discrimination. In the case of the State of Missouri v. Bell Telephone Co. (C. C.) 23 Fed. 539, 541, Justice Brewer said:

"A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all. It may not say to the lawyers of St. Louis, 'My license is to establish a telephonic system open to the doctors and the merchants, but shutting out you gentlemen of the bar.' The moment it establishes a telephonic system here, it is bound to deal equally with all citizens in every department of business; and the moment it opened its telephonic system to one telegraph company, that moment it put itself in a position where it was bound to open its system to any other telegraph company tendering equal pay for equal service."

In *Delaware & A. Tel. & Tel. Co. v. Delaware*, 50 Fed. 677, 2 C. C. A. 1, the Circuit Court of Appeals for the Third Circuit said:

"It is no longer open to question that telephone and telegraph companies are subject to the rules governing common carriers and others engaged in like public employment. This has been so frequently decided that the point must be regarded as settled. While it has not been directly before the Supreme Court of the United States, cases in which it has been so determined are cited approvingly by that court in *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, 38 L. Ed. 247. While such companies are not required to extend their facilities beyond such reasonable limits as they may prescribe for themselves, they cannot discriminate between individuals of classes which they undertake to serve."

This principle has been recognized over and over again in respect of many classes of business affected with a public interest, and cases applying to the telephone companies have been cited and approved by the Supreme Court as justifying the regulation by statute of analogous

kinds of business. *Budd v. New York*, 143 U. S. 517, 542, 12 Sup. Ct. 468, 36 L. Ed. 247. The cases directly holding telephone companies to the obligation of an impartial and undiscriminating service upon common-law principles are numerous. Some of these are: *Chesapeake, etc., Telephone Co. v. B. & O. Ry. Co.*, 66 Md. 399, 414, 7 Atl. 809, 59 Am. Rep. 167; *Hockett v. State*, 105 Ind. 250, 258, 5 N. E. 178, 55 Am. Rep. 201; *Central Union Telephone Co. v. State*, 106 Ind. 1, 5 N. E. 721; *State v. Citizens' Telephone Co.*, 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870. The text-writers state the duty in the same way. *Joyce on Electric Law*, vol. 2, § 520; *James on Telegraphs and Telephones*, pp. 229, 239; 27 Am. & Eng. Enc. of Law, p. 1021. Telegraph companies are equally obligated by the common law against discrimination. *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765. Statutes enforcing this common-law liability not to discriminate are therefore merely in affirmance of the common law. 27 Am. & Eng. Enc. of Law 1021, 1022; *Central Union Telephone Co. v. Fehring*, 146 Ind. 189, 45 N. E. 64; *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404; *State v. Citizens' Tel. Co.*, 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870; *State v. Bell Tel. Co.*, 36 Ohio St. 296, 38 Am. Rep. 585. Neither is there anything in the Tennessee statute, set out heretofore, which adds anything to the common-law obligation of such companies. A new remedy is given and severe penalties are imposed for non-observance, but the statute is directed only against discrimination. The contention underlying the whole argument of the attorney for the defendant in error, rather than directly advanced, that under this statute such companies are required to "supply all applicants" for service without regard to their location within the limits of territory to which they have in good faith confined their facilities, would lead to absurd results, and make the conduct of such a business practically impossible. The statute must be sensibly construed, and general terms so limited in their application by the context as not to lead to injustice or oppression. To avoid absurd consequences, it was said in *U. S. v. Kirby*, 7 Wall. 482, 486, 19 L. Ed. 278, the courts, when possible, "will presume that the Legislature intended exceptions to its language which will avoid results of this character." This general principle of statutory construction has been again and again applied. Some of the cases are: *Chew Heong v. United States*, 112 U. S. 536, 5 Sup. Ct. 255, 28 L. Ed. 770; *Holy Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 37, 15 Sup. Ct. 516, 39 L. Ed. 601. In the last-cited case the court said:

"Undoubtedly the court, when endeavoring to ascertain the intention of the Legislature, may be justified, in some circumstances, in giving weight to considerations of injustice or inconvenience that may arise from a particular construction of a statute."

Verbiage which is supposed to impose the duty of supplying all applicants is taken out of its context. The subject-matter of the eleventh section is the prevention of "discrimination"—the avoidance of "partiality." The mandate of the statute is that applicants shall not be

discriminated against, not that all shall be supplied, regardless of location or conditions. Neither does the provision disregard the usual and approved methods upon which such a business is conducted and compel a service under conditions forbidden by general regulations adopted in good faith as conducive to efficiency of service and economy of operation. We must presume that the right of such companies to conduct their business in the usual and approved manner of such utility companies is not prohibited, and that a service delayed in consequence of such business conditions is not, when all similarly situated are subject to same regulations, a discrimination penalized by the law. This section is identical with an Arkansas statute and another of Indiana, which are, apparently, the only other states imposing such penalties. In *Irvin v. Rushville Co-operative Tel. Co.*, 161 Ind. 524, 69 N. E. 258, the Indiana court said that "the statute travels on the assumption that telephone companies may make reasonable rules," and that a service denied under a rule providing for a denial or delayed under such circumstances is not a discrimination unless it is averred and proven that it had not been impartially applied. The Arkansas court, construing the same provision, held that a pleading which alleged that the defendant telephone company had failed to furnish him with a telephone after repeated applications "had thereby discriminated," stated no case, as no fact was thereby stated which showed that he had been discriminated against. In this case the plaintiff escaped this rock in his amended declaration by averring that the defendant violated the law "in that it failed to give him telephonic connection and facilities and furnished others in the same class and like conditions with himself," etc. Neither does this statute apply to a case of mere negligence. The penal clause of the act, "under penalty of one hundred dollars for each day * * * and time to furnish the same has elapsed, to be recovered by the applicant when application is so neglected or refused," is merely descriptive of the applicant who has been discriminated against. Thus the brief of the learned counsel for the defendant in error frankly concludes by saying, "We do not think they would be liable for a case of inadvertent negligence." But, whether conceded or not, it is plain that a mere negligent or accidental omission to supply a telephone would not involve an intentional discrimination against the plaintiff in favor of other applicants similarly situated. The cases construing such statutes in relation to discriminations by telegraph companies holding that mere negligence is not penal discrimination are numerous and apply. *State v. Western Union Telegraph Co.*, 76 Ark. 124, 88 S. W. 834; *Western Union Telegraph Co. v. State*, 146 Ind. 63, 44 N. E. 793; *Western Union Telegraph Co. v. Swain*, 109 Ind. 405, 9 N. E. 927; *Fox v. Francher*, 66 Mich. 536, 33 N. W. 416; *Hearn v. Western Union Telegraph Co.* (Sup.) 73 N. Y. Supp. 1077.

These conclusions support the view stated above, that the Tennessee act of 1885 is only declaratory of the common-law duty not to discriminate, and enforcing that obligation by penalties. It follows, therefore, that conduct which would not amount to an illegal discrimination by such a public service company at the common law would not be an illegal discrimination under the statute. Not only is this statute to

be read in the light of the common law, but we must assume, as before stated, that the severe penal provisions against discrimination were imposed with knowledge of the character of the peculiar business regulated, and without any purpose to interfere with the methods for the conduct of such business usual with such companies, and calculated to insure efficiency of service with reasonable business economy. When a statute is merely declarative of the common law, or in affirmance of it, and is in the general terms of the common law, there is no safer rule for its construction than that so well stated by Sutherland upon Statutory Const. § 290, that "the best construction of a statute is to construe it as near to the rule and reason of the common law as may be, and by the course which that observes in other cases." This construction of the Tennessee act does not appear to have been observed by the learned trial judge. After distinctly recognizing that the one intent and purpose of the act was to enforce the obligation of nondiscrimination by saying to the jury, "that the keynote of the lawsuit is the question of discrimination as against the plaintiff in favor of somebody else similarly situated," the court said:

"We must take the law as we find it written by the Legislature, and if you believe from the testimony (and it has gone before you almost without an exception by either counsel), that this telephone company, in the territory which it proposed to serve, has furnished applicants and was furnishing them, at the time of the bringing of this suit and before, telephonic connection, and that this man, the plaintiff here, Mr. Kelly, made his application and did all that was required of him to do, and that he was similarly situated as were those for whom they were supplying the telephone connection at the time, and they declined to supply him, then they were liable to him for one hundred dollars for every day which they declined and refused to furnish him that connection. Discrimination means, under this statute, taking men similarly situated: that the company, while furnishing one man telephonic connection, declines to furnish the other, or failed to do it. Much has been said about the purpose of the law. Evidently the intention of the Legislature was to prevent the telephone company from serving one citizen and, then, to favor him, refuse to serve another citizen similarly situated. To illustrate the idea: Here is a man on this corner who is in the grocery business, and here is a man just across the street who is in the grocery business. The first grocer referred to makes application for telephone connection and he gets it, and is put in connection with all the subscribers of the telephone company—to business houses. The other puts in his application, and complies with all the reasonable rules of the company, and he does not get it, and he is not put in connection with all the subscribers of the company. Now, it is that class of thing that the law was intended to remedy and prevent."

If we assume this illustration to apply to grocers "similarly situated," and the company was or should have been under the conditions able to serve both without preferring one over the other, it was not misleading. But this can not be indulged in in view of the definition of "discrimination" which immediately followed. Upon this subject the court said:

"In determining whether there was discrimination or not as against this man in the territory where he was situated, you may look to the testimony, and consider the situation in that locality. Had the company furnished other men on application for service in that locality when their cable lines or cables were filled? Could they make arrangements to supply other men, and did they do it? Or, on the other hand, did they treat them all alike when that condition of things appertained? This statute here has made no ex-

ception wherein the company might exercise its discretion to furnish one class of citizens—one citizen who happened to be in distress—and deny to somebody else. There is nothing written in the law about that, and I can't therefore charge you that the law is that way, but we take the statute, as I said, as it is here."

The effect of this was to cut up by the roots the defense of the plaintiff in error growing out of the evidence as to the usual and customary method of conducting the telephone business. The undisputed evidence showed that the Cumberland Telephone Company had constituted and maintained a telephone exchange in the center of the city. To furnish direct line service, which was the service the defendant in error applied for, it is necessary to provide for the exclusive use of each patron two wires having their termini at the central exchange and at the place where the service is desired. Necessarily all of these direct service wires converge at this exchange. Where, as at Memphis, service is supplied to thousands of patrons, these converging wires are numerous. There was an ordinance which required all such connecting wires to be placed in conduits underground, and thus carried through the business district of the city as defined by law. In compliance with the practice and the most efficient system adopted by such companies, those parts of the city which this company proposed to serve were divided into service districts, and the wires serving that district were bunched into one or more cables and inclosed in lead and in this condition carried underground to the border of the conduit district. The plaintiff below lived five blocks north of Poplar street, and was within the area served by the Poplar and High street cable, which came out of the ground at Poplar and was thence run up a pole at that point and became a part of the aerial system. At a convenient point this cable is run into a cable box situated upon one of the company's poles, from which box were distributed the various wires supplying the various telephones within this cable district. In this manner the wires were carried from the exchange to convenient points of distribution. When the wires carried in such a cable were all in use the cable was said to be full, and new patrons could not be supplied with direct service until another cable could be constructed and carried to a point of distribution or until some pair of wires became vacant by a telephone being given up. The cable supplying the district in which the defendant in error lived was full when he made his application, and there were a number of applications for service in advance of his. The practice and rule of the company was to serve applicants in the order of their application. This was necessary to prevent discrimination. There was conflicting evidence as to whether defendant in error was advised that the cable was full, and that he could not be served until those ahead of him had been, and none supplied until wires were given up or the company's facilities enlarged by new construction. He does, however, admit that, after some delay had occurred, he was informed that the delay was due to want of cable capacity to supply him at once. The evidence was that the plan and method upon which the Cumberland Company conducted its business was up to date, and in accord with that used by the best managed companies. There was some evidence showing that other applicants were served while defendant in error was kept wait-

ing. But all such service was to parties applying for a party line. This kind of service is where a number of telephones are served by one pair of wires with which every party on the pair is connected by individual wires. That plan is very inconvenient, and much cheaper. Defendant in error could have had that kind of service without delay. That he did not want. His application was for "direct" service, by which is meant the exclusive use of a pair of wires running into the exchange through the local cable. There was, therefore, no sort of discrimination in supplying other applicants with party wire service, and defendant in error made no point on this. Neither was there any evidence that any later applicant, within his service district, was supplied with direct service, on any plan after Kelly's application was received.

What, then, was the basis for the claim of a violation of this statute? For one thing it is said that, during the time of delay, other applicants in other parts of the city were given connection. But as these other applicants were within other cable districts in which the cables were not congested, this cannot be said to be a discrimination. This is not evidence of partiality shown them, and was not a discrimination against Kelly, who was not similarly situated. Of course, if we are to construe this statute as one which overrides the business methods under which the company carried its wires in cables to the different areas to be served, distributing the wires from stations conveniently located within such business or cable districts, then, to serve any applicant anywhere ahead of Kelly, would be an illegal discrimination. But such a construction would lead to most unjust results, and practically destroy every such company. If such a company, in good faith, determines for itself the limits within which it will conduct such a business, and if in accordance with the usual and approved methods of well-managed companies, it divides that area into districts to be served by wires carried in cables to a point within it convenient for distribution, there is no discrimination at common law or under the statute, unless an applicant within a particular district is discriminated against and others served within the same general area, in like situation and under like conditions with himself. This was the view of the matter entertained by the court below, for the jury were instructed that the question of discrimination depended upon the conduct of the company in "the territory where he was situated," and the case was made to turn by the charge upon the question, "Had the company furnished other men on applications for service in that locality when their cable lines were filled?" "Could they make arrangements to supply other men and did they do it? Or, on the other hand, did they treat them all alike when that condition of things appertained?" The suggestion made here in argument, that it was the immediate duty of the company to provide additional wires if all those in the existing cable were in use, and that the failure to do this was a discrimination under the statute, was not by any charge given or refused raised below, and is only relevant here as arising under the alleged general purpose of the statute to compel the service of all applicants regardless of conditions and methods of carrying on such a business. We have already expressed our view of this above. There might be much in the sugges-

tion, if the business of the company had been carried on by giving to each applicant an aërially supported pair of wires running direct from the exchange to each private telephone. If it had also appeared that it was the practice and custom of the company to put up such a pair of wires whenever service was required, there would be evidence tending to show discrimination if such connection should be denied or unduly delayed to one and furnished to others. That method of doing business, as we may judicially take notice, does prevail where the patrons are few in number. But there was evidence tending to show that where the patrons run up into the thousands, the cable system, to avoid confusion of wires, becomes necessary for efficient service. In Memphis the city ordinance compelled the wires to go underground through the business part of the city, and this, aside from other considerations, involved the carrying of the wires deemed necessary for the business of a particular district in leaden covered cables and their distribution from a box conveniently situated within the district. If the cable in a particular district should become congested it was usual, if the new business promised a fair return, to carry another cable to the same district and make a new point of distribution.

Telephone companies, like similar quasi public corporations, are under a general common-law obligation to supply reasonably adequate facilities for supplying the service which they hold themselves out to do. This obligation, in a proper proceeding, may be enforced by compelling an enlargement of the plant, or by an action for damages due to disregard of this duty. The principle applicable to common carriers proper is sufficiently stated with its qualifications in 5 Am. & Eng. Cyc. of Law, 167, 168, and many illustrative cases are cited. But we cannot conceive that this common-law obligation is within the intent and purpose of this severe penal act. If, as we have before stated, the business of the company was conducted by individual wires aërially supported between the exchange and the telephones of the patrons, and it was its usual custom to string a pair of wires upon the plant already provided when a new customer desired a telephone, a very different question would be presented. There was evidence tending to show that to put in a new cable in order to serve Kelly would have taken some weeks at least, and would have cost the company about \$7,000, if such a cable was strung as they were using. We cannot believe that the Tennessee Legislature ever intended that the common-law duty of providing facilities reasonably adapted to the business which might have with reason been anticipated should be enforced by the imposition of an arbitrary penalty of \$100 per day from the time when such connection might have been supplied had the company's cable capacity not been full. This construction would operate to ruin any ordinary company, with profit only to such as might choose to prosecute a penal action against them. No such construction ought to be placed upon such a penal statute if it be susceptible of a more just and reasonable one. This we have no difficulty in doing, inasmuch as we regard the statute as intended only to prevent a partial and discriminating service, having regard to the capacity of the company, and the usual and customary method under which its operations were conducted. The learned trial judge evidently held

this view of the law, for he made the case turn upon whether, notwithstanding a full cable in Kelly's district, the company had supplied other persons in that locality, and might have served him in the same way. But the charge upon this aspect of the case was misleading, as it drew no distinction between a direct and a party service. The jury might well from the evidence have found that other men in the same district had been supplied with party lines. But this would not have been a discrimination, inasmuch as that was not the service Kelly had asked for.

There was also some evidence tending to show that the company had a method of making a "direct" connection, for applicants residing within the area served by a cable which was congested, known as "backing up" or "jumping wires." There was also evidence that the company sometimes "split a pair of wires" to make a connection. Splitting a pair of wires was done when by electricity some of the wires in a cable were disabled, leaving others effective. When one good wire of a pair was connected with another good wire of another pair this was called "splitting a pair." Kelly contended that he might have been given a connection in the same way and that the failure of the company to so connect him was a discrimination. To avoid such a conclusion the company gave evidence tending to show that splitting a pair could only be done when there were two bad pair to split, and that as it involved the loss of a pair of wires, was not resorted to except in extraordinary circumstances. "Jumping a wire" or "backing up" consisted in taking a pair of unused wires from a cable supplying another area or cable district and carrying it aërially into the cable box of another district from which they were extended to the phone to be connected. The evidence of the company, as well as that of the plaintiff, tended to show that this was an impracticable method by which the wires from one cable get mixed up with those from another, making it difficult to discover wires "in trouble." The general manager of the company described it as a method by which the central exchange is likely to get into "a general mess." As a deleterious plan tending to affect the efficiency of the general service it was forbidden by the general manager of the company. There was, however, evidence tending to show that the manager of the Memphis branch allowed it to be done upon special application and permission in cases of serious sickness in a family making an immediate connection emergent. If making a direct connection by this unusual and deleterious plan was not resorted to capriciously and as a disguise for partiality, but under an exception grounded upon general and reasonable conditions, applicable to all in like circumstances, it would not constitute that intentional discrimination forbidden by the statute. The defense presented by the evidence referred to was proper to have gone to the jury under a proper instruction as to its effect. The charge of the court effectually excluded the defense from the jury, and was therefore error. To constitute a discrimination it would devolve upon a plaintiff to show that he had been denied a connection by one or other of the unusual methods of connection referred to, although he had brought himself within the conditions under which that practice was resorted to.

We do not consider it necessary to consider other assignments, as what we have said is enough to indicate our view of the act, further than to say that the admission of evidence tending to show that there was some ill feeling between the telephone company and a brother of the plaintiff below was erroneous and prejudicial.

Judgment reversed, and remanded for a new trial.

CLINGMAN v. MILLER et al.

(Circuit Court of Appeals, Eighth Circuit. March 6, 1908.)

No. 2,647.

1. **BANKRUPTCY—TRANSFER OF PROPERTY BY BANKRUPT—CREDITOR.**

A car load of eggs was shipped to a dealer a short time before his bankruptcy to be delivered on payment of a draft attached to the bill of lading. In some way the bankrupt obtained delivery of the eggs without the bill of lading or payment of the draft and converted the same to his own use. The shipper thereupon demanded payment and received certain other property in settlement. *Held* that, whether he be considered as making the demand as damages for the conversion or as waiving the conversion and affirming the sale, he was in either case a creditor at the time the property was transferred to him in payment of his claim, whose debt was provable in bankruptcy.

2. **SAME—ACTION BY TRUSTEE TO RECOVER PROPERTY TRANSFERRED—QUESTIONS FOR JURY.**

A bankrupt a short time before proceedings in bankruptcy were instituted against him, being insolvent, executed a general assignment for the benefit of his creditors under the law of Kansas. On the same day, at practically the same time and while the assignment papers were being prepared, he transferred certain property to one of his creditors. Gen. St. Kan. 1899, § 342, provided that "every voluntary assignment * * * made by a debtor to any person in trust for his creditors shall be for the benefit of all the creditors of the assignor," and under such statute as construed by the Supreme Court of the state an insolvent debtor engaged in making a general assignment cannot at the same time, although by a separate instrument, make a valid preference in favor of one creditor. Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), provides that all transfers of property made by an insolvent debtor within four months prior to his bankruptcy which are null and void as against his creditors by the laws of the state shall be null and void under the act, and the property may be reclaimed by his trustee. *Held*, in an action by the bankrupt's trustee against the creditor to recover the value of the property so transferred, that the evidence required the submission to the jury of the question whether the transfer was substantially a part of the same transaction as the assignment so as to render it void under such statutes.

In Error to the District Court of the United States for the District of Kansas.

Plaintiff in error as trustee in bankruptcy of the estate of W. H. Pendleton, a bankrupt, brought this suit at law in the court below against Miller & Co., for the purpose of recovering the sum of \$1,860 the alleged value of 400 cases of eggs which the petition alleged had been transferred by Pendleton to Miller & Co., under such circumstances as to render such transfer voidable under section 60b of the bankruptcy law, or under such circumstances as to render such transfer null and void under section 67e of said law (Act July 1, 1898, c. 541, 30 Stat. 562, 564 [U. S. Comp. St. 1901, pp. 3445, 3449]). The case came on for trial before the court sitting with a jury, and at the close of the plain-

tiff's evidence a demurrer was interposed thereto and sustained by the court, whereupon a verdict was directed by the court in favor of the defendants. An exception was taken to the ruling of the court on the demurrer to the evidence and the only question for review is, did the court err in making said ruling?

The uncontradicted evidence introduced on the part of the plaintiff at the trial showed the following facts: W. H. Pendleton was adjudged a bankrupt by the United States District Court for the District of Kansas, June 6, 1904, and July 15, 1904, plaintiff in error was appointed trustee of his estate. Pendleton was insolvent on April 23, 1904, and continued so to be until the date of his adjudication in bankruptcy. On May 4, 1904, Pendleton made, executed and delivered to H. S. Clark of Lawrence, Kan., a deed of general assignment for the benefit of his creditors which was duly accepted by Clark and filed for record as required by law on the same day at 9:30 a. m. In regard to this assignment Pendleton testified: "Q. Now at the time you made this exchange of bills of lading for the two cars of eggs, state whether or not you had executed this deed of assignment to Mr. Clark? A. I do not think it had been executed. It was very near the time, possibly within an hour either way. Q. You may state what, if anything, had been done preparatory to making a deed of assignment before you delivered the bill of lading to Mr. Miller? A. I think probably I had been working on it some; I had been trying to get money. Q. I am asking about the execution of this deed of assignment. What had been done about that, if anything? A. I don't remember just what had been done, but I must have been working on it; the list must have been worked on. Q. How many creditors were there at that time, during these days, pressing for payment of their debts? A. I understood there were six or eight. Q. I will ask you if it is not a fact that drafts drawn upon you by your various creditors were being presented during this time and going to protest in the banks in Lawrence? A. Yes, sir. Q. Was there anything said by you to Mr. Miller in regard to your financial condition? A. I told Mr. Miller I was short of funds; yes, sir. Q. At that time? (May 4, 1904.) A. Yes, sir. Q. What efforts did you make, if any, to keep out of Mr. Miller's way? A. I was being pressed at that time for money, and I was making an effort to get it, and was not at my office very much."

April 23, 1904, Miller & Co., shipped to the order of Pendleton to be delivered to him at Chicago, one car of eggs, upon payment of a draft for the amount due on the car, said draft being attached to the bill of lading. Except for the incident of the draft being attached to the bill of lading, the sale of the eggs was intended to be a cash transaction by Miller & Co. On April 27 or 28, 1904, the car load of eggs above mentioned reached Chicago. Pendleton sold this car of eggs to J. Dixon Avery & Co. of Chicago, and in some way obtained the same from the railroad company without payment of the draft drawn by Miller & Co. The draft was subsequently protested for non-payment and returned to Miller & Co., at Hanover, Kan., together with the bill of lading. Pendleton lived at Lawrence, Kan. The proceeds of the car of eggs amounting to \$1,930 or \$1,940 was received by Pendleton and went into his general estate. On May 4, 1904, Mr. Miller of the firm of Miller & Co., was at Lawrence, Kan., for the purpose of getting payment for the car of eggs shipped Pendleton. Pendleton had on May 2, 1904, shipped a car of eggs to Chicago for which he had still the bill of lading and as he could not pay Miller & Co., the money for the car of eggs sold him by Miller & Co., Miller & Co. and Pendleton agreed to exchange bills of lading, Pendleton taking the bill of lading with the protested draft attached, and Miller taking the bill of lading for the car shipped May 2d. The car of eggs for which Miller on May 4th received the bill of lading was worth \$1,860. There was no evidence sufficient to sustain a finding by the jury that Miller & Co. knew that Pendleton was insolvent on May 4, 1904, or that Miller & Co. had reasonable cause to believe that Pendleton intended to prefer them as creditors, or that Pendleton was about to make a deed of assignment for the benefit of creditors. It is to recover the value of the car load of eggs that this suit was brought. There was proof of demand upon Miller & Co. by the trustee, and that the assets in the hands of the trustee would not pay the debts of the estate.

Clifford Histed (W. S. McClintock and Harkless, Crysler & Histed, on the brief), for plaintiff in error.

George J. Barker and John Q. A. Norton, for defendants in error.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge (after stating the facts as above). The claim that Miller & Co. were not creditors of Pendleton at the time of the transfer of the car of eggs on May 4, 1904, arises out of an erroneous view as to the character of the claim which Miller & Co. then had against Pendleton. No doubt Miller & Co. intended the sale of the car of eggs sold on April 23, 1904, to be for cash. The sale of the eggs, however, was defeated by the unlawful conversion of the car of eggs by Pendleton without payment of the draft attached to the bill of lading, as the payment of the draft was a condition precedent to the passing of the title from Miller & Co. to Pendleton. The claim, therefore, that Miller & Co. were pressing for payment on May 4, 1904, was a claim which though amounting to the same sum in amount was not for the purchase price of the eggs, but for damages for the unlawful conversion of property. Miller & Co. having elected to receive payment for these damages instead of endeavoring to recover the eggs themselves cannot be heard to say that they were not creditors of Pendleton on May 4, 1904, and the owners of a claim against Pendleton provable in bankruptcy, which had existed since the date of the conversion of the eggs by Pendleton. If we take the position that Miller & Co. had the right to waive the tort and treat the sale as valid, we are in no better position, for that would ratify the delivery of the eggs without payment, and constitute Miller & Co. creditors beyond question.

Treating Miller & Co. as creditors, therefore, we find no evidence in the record sufficient to sustain a finding by the jury that Miller & Co. on May 4, 1904, had reasonable cause to believe that a preference was intended by the transfer to them of the car of eggs by Pendleton. This destroys any cause of action based upon section 60b of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]). There is also no evidence in the record which would, independent of the laws of Kansas, sustain a finding of the jury that the transfer of the car of eggs by Pendleton to Miller & Co. was made with the intent on the part of Pendleton to hinder, delay, or defraud his creditors under the first clause of section 67e of said law (30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]). *Coder v. Arts*, 152 Fed. 943, 82 C. C. A. 91; *Kingsbury v. Bank*, 71 Kan. 570, 81 Pac. 187.

We now come to the serious question in the case. Is there evidence in the record which would have supported a finding by the jury that the transfer of the car of eggs by Pendleton to Miller & Co. on May 4, 1904, was made by Pendleton simultaneously with and as a part of the transaction which resulted in the making of the deed of general assignment for the benefit of the creditors of Pendleton, and with the intent on his part to evade the provision of the statute of Kansas

which prohibits any preferences in deeds of general assignments? If this question be answered in the affirmative, then we think the judgment below must be reversed. The law from which this cause of action arises is as follows: The last clause of section 67e of the bankruptcy law provides that all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situated shall be deemed null and void under said law against the creditors of such debtor, if he shall be adjudged a bankrupt, and such property shall pass to the trustee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.

Section 342, Gen. St. Kan. 1899 (section 346, Gen. St. 1905), provides as follows:

"Every voluntary assignment of lands, tenements, goods, chattels, effects and credits made by a debtor to any person in trust for his creditors shall be for the benefit of all the creditors of the assignor, in proportion to their respective claims; and every such assignment shall be proved or acknowledged and certified and recorded in the same manner as is prescribed by law in cases wherein real estate is conveyed."

In *Hardware Co. v. Implement Co.*, 47 Kan. 423, 28 Pac. 171, it was held under the above section that a debtor in failing circumstances engaged in making a general assignment of his property for the benefit of all his creditors cannot at the same time make valid preferences of certain of his creditors by chattel mortgage or otherwise. In this case a chattel mortgage given by T. C. Ritter & Co., an insolvent firm, on the same day that the firm made a general assignment for the benefit of creditors, was held null and void. In this case also the Supreme Court of Kansas quotes and approves the following language from *Shillito v. McConnell*, decided by the Supreme Court of Indiana, 130 Ind. 41, 26 N. E. 832:

"While it cannot be said that the debtor has in fact surrendered dominion over his property until the assignment is complete, as from the purely voluntary nature of the transaction he may at any time before the final act change his mind and refuse to complete it, yet, being completed, we think it ought to be held to relate back to the time when it was actually commenced, and cover all intervening transactions. The act of making the assignment embraces the preparation and execution of the necessary instruments; and whether that takes a long or a short time, it certainly must all be treated as one continuous act. To say that the debtor's surrender for his absolute control over the disposition of his property is to be dated from the time he actually commences to make the assignment, is to give to the entire transaction the character of good faith, and make it in fact what it purports to be, an effort to secure to all his creditors that equal consideration contemplated by the statute. But to hold that while he is thus engaged he may at the same time successfully prefer favorite creditors is to hold that he may at one and the same time do two exactly contradictory acts. It is to hold that he may be engaged in making a voluntary assignment for the benefit of all his creditors, insuring the equal distribution of all his property among all of them, without preference, and also in securing to some of these creditors payment in full of their claims to the exclusion of others; something as difficult of accomplishment as the equestrian feat of riding two horses in opposite directions at the same time."

In *Watkins National Bank v. Sands et al.*, 47 Kan. 591, 28 Pac. 618, the Supreme Court of Kansas, in construing the above section, said:

"An examination of the testimony leads us to the conclusion necessarily reached by the District Court that Sands acted throughout in good faith and without fraudulent purpose. The debts which the mortgages were given to secure appear to be actual and bona fide, and the debtor's purpose seems to have been to devote all his property to the payment of his debts. If the assignment and mortgages were made in good faith and without actual intent to defraud or defeat creditors, the fact that they were informal or irregular is not alone sufficient to sustain an attachment. While the debts are to be treated as bona fide and the conveyances as having been made in good faith, it does not follow that the mortgages are to be upheld, nor that the mortgagees are to be treated as preferred creditors. It is true and has frequently been held that a debtor in failing circumstances may prefer creditors so long as he retains the control and disposition of his property by the payment of money or property or by securing such creditors providing the payment is made, or the security given in good faith. Such honest preference may be given at any time prior to the making of an assignment. If however, the mortgages are prepared and executed in connection with the deed of assignment and substantially at the same time, then all should be treated as a single and continuous transaction, and nothing could be taken under the mortgages."

In *Jones v. Kellogg*, 51 Kan. 263, 277, 33 Pac. 997, 37 Am. St. Rep. 278, the same court said:

"While there is nothing to show that any real or actual fraud intervened, yet it is the opinion of this court, from the findings and the evidence, that the mortgages and the deed of assignment were executed at substantially the same time, and as parts of substantially the same transaction. They were all drawn up the same day, to wit, November 28, 1886, were all dated the same day, to wit, November 29, 1886, and were all executed in pursuance of a single determination formed by Townley to execute them; and this determination was not entertained by him until the day on which they were drawn up to be executed; and therefore, under the following decisions, both the mortgages and the attachment must be held to be absolutely and entirely void."

In *Goodman v. Kendall*, 56 Kan. 440, 43 Pac. 687, it was held that, where an insolvent debtor executes to two of his creditors chattel mortgages substantially at the same time that he executes a general assignment for the benefit of his creditors so that the execution of all constitutes a single transaction, no preference can be rightly claimed under the mortgages. The validity of the transfer of the car of eggs from Pendleton to Miller & Co. under the circumstances detailed in the record must both by the provision of section 67e and general law be determined by the laws of Kansas. We may, however, look to decisions of other courts upon similar statutes for instruction. The statute of Iowa as set out in *South Branch Lumber Co. v. Ott*, 142 U. S. 626, 12 Sup. Ct. 318, 35 L. Ed. 1136, is as follows:

"No general assignment by an insolvent, or in contemplation of insolvency, for the benefit of creditors, shall be valid unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims."

The Supreme Court of the United States in this case after reviewing the Iowa decisions held that the following propositions had been established by said decisions, relative to said law:

"Second, several instruments executed by a debtor, at about the same time, may be considered as part of one transaction, and in law forming but one in-

strument; and if, as thus construed, they have the effect of a general assignment with preferences, they are within the denunciation of the statute. *Burrows v. Lehdorff*, 8 Iowa, 96; *Cole v. Dealham*, 13 Iowa, 551; *Van Patten v. Burr*, 52 Iowa, 518, 3 N. W. 524. And, third, that although several instruments may be executed by the debtor at about the same time, they do not necessarily create one transaction or are to be considered as one instrument; and whether they do or not, and whether they come within the denunciation of the statute, depend upon the character of the instruments, the circumstances of the case, and the intent of the parties. *Lampson v. Arnold*, 19 Iowa, 479; *Van Patten v. Burr*, 55 Iowa, 224, 7 N. W. 522; *Perry v. Vezina*, 63 Iowa, 25, 18 N. W. 657; *Gage v. Parry*, 69 Iowa, 605, 29 N. W. 822; *Garrett v. Plow Company*, 70 Iowa, 697, 29 N. W. 395, 59 Am. Rep. 461; *Bolles v. Creighton*, 73 Iowa, 199, 34 N. W. 815; *Loomis v. Stewart*, 75 Iowa, 887, 39 N. W. 600."

In applying the law of Iowa as thus found to be to certain facts, the court in the same case said:

"With respect to the three other matters, there is more of a question. It appears that on the 12th of April, on receipt of a statement of account, Francis Beldler, the representative of the appellant, came to Davenport to investigate the situation. The outcome of that investigation was not satisfactory. A demand was made for a reduction of the indebtedness. The plain import of the interview was that things could not continue as they had been. Two or three days before the assignment the bank with which Ott had been doing business for a series of years, and which had been discounting his drafts before acceptance, and which was at such time carrying about \$11,000 of such drafts, intimated that it must have acceptances before discounting. His son, who was his principal salesman, his only traveling man, returned from one of his trips. While ordinarily selling from \$18,000 to \$20,000, his sales on that trip had practically amounted to nothing. Strikes in the Southwest were significant of labor troubles, and shadowed the business outlook. With these accumulating facts, evidently Ott began to think that the end of his business career, at least so far as his present undertakings were concerned, was at hand. On the day before the assignment he gave to one Mueller, to whom he owed about \$9,000, drafts on his customers for goods sold to the amount of \$1,239.46. On the same day he gave to McClelland & Co., to apply on a debt of \$900, a like draft to the amount of \$660.80; and on the very morning of the assignment he sent a letter to George F. White, the agent of the railroad company, notifying him that he might hold four car loads of glass, then in the possession and on the tracks of the railroad company, as security for a balance of between eight and nine hundred dollars of freight due. Now, these transactions were but shortly prior to the assignment. They were in a general sense contemporaneous with it. They took place when Ott was conscious of the impending danger of the closing out of his business, and they operated as preferences to these creditors. They were so nearly related in time to the assignment, and made under such circumstances, that if in an action at law and under proper instructions the question had been submitted to a jury whether they were made with a view to an assignment, and to evade the statute, and the verdict had been in the affirmative, it would be difficult to say that such verdict was not warranted by the testimony."

In the present case the evidence showed that Pendleton was insolvent on May 4, 1904, and that he must have known it. He made the transfer to Miller & Co. substantially at the same time he made the deed of assignment. Knowing that he was insolvent, he knew that the transfer to Miller & Co. created a preference. He is charged with a knowledge of the law, and hence knew that he could not prefer any creditor in his deed of assignment. He was being pressed by his creditors. Drafts upon him were being protested at the bank. He was short of funds, and could not raise money. He told Miller & Co. so. He must be presumed to have intended the reasonably to be expected

results of his acts. The law of Kansas does not prohibit preferences, but it does say that if a debtor makes a deed of general assignment for the benefit of his creditors he must treat all alike, and that he cannot evade this prohibition of the statute by making simultaneously with the deed of assignment a separate transfer which creates a preference. The preference would be void if contained in the deed of assignment, and it is no less so because made outside of it, but at the same time and as a part of the same transaction. The intent of Pendleton is the true and guiding principle. As was said in *Lumber Co. v. Ott*, supra, at page 630 of 142 U. S., page 321 of 12 Sup. Ct. (35 L. Ed. 1136):

"With what intent did Ott in this case execute the various instruments prior to the general assignment? Was he intending a general assignment, and seeking to evade the statute, and to give preferences by other instruments? Or was he, finding himself involved and likely to be closed out by some of his creditors, simply preferring some, uncertain as to what disposition he should make of the balance of his property after they had been secured?"

The knowledge, or want of knowledge, of the purpose and intent of Pendleton at the time of the transfer by Miller & Co. is immaterial under the laws of Kansas; otherwise, the prohibition of the statute would be rendered useless.

In *Bank v. Sands*, supra, the fact that certain creditors lived in towns distant from the debtor and had no knowledge of the execution of certain mortgages seems to have been advanced as an additional reason for holding the mortgages void. We think the facts appearing in the record entitled the trustee to go to the jury, and had the jury found in his favor under proper instructions, we also think such finding would have been sustained by the evidence.

For the error in directing a verdict against the plaintiff, the judgment is reversed, and a new trial ordered.

SOUTHERN RY. CO. v. KING (two cases).

(Circuit Court of Appeals, Fifth Circuit. March 3, 1908.)

Nos. 1,634, 1,635.

1. ACTION—INJURY TO PERSON AND PROPERTY—CAUSES OF ACTION.

Where a wife was injured and her husband was killed in the same railroad crossing accident, the fact that the wife did not join her cause of action for the death of her husband with an action for her own injuries did not preclude her subsequent maintenance of an action for her husband's wrongful death, under the rule that, where injuries to the person and the personal property of the injured person grow out of a single tort, the tort to the person and the property constitutes but a single cause of action, the husband not being the "personal property of the wife."

2. SAME—SUITS IN DIFFERENT CAPACITIES.

The rule against splitting a cause of action has no application where the injury is suffered in a different capacity, or by different persons, as where a wife sustains injuries to her person in the same railroad accident in which her husband was killed, the damages recoverable for her own injuries being her separate property, while those recoverable for the death of her husband under the Georgia law constitute a trust fund for the benefit of the husband's heirs.

2. RAILROADS—ACCIDENTS AT CROSSINGS—NEGLIGENCE—CARE REQUIRED—“WOULD”—“SHOULD”—INSTRUCTIONS.

An instruction that the care required of a person approaching a railroad crossing is such as an ordinarily prudent person “would exercise” was equivalent to such as an ordinarily prudent person “should exercise,” the words “would” and “should” in that connection being synonymous, citing *Words and Phrases*, vol. 8, p. 1527.

4. COMMERCE—SUBJECTS OF REGULATION—RAILROADS—OPERATION OF TRAINS—CROSSINGS—SPEED.

Civ. Code Ga. 1895, § 2222, requiring locomotive engineers to simultaneously check and keep checking the speed of their trains so as to stop in time should any person or thing be crossing the track on said road at a public road crossing, was not invalid in so far as it applied to trains engaged in interstate commerce, as an invalid regulation thereof by the state, but was within the state's police power to provide regulations for public safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, § 79.]

5. COURTS—FEDERAL COURTS—PRACTICE—EVIDENCE—ADMISSIBILITY—APPLICABILITY TO PLEADINGS.

Under the laws of Georgia, requiring the invalidity of a statute if relied on to be alleged by special plea, and Rev. St. § 914 [U. S. Comp. St. 1901, p. 684], requiring the pleadings in federal courts in actions at law to conform to the practice of the state court, an interstate railroad was not entitled to offer evidence to show that Civ. Code Ga. 1895, § 2222, requiring the checking of trains on approaching public crossings in time to avoid injuring any person or thing on the crossing, was invalid as an unreasonable regulation of interstate commerce, where such objection was not pleaded.

[Ed. Note.—Conformity of practice in federal courts in common-law actions to that of state courts, see notes to *O'Connell v. Reed*, 5 O. C. A. 594; *Nederland Life Ins. Co. v. Hall*, 27 C. O. A. 392.]

6. APPEAL AND ERROR—SCOPE OF REVIEW—INVALIDITY OF STATUTE.

The invalidity of a statute cannot be considered on a writ of error unless the record shows that the question was distinctly raised in the pleadings in the trial court.

7. RAILROADS—CROSSING ACCIDENT—NEGLIGENCE.

If a person about to go on a railroad crossing sees, hears, or otherwise knows of the approach of the train in time to avoid injury, the railroad's failure to give a statutory warning of the approach of a train would not constitute actionable negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1094.]

8. TRIAL—INSTRUCTIONS—PREJUDICE.

In an action for injury and death at a railroad crossing, an instruction that defendant's failure to give statutory signals of the train's approach to the crossing constituted negligence as a matter of law was rendered harmless to defendant by a further charge that, notwithstanding defendant's negligence in failing to comply with the statute, there could be no recovery if the persons injured and killed by the exercise of ordinary care could have avoided the consequences of defendant's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

In Error to the Circuit Court of the United States for the Northern District of Georgia.

Jno. J. Strickland, for plaintiff in error.

Reuben R. Arnold and Harvey Hill, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and BURNS, District Judge.

BURNS, District Judge. These suits were brought in the superior court of Habersham county, state of Georgia, against the Southern Railway Company, and were removed by the latter to the United States Circuit Court. Mrs. King sought recovery for the death of her husband, and Inez, a minor, sued by next friend for personal injuries which she had sustained. The grounds of negligence set out in both petitions are practically the same. Mrs. King alleging that, on the day of the accident, "your petitioner, her daughter, Inez, about 14 years old, and her husband, A. O. King, were in a buggy drawn by a mule, traveling on a public road, and while crossing the track of said railway at what is known as the 'Wade Crossing' the vehicle was struck by the locomotive; that in the approach to said crossing the track was obscured by trees, brush, and a high bank; that the approaching train was not discovered until they were upon the track; that the speed of the train was fifty miles an hour; that the death of A. O. King and the injuries received by petitioners were due to the negligent manner in which the train was operated, the high rate of speed, and failure to give any warning." The petitions further aver that "the defendant's agents failed to blow the whistle at the blow post; and failed to simultaneously check and keep checking the speed of said train as it approached said crossing, so as to stop in time, should any person or thing be crossing said track."

The defendant, the railway company, filed its answer denying each and every paragraph of plaintiff's petition, and thereafter, with leave of court, pleaded by amendment that at the time of the accident for many years prior thereto, and now, the defendant operates and controls a line of railway from the city of Washington, D. C., through the states of Virginia, North and South Carolina, into and through Georgia; that said railway forms a continuous line under the act of Congress, for the purpose of facilitating commerce among the several states, and the postal and military communications of the United States, and to that end for the purpose of carrying passengers, freight, mails, troops, and supplies from one state into another; that said train was a through train made up in the city of Washington, carrying mail, express, and passengers from one state into another, and doing an interstate business, under the authority and control of the Congress of the United States; that the statute of Georgia providing that "there must be fixed on the line of said road, at the distance of 400 yards from the center of each of said crossings and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts to blow the whistle of the locomotive until it arrives at the public crossing, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road," is inoperative as to defendant's trains, for that it is in violation of section 8, art. 1, of the Constitution of the United States, which gives to Congress the right to "regulate commerce with foreign nations and among the several states"; that said statute is not a reasonable regulation of the police power, but a direct burden upon and impediment to interstate traffic, and impairs the usefulness of defendant for the conduct of such business; that it is impossible to observe said statute and carry the mails

under the contract which defendant has with the government, and the observance of said statute renders it impossible to do an interstate business.

Mrs. King, about the same time, filed suit in Habersham county seeking compensation for the injuries to her person, and, the amount claimed as damages not being within the jurisdiction of the said federal court, trial was had in the superior court of said county, resulting in a verdict for \$1,000. On appeal, the judgment was affirmed by the Supreme Court of the state of Georgia. See *King v. Ry. Co.*, 126 Ga. 794, 55 S. E. page 965, 8 L. R. A. (N. S.) 544. Upon motion and agreement of counsel, an order was entered consolidating the two causes of the mother and daughter, resulting in verdicts for the plaintiffs below, from which, and the judgments thereon, assignments of error are presented for review.

The records are identical in both cases with the exception that the railway company filed in the trial court a plea in bar against the petition of Mrs. King upon the ground that plaintiff having recovered in the state court for damages to her person is now estopped from maintaining the present action for the death of her husband. The contention is made that the injuries to the person of the wife, and the loss occasioned by the death of the husband, constitute a single cause of action, and that separate actions will not lie. This contention appears to be seriously made, but in the practice and procedure of the several states it would appear to be a legal novelty without law or precedent. If it be conceded that the deceased husband was the "personal property" of the plaintiff herein, then the contention would be supported by the decisions of every state court but one. Where injuries to the person and the physical property of the injured party grow out of a single tort, then, and in that event, the tort to the person and the property constitutes a single cause of action, and, as previously suggested, the same should be presented in a single suit. This is the English view, and the holding is the same in all of the American courts with one exception. The declaration that the husband is the "personal property" of the wife has not, as yet, received the sanction of court or text-writer. The rule as to a single cause of action has no application where the injury is suffered in a different capacity, or by different persons. In such cases there is, of necessity, two causes of action, and, when embraced in a single suit, a plea of misjoinder would be applicable. Damages recovered by the surviving wife for injuries to her person become her separate property, whereas in many states, and especially in Georgia, the recovery for the death of the husband becomes a trust fund for the benefit of the heirs of the deceased. It follows that the error complained of, by reason of the court overruling said plea, is without merit. Any other disposition would have been error.

The following instruction is assigned as error:

"I further charge you that the care to be exercised by the said A. O. King in approaching the crossing and railroad track is that care which an ordinarily prudent person would exercise for his own safety. What would, or would not, amount to negligence in the manner in which a person entered upon a railroad track would depend, to a large extent, upon the peculiar loca-

tion of the place at which he went upon the track. An ordinarily prudent person in the possession of all his faculties would not attempt to cross a railroad track at any place without using at least his sense of sight, if not that of hearing, to determine whether, at the time and place he was about to cross the same, there were present any of those dangers which a person of ordinary intelligence would reasonably apprehend."

This charge was given at the request of the defendant, with this exception, that the judge substituted the word "should" for "would" where it occurs in the last paragraph of the charge, and plaintiff in error contends that it changed the whole force of the charge. This assignment cannot be sustained. Instructing the jury that the care required is such that an ordinarily prudent person "would exercise" is equivalent to saying "should exercise"; the words "would" and "should" import the same meaning, and the best authorities use them interchangeably. *Blythe v. Birmingham Water Works*, 11 Exch. 781; *Words & Phrases*, vol. 8, p. 1527.

The action of the trial court in sustaining a demurrer to so much of defendant's answer, setting up, by amendment, the statute of Georgia governing trains in approaching a public road crossing, known as "the blow post and checking act," is assigned as error, and particularly the ruling as to the second clause thereof, which requires the engineer "to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road." This legislative act appears in the statement, and is known as section 2222 of the Civil Code of 1895, and was formerly section 708, Civ. Code 1882. The brief and argument of the plaintiff in error largely rests the disposition to be made here upon this assignment. An examination of the act complained against, and its construction by the courts of Georgia, will relieve it from the suggestion that it was enacted for the purpose of regulating interstate commerce. This statute was passed January 22, 1852 (Acts 1851-52, p. 108), and became effective on the 1st of February thereafter. The original act provided that blow posts should be erected at a distance of 200 yards from each public road crossing, and a sign at the crossing in large letters with the warning: "When You Hear the Whistle Blow, Look Out for the Engine." As amended, the distance of the blow post is 400 yards, and the warning sign has been eliminated. This enactment resulted from an accident to Mrs. Winn, her children and driver, which occurred at a public road crossing on the line of the Macon & Western Railway on December 14, 1851, resulting in the death of two of the children and the driver, and serious injuries to Mrs. Winn and one child, the limbs of the former being broken and the skull of the latter fractured. The catastrophe was of such a serious nature, that the General Assembly, then in session, promptly passed the act above referred to. This accident was the foundation of the cases of *Macon & W. R. Co. v. Davis*, 18 Ga. 679; *Macon & W. R. Co. v. Winn*, 19 Ga. 440; *Macon & W. R. Co. v. Winn*, 26 Ga. 250.

It being conceded, or rather found as a fact by this court, that the legislative intent was to protect travelers and others in the use of the public highways of Georgia, and not to regulate interstate traffic, it is still permissible, and ordinarily a matter of duty, to inquire what effect

the statute has upon trains engaged in interstate commerce, for the reason that the intent may be waived, or dismissed, and still the courts are not relieved from the necessity of ascertaining the practical effect of a particular act, for if it be conceded that the Legislature of a state is inhibited from passing any law which has the effect of regulating that which was directly committed to the nation in the adoption of the Constitution, it follows that duty would not be performed, short of the declaration, that such legislation is beyond the scope and power of the state. The authorities supporting this proposition may be found in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, decided as early as 1824, the opinion being by Chief Justice Marshall, and in all subsequent cases where the question was at issue, and particularly the case of *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166, where the earlier decisions are reviewed. If the act under discussion is but the reasonable exercise of the police power of the state, though it may effect and tend in a measure to regulate interstate commerce, it would not be obnoxious, nor a subject for inquiry by this court, until such time as the Congress may enact legislation covering this particular question. It appears to have been passed for the sole purpose of protecting those who may use public highways, and presumably has its classification under the police power relating to the public safety. It may be contended, however, that the safety of the public is so remotely involved that the effect of the enactment is unreasonable and places an undue burden upon the carrier. While this act in regard to its effect upon interstate commerce has never been presented to the Supreme Court of Georgia, as appears from an examination of the Reports of that state from volumes 18 to 128, the statute has frequently been construed in regard to local actions and uniformly upheld, though the Supreme Court of that state has seen proper to subject it to criticism.

In affirming the judgment in *Central of Georgia Railway Company v. Hall*, 109 Ga. 367, 34 S. E. 605, the Supreme Court makes the following observations concerning section 2222 of the Georgia Code:

"We agree with the learned counsel that this law which requires trains to check, and keep checking, when approaching crossings is a hard one, and that it is impossible for the railroads of the country to transact the business of the country and obey it. It was passed about 50 years ago, before the people appreciated the necessity of rapid transit in travel and in freight. If the law was duly obeyed by the locomotive engineers, I am informed that it would take 12 hours or more to run a passenger train from Atlanta to Macon, a distance of about 100 miles; still, it is the law of the land, and the courts must enforce it, however hard it may work upon the business interests of the country, if it should be observed, or upon the railroads when they violate it. Where the servants of the railroad company fail to observe it, and any person or property is injured upon the crossing, the company can make no defense, except that the injury was done by the consent of the person injured, or that he could have avoided the injury by the observance of ordinary care, or that his negligence contributed to it in the way of mitigation of damages."

In *Bowen v. Gainesville, etc., Ry. Co.*, 95 Ga. 688, 22 S. E. 695 (March 25, 1895), the Supreme Court, referring to the requirement to check, says:

"That requirement has frequently been construed to mean must have his train under such control, that he can bring it to a complete stop, if necessary, to prevent a collision upon the track itself, and, should it be strictly obeyed,

a collision of any sort would be rendered impossible, and there would be no necessity whatever for any warning of the approach of the train by the blowing of the whistle."

The question of the validity of state statutes and orders of State Railroad Commissions directing the stoppage of through interstate trains have frequently, within late years, been before the Supreme Court of the United States. One of the recent cases is that of *Mississippi Railroad Commission v. Illinois Central*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209, and *Atlantic Coast Line Railroad v. North Carolina Commission*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933. The last declaration by the Supreme Court is found in the opinion rendered December 9, 1907, in *Atlantic Coast Line Railroad v. Wharton*, 207 U. S. 328, 28 Sup. Ct. 121, 52 L. Ed. 328, in which Mr. Justice Peckham speaking for that tribunal uses the following language:

"That any exercise of state authority in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution is obvious. It hence arises that any command of a state, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order, the stopping of an interstate train at a named station or stations, if it directly regulates interstate commerce, is void."

In *Gladson v. Minnesota*, 166 U. S. 430, 17 Sup. Ct. 628, 41 L. Ed. 1064, it was said:

"The principles of law which govern this case are familiar, and have been often affirmed by this court. A railroad corporation created by a state is for all purposes of local government a domestic corporation, and its railroad within the state is a matter of domestic concern. Even when its road connects, as most railroads do, with railroads in other states, the state which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience, and comfort of the passengers and of the public. All such regulations are strictly within the police power of the state. They are not in themselves regulations of interstate commerce; and it is only when they operate as such in the circumstances of their application, and conflict with the express or presumed will of Congress exerted upon the same subject, that they can be required to give way to the paramount authority of the Constitution of the United States. *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 807, 333, 334, 6 Sup. Ct. 334, 29 L. Ed. 636; *Smith v. Alabama*, 124 U. S. 465, 481, 482, 8 Sup. Ct. 564, 31 L. Ed. 508; *Hennington v. Georgia*, 163 U. S. 299, 308, 317, 16 Sup. Ct. 1086, 41 L. Ed. 166; *New York, New Haven & Hartford Railroad v. New York*, 165 U. S. 628, 632, 17 Sup. Ct. 418, 41 L. Ed. 833."

The majority of the court are of opinion that *Gladson v. Minnesota*, supra, and authorities therein cited, sustain the constitutionality of the statute, that the same is a valid exercise of the police power of the state, and therefore the trial court did not err in sustaining the demurrer to the amended answer. The writer entertains the view that the statute is valid in so far as domestic corporations are concerned; but unreasonable and void as to trains engaged in interstate commerce. The business of the country must go on, and in the language of the Supreme Court of Georgia, in *Central Railway v. Hall*, supra, "it is impossible for the railroads to transact the business of the country and

obey it." Any exercise of state authority in whatever form manifested, which directly regulates, or the necessary effect of which is to regulate, interstate commerce is void. *Atlantic, etc., Ry. v. North Carolina, supra.*

Plaintiff in error excepted to the ruling of the court in excluding the testimony of Ben Dewberry, in charge of the engine at the time of the collision, in that said witness being called to testify in behalf of the defendant below, in response to a question from counsel, answered, "There are between 90 and 100 crossings on the Southern Railway between the South Carolina line and Atlanta." The question was objected to because incompetent, immaterial, and inadmissible with the observation by counsel, "I think the entire case should be confined to this crossing." Counsel for defendant stated:

"I expect to prove that between the South Carolina line and Atlanta there are practically 100 road crossings, or between 85 and 100 public road crossings; that the distance is 101 miles; that the crossings in some localities are very close together, and within a few hundred yards of each other, and at others further apart; the average making about a crossing to the mile almost. We expect to show further that to observe the statute, and check and keep checking, so as to have the train under control, and to stop, should any person or thing be on the crossing, would consume from 5 to 10 minutes at each crossing, depending upon the weight and length of train and grade. We wish to show that this train was made up and known as No. 39 vestibule train, which runs from the city of Washington through the states of Virginia, North and South Carolina, and Georgia; that it was carrying passengers from one state to another, and also carried an express car with freight. We expect to show that obedience to that crossing act would hinder and practically prevent interstate business being done by the defendant."

The objection was sustained, testimony excluded, and exception noted. We are of the opinion that there was no error in the action of the court in sustaining the objection, as the testimony was not properly admissible in the absence of pleading to support it. This view seems to have obtained with counsel for defendant below, as evidenced by the amendment filed and heretofore discussed. Pleadings of the parties are the allegations made by the parties to a civil, or criminal case, for the purpose of definitely fixing and presenting the issues to be tried and determined between them; and the facts from which the law draws the conclusion of nonliability must be pleaded in the answer, where they are not stated in the petition. Under section 914 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 684], it is provided that the practice, pleadings, forms, and modes of proceeding in civil causes, other than equity and admiralty, in the Circuit and District Courts shall conform, as near as may be, to the practice, pleadings, forms, and modes of proceeding existing in like causes in the courts of record of the state in which such Circuit and District Courts are held. The only object, and the avowed purpose of tendering this testimony, was to show the invalidity of the statute in so far as it related to trains engaged in interstate traffic, and this, without special plea, would not be permissible under the practice and pleadings obtaining in Georgia. See *Parham & Co. v. Potts-Thompson Liquor Co.*, 127 Ga. 303, 56 S. E. 460, and cases there cited. The validity, or invalidity of a statute, cannot be considered upon appeal, unless the record shows that the question was distinctly raised in the pleadings in

the court below. Savannah, etc., Ry. Co. v. Hardin, 110 Ga. 433, 35 S. E. 681.

A subsequent assignment complains of the refusal to direct a verdict for the defendant. The evidence was sharply in conflict, and the charge requested would have invaded the province of the jury.

The last assignment seeks to review the following paragraph of the general charge to the jury:

"Under the statutes of Georgia, gentlemen, which have been referred to, it is the duty of engineers of trains in Georgia when approaching a crossing, to blow the whistle, as stated to you by counsel, and to check, and keep checking their trains as they approach the crossing, so as to be able to stop them if any person or thing should be upon the crossing. That is the statute of this state, and it is entirely clear that they were not doing that in this case; so there is no question that the railway company, through its servants and agents, was guilty of negligence. I therefore instruct you as a matter of law that the defendant through its servants, agents, and employes was guilty of negligence."

This point is reserved, but the brief contains neither authority nor argument in support of the proposition. The failure to comply with a state statute is held to be negligence *per se* in Georgia and many other jurisdictions. The engineer testified that he sounded the whistle at the blow post 400 yards from the crossing, but did not continue to blow until the crossing was reached, and made "no effort to comply with the statute in any other particular," and only attempted to check his train when he realized the danger of collision. The object of blowing the whistle is to give timely warning of the approach of the train. It follows that, if a person about to go upon the crossing, sees, hears, or otherwise knows of the approach of the train in time to avoid injury, the object of the statute has been accomplished, and in that event failure to give the statutory warning would not be negligence. This view occurred to the trial court, and the record discloses that upon this point the jury was charged:

"If by the exercise of ordinary care and prudence the deceased could have ascertained by the use of his sense of hearing, and of sight, that the train was approaching, and thereby avoided the accident, his widow cannot recover in this action."

And, further:

"If you believe that King drove on the crossing without having stopped and listened, and if he had listened he would have heard the approach of the train in time to have avoided the injury, then I charge you that his widow cannot recover."

If the charge is error, which we do not concede, it is rendered harmless by the further charge, to wit:

"Notwithstanding the negligence of the defendant (in failing to comply with the statute), if the deceased, by the exercise of ordinary care, could have avoided the consequences of defendant's negligence his widow cannot recover."

The same rule was applied to the daughter, with the exception that the negligence of the father, if any, could not be attributed to her.

Upon the whole case, as made by the pleadings and testimony, the law was clearly presented, the assignments disclose no error, and the judgments should be in all things affirmed.

ELDER DEMPSTER & CO. v. MENGE

(Circuit Court of Appeals, Fifth Circuit. March 10, 1906. On Rehearing, April 8, 1906.)

No. 1,731.

1. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where, in an action for injuries to a watchman by an explosion on a gasoline launch on which he was employed, he claimed that the explosion was caused by defendant's negligence in allowing gasoline to leak from machinery, etc., while defendant pleaded that plaintiff was negligent in pouring oil from one lantern into another just prior to the explosion, and that this was the cause thereof, and there was evidence that two lanterns were afterwards found where the explosion occurred, the court erred in refusing to submit the question of contributory negligence to the jury and in charging that the answer did not raise the defense of contributory negligence, but pleaded that plaintiff's negligence was the exclusive cause of the injury, and that, if the accident happened as plaintiff alleged, it could not have been in the way that defendant claimed it did, and vice versa.

2. TRIAL—WITNESSES—CREDIBILITY—IMPEACHMENT.

An instruction that the fact that plaintiff had not been impeached raised a presumption in favor of his account of the transaction was error; defendant being entitled to rely on the inherent improbability of plaintiff's story as inconsistent either with itself, or with the conceded facts in the case or matters of common knowledge.

3. SAME—INTEREST.

Plaintiff's interest in the case is always a matter to be considered in connection with the weight to be given to his testimony.

McCormick, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Henry P. Dart and B. W. Kernan, for plaintiff in error.

Frank E. Rainold and Armand Romain, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

NEWMAN, District Judge. Charles Menge brought suit against Elder Dempster & Co. for damages for injuries which he sustained by reason of an explosion which occurred on a gasoline or naphtha launch on which he was acting as watchman at the time of the explosion. The plaintiff claimed that the explosion was due to the ignition of the gas or vapor generated by the gasoline or oil stored in the tanks and pipes of the launch, and that the gas, vapor, and oil escaped from the tank and accumulated in the cabin of the vessel during the night because the stopcocks, valves, and apertures of the tank had not been closed properly by the master of the vessel, but were negligently left open or partly open. The ground of liability is that Menge was put by Elder Dempster & Co., by whom he was employed, to work in an unsafe place; that Elder Dempster & Co. knew or should have known all about the unsafe condition of the launch; and that Menge knew nothing about it. There was a general denial by the defendants of negligence, a plea of contributory negligence, and a further plea that

the plaintiff was guilty of independent negligence on his part which caused the accident.

It appears that it was the habit of the plaintiff to report to one Wilt, who was the foreman or roundsman of watchmen employed by Elder Dempster & Co., and on the evening of September 8, 1901, Menge reported for duty to Wilt, who told Menge to go up to the launch Edco, tied up at Walnut street and the river, and Menge went there and found one Vogt in charge, whom he relieved. Vogt said the vessel was leaking, and Menge would have to keep her bailed out. He told Menge where to find a lantern, and showed him a bucket and a couple of cans to use in bailing. Menge went in and out of the cabin a number of times during the night while engaged in bailing. The explosion occurred about 5 o'clock in the morning. At the time of the explosion Menge was engaged in bailing the launch. It appears from Menge's testimony that, when he first went into the boat, there was considerable odor; that he smelled something like oil; that he knew the vessel was a gasoline launch before he went on her; and that he knew that gasoline was explosive. There was evidence tending to show that both Vogt, whom Menge relieved when he took charge of the launch, and Menge, were employes of Elder Dempster & Co. Menge had been employed by the defendants as watchman for a period of about three months before the accident. He was employed on nights when his services were needed, but not regularly. He was in their employ commencing on the afternoon of September 8th and until the next morning when the accident occurred. He was paid a fixed sum for each night, and not by the week or month. Elder Dempster & Co. are large shipowners and agents, engaged in navigation and transporting freight to and from the city of New Orleans and to and from foreign ports, and received and delivered at the wharves of New Orleans large quantities of freight. The Edco, the launch on which this accident occurred, was owned by Mr. Warriner, one of Elder Dempster & Co.'s representatives in New Orleans, and was used by their employes engaged in handling their ships and cargoes in and around the city of New Orleans. There was considerable evidence, but the foregoing sufficiently states the case for the purpose of noticing the questions we consider important in determining it. We notice only two of the questions raised by the exceptions and assignments of error, and which were stressed in argument, as they will be controlling in the disposition of the case.

The first is that the court erred in failing to charge the jury on the question of contributory negligence. The defendants' theory of the accident was that it occurred while Menge was trying to pour oil from one lantern into another. This was the independent negligence set up by the defendants against Menge, and this, it was said, was the cause of the explosion. The court in the charge presented to the jury the two theories—the one, the plaintiff's theory, that the explosion occurred by reason of the oil being negligently allowed to leak on account of the condition of the machinery, valves, etc., and the other, the defendants' theory, that the plaintiff was engaged in pouring oil from one lantern to another at the time, and that, while they had the posi-

tive testimony of the plaintiff that it did not occur as the defendants contended, still they had the circumstances which were offered tending to show that there were two lanterns found where the explosion occurred. The contention here is that the defendants in the Circuit Court were entitled to have an instruction on the plaintiff's alleged contributory negligence.

The court charged the jury as follows:

"The defendant answers that the accident was due not to any negligence of the defendant, but solely to the independent negligence of the plaintiff himself. The defense is not contributory negligence but exclusive negligence of the plaintiff. If the accident happened as the plaintiff alleged it did, as he testified it did, then it could not possibly have happened in the way in which the defendant alleges it did, and, on the other hand, if it happened in the manner in which the defendant alleges it did, then it could not have happened in the way in which the plaintiff avers it happened."

The court also refused to give to the jury the following charge:

"That if the jury find that the plaintiff knew that gasoline was explosive, and knew that the launch on which he was engaged was a gasoline launch, and that immediately upon coming on board of said launch he detected a noxious odor, which made him sick, and if the jury find that he discovered the presence of gasoline gas while bailing the said water out of said cabin during the night, and before said explosion, it was the duty of the plaintiff under the circumstances to make an examination and inspection of the premises in which he was working to ascertain the cause of the presence of said gasoline gas, and to take such reasonable precautions for his own safety as would avoid an explosion of said gas, and his failure to do so would be negligence contributing to the accident, and thereby bar recovery against the defendant."

We think the charge given, as quoted above, was erroneous, and that the defendants were entitled to have the jury instructed substantially as requested on the subject of contributory negligence. The defendants had pleaded both contributory negligence and independent negligence on the part of the plaintiff, and we think the facts entitled them to an instruction to the jury on both points of defense. While it is true that there were two distinct theories of the case apparently insisted upon by the parties, on the part of the plaintiff that the accident was due entirely to the negligence of the defendants in having leaking and defective machinery on the vessel, and on the part of the defendants that it was caused by the plaintiff's pouring oil from one lamp to another, and while it is true that this alleged negligent conduct of the plaintiff might have been the independent and real cause of the explosion—still it might also have been a co-operating and contributing cause. If the cabin of the vessel was filled with dangerous gases, and the plaintiff used the two lanterns in such a way as to cause those gases to ignite and result in the explosion, this might we think reasonably be said to be a contributing cause, aside from the question of its being the independent cause. We are clear that the jury were entitled to have the law of contributory negligence presented to them on the facts of the case.

The next question presented is as to the action of the court in instructing the jury on the subject of the credibility of witnesses, and especially of the weight to be given the testimony of the plaintiff Menge. The court instructed the jury as follows:

"Now, as to how the accident happened, I want to say that you, gentlemen of the jury, are the sole judges. I called your attention to some of the evidence, but you are to disregard anything that seems a comment or expression of opinion on my part as to the effect of that evidence. It is for you to judge from the evidence before you, how the accident did occur. The plaintiff has sworn positively how it occurred. He was the only eyewitness to the accident. He swears that there was an explosion. Now, it is for you to decide whether you will believe him or not. If you believe him—and in determining whether you will believe him or not you must bear in mind that no attempt has been made to impeach his character for truth and veracity, he has lived in this community for 25 or 30 or 40 years, and must be pretty well known from his occupation as gardener and watchman, and no effort has been made to show that he is generally a person unworthy of belief—that raises a presumption which you are to apply in this case that ordinarily he is a man whose word can be relied on."

It will be perceived that the instruction of the court was to the effect that the fact that Menge had not been impeached raised a presumption in favor of the truth of his account of the transaction. We think this was error. We do not think it was proper for the court to tell the jury that, because a witness had not been impeached, there was a presumption in favor of the truth of what he had stated. The party in opposition to whom a witness is called may well rely upon the inherent improbability of the story told by the witness. It may be so inconsistent with itself and with conceded facts in the case that are matters of common knowledge as to justify the jury in rejecting it entirely. It will not do to say, therefore, that because there is a failure to impeach a witness by proving his general bad character or in other ways known to the law that a story related by the witness may not be rejected on account of its own inherent weakness or improbability.

In *Quock Ting v. United States*, 140 U. S. 420, 11 Sup. Ct. 734, 35 L. Ed. 501, the Supreme Court says this:

"Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statement, although there be no adverse verbal testimony adduced."

The court, also, in the *Quock Ting* Case approves the case of *Kavanagh v. Wilson*, 70 N. Y. 177-179, and in referring to that case, and other cases, uses the following language:

"In *Koehler v. Adler*, 78 N. Y. 287, it was held that court or jury was not bound to adopt the statements of a witness simply for the reason that no witness had denied them, and that the character of the witness was not impeached, and that the witness might be contradicted by circumstances as well as by statements of others contrary to his own, or there might be such a degree of improbability in his statements as to deprive them of credit, however positively made. The case of *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 140, was cited in support of this position, where in de-

livering the opinion of the court the rule and its exceptions are stated by Judge Rapallo with great clearness and precision; so, also, as the case of *Kavanagh v. Wilson*, above referred to. In *Wait v. McNeil*, 7 Mass. 261, the Supreme Court of Massachusetts held that a verdict was not to be set aside, although it was given against the positive testimony of a witness not impeached, where there were circumstances in evidence tending to lessen the probability that such testimony was true. Numerous other cases might be cited in support of this same general doctrine."

In *Chicago Union Traction Co. v. O'Brien*, 219 Ill. 303-308, 76 N. E. 341-343, in the opinion by the court, discussing the question here involved, the following is said:

"The part of the instruction which states that witnesses, like all other citizens, are presumed by the law to be law-abiding citizens, and the law supplies a proper method of impeaching their evidence in cases where it can be impeached, is equally vicious with the other part. The question of the credibility of witnesses is exclusively within the province of the jury; and it is not the right of the court to take that question from them. Whether a witness has been impeached is a question of fact, and not of law, and, when not impeached, it is for the jury to determine whether he shall be believed, and to what extent. The court may give the jury general rules for their guidance, but where witnesses contradict each other as to matters of fact, and there is no impeachment of any witness, as was the case here, the law indulges no presumption that they are all telling the truth. When a witness testifies in a case, the inherent improbability of his statements may induce the jury to disbelieve him, although he is not contradicted. How much weight is to be given to his testimony depends largely upon his appearance, his manner of testifying, and all the other evidence and circumstances from which the jury may credit or discredit him. Where witnesses contradict each other, and the result of the case depends upon their credibility, it is for the jury to determine which one they will believe. *Stampofski v. Steffens*, 79 Ill. 303. The law has no rule which the court may lay down in instructions to the jury that there is a presumption that an unimpeached witness has testified truly, and such instructions infringe upon the province of the jury to determine the credibility of the witnesses and the weight and value of their testimony. *Hauser v. People*, 210 Ill. 253, 71 N. E. 416; 30 Am. & Eng. Ency. of Law (2d Ed.) 1068; 11 Ency. of Pl. & Pr. 312."

Following the remarks of the court as to the weight to be given the testimony of Menge, the following language is used in reference to the testimony of another witness in the case:

"There is the negro woman who says she was a square or a square and a half away from the boat, and was awakened by an explosion which she described in language that is evidently exaggerated. Now, in order to determine what credence you ought to give to that negro woman's testimony, you must also bear in mind that she, too, has the benefit of a character which has not been impeached, and the door was wide open to the defendants, if it was open to impeachment. She gave the name of a gentleman for whom she worked and where she had lived on State street in this city. With this data it would have been very easy for the defendants in this case to have attacked her character if her character was generally a bad character."

We think these two instructions were calculated to impress the jury unduly with the idea that the testimony of these two witnesses was to be believed and acted upon solely because the defendants had failed to show bad character and impeach them in that way. It manifestly tended to prevent the defendants from having the benefit of what they claimed; that is, as we understand it, that the testimony of these two witnesses was improbable of itself, without reference to whether their characters were good or bad. In addition to this, we think the court

might well have coupled with whatever was said on the subject of the apparent good character of the plaintiff the fact of his interest in the case. This is always a matter to be considered in connection with the weight to be given the testimony of those interested in the result of litigation.

Both of these errors we think tended to prejudice the defendants in the trial of the case, and may have contributed substantially to the result reached by the jury. For the reasons given, we are constrained to reverse the judgment of the court below, and remand the case, with instructions to award a new trial.

PARDEE, Circuit Judge. I concur with the court in the foregoing opinion, but think that the issue presented in the answer of fellow servant negligence should have been passed upon.

The trial judge instructed the jury that plaintiff was not a fellow servant with the employes of the defendant who were concerned in bringing about the condition of the boat when the plaintiff was injured, to which exception was made, and it is here presented by bill of exceptions. It was shown on the trial that Menge had been in the employ of Elder Dempster & Co. as a watchman for a period of about three months before the accident, and was so employed on the night of the accident; that when he reported for duty to Wilt, foreman or roundsman of watchmen, employed by defendant, on the evening of Sunday, September 8, 1901, he was told to go up to the launch of Elder Dempster & Co., lying up at Walnut street and the river, Wilt saying to him: "They want you up there, the launch is leaking"—and that he would find a man up there. The man in charge of the Edco, who gave plaintiff instructions as to bailing out the boat, was one Vogt, who, while registered as the master of the launch, performed the duties of deckhand and watchman, and was employed by defendant. He had during Sunday been watching the Edco and bailing her out just as Menge was told to do during the night. The Edco was a gasoline launch, and was used by Elder Dempster & Co. for the purpose of its business. When in use Capt. Treleven, the outdoor representative of defendant, was captain, and George Brewster was engineer, and Vogt the deckhand. Neither Treleven nor Brewster had been on the boat since the Saturday preceding the accident, which happened about 5 o'clock on the morning of Monday, September 9, 1901. If there was gasoline in the cabin of the launch where Menge was working, it can be accounted for only upon the theory that gasoline leaked during the night out of the pipe supplying the port engine with gasoline from the tank underneath the forward deck. This pipe was disconnected from the port engine, and was turned up at the end, and a piece of waste had been put in the end as a stopper. The valve which releases the oil from the supply tank had been opened by Vogt to get a small quantity of gasoline to clean his trousers between 1 and 2 o'clock in the afternoon before the arrival of Menge, and, as Vogt testifies, the valve was again tightly closed by him. This leakage, if there was any, must have, under the evidence, been caused by the failure of Vogt to close the valve tight enough to prevent the leakage of oil, or to put back the waste as he found it. If the evidence establishes

that the leakage was so caused then the presence of gasoline oil and vapor was due to the negligence of Vogt, who was a fellow servant with Menge, and no recovery can be had against the common master for plaintiff's injuries, because such act was an act of administration in using the property, and not a failure of duty of the master in furnishing a safe place. *Kinnear Co. v. Carlisle*, 152 Fed. 937, 82 C. C. A. 81; also *American Bridge Co. v. Seeds*, 144 Fed. 605, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041; *Armour v. Russell*, 144 Fed. 614, 75 C. C. A. 416, 6 L. R. A. (N. S.) 602.

The judge adds to the bill of exceptions a *per curiam*, as follows:

"That plaintiff was a mere watchman, employed by defendant's agent to watch the launch. It was defendant's absolute duty, through its agents, to inform the plaintiff of the dangers incident to the situation in which he was employed to watch. If the plaintiff was injured through some danger of the situation of which he should have a warning, the defendant cannot escape liability by alleging that, in any event, the plaintiff was a fellow servant with those who employed him and assigned him to the dangerous situation. I left it to the jury to decide whether the situation was dangerous, and required that plaintiff should be warned of the danger."

The theory of the defense was—and under the evidence it is very plausible—that, if the place was dangerous, it was made so by the negligence of Vogt, a fellow servant of Menge, and wholly without the knowledge of the plaintiff in error, who was neither informed nor had time and opportunity to inspect in person or by deputy. By this instruction the judge took from the jury the right to determine whether the condition of the boat was brought about by the negligence of Vogt and whether Vogt and Menge were fellow servants. In my opinion the jury should have been instructed to determine these facts from the evidence, and, if they found that Menge and Vogt were fellow servants, and that the condition of the boat was brought about by Vogt, then that Menge could not recover.

MCCORMICK, Circuit Judge (dissenting). I cannot concur in the view of this case taken by the majority of the court. A careful reading of the record and consideration of all the proof satisfies me fully that the trial judge presented the matter fairly to the jury both in his statement of the testimony and in his suggestion to the jury of inferences that might be drawn from it. So far from undertaking to conclude the jury, or to exclude from them, a consideration of the proof, he said in apt terms:

"Now, as to how the accident happened, I want to say that you, gentlemen of the jury, are the sole judges. I call your attention to some of the evidence, but you are to disregard anything that seems a comment or expression of opinion on my part as to the effect of that evidence. It is for you to judge from the evidence before you how the accident did occur. Plaintiff has sworn positively how it occurred. He was the only eyewitness to the accident."

And in the conclusion of the charge he used this language:

"Now in instructing you, gentlemen of the jury, that you are to consider and determine the damages, and in calling your attention to what you must consider in determining the damages, I do not mean to intimate in the slightest degree that it is incumbent on you to find for the plaintiff. I simply instruct you how to assess his damages if you find for the plaintiff, but if

you are satisfied either that the plaintiff has not proved his case, or that the defendant has shown that the accident resulted from the cause which the defendant set up in its answer, then you won't assess any damages for the plaintiff."

I have not been able to find in the charge anything that is obnoxious to the ruling of the Supreme Court in the case of Quock Ting, or in the language of Mr. Justice Fields, who announced the opinion of the court in that case. The holding of the court in that case as correctly stated in the syllabus is only to the effect that uncontradicted evidence of interested witnesses to an improbable fact does no require judgment to be rendered accordingly, in support of which Mr. Justice Fields cited *Koehler v. Adler*, 78 N. Y. 287, and quoted a paragraph from the syllabus of the report of that case. To show the application of that language to this case it is only necessary to quote the last paragraph of the opinion in *Koehler v. Adler*, supra, as follows:

"It may be that the evidence of these two witnesses ought to outweigh all the circumstances referred to. All that we intend to decide is that it was a question of fact for the jury, and not one of law for the court, and that the rule invoked is not applicable to the case."

The rule invoked was that the positive testimony of an unimpeached, uncontradicted witness cannot be disregarded by the court or jury arbitrarily or capriciously, but in applying this rule great care should be exercised. In *Kavanagh v. Wilson*, 70 N. Y. 177, the holding of the court was "that the case was a proper one for the jury, and that a refusal to submit the question to the jury, and a direction of a verdict for the amount claimed was error." To this effect and only to this effect is the case of *Wait v. McNeil*, 7 Mass. 261, referred to in one of the excerpts embraced in the opinion of the majority.

In my judgment none of these authorities reflect in the least upon the soundness of the action and views of the trial judge in the case before us in his instruction to the jury. I think the judgment should be affirmed.

On Rehearing.

PER CURIAM. The petition for rehearing is denied.

VIRGINIA & S. W. RY. CO. v. HAWK.

(Circuit Court of Appeals, Sixth Circuit. March 23, 1908.)

No. 1,735.

1. RAILROADS—PERSONS ON TRACK—DEATH—STATE STATUTES—ACTIONS.

Shannon's Code Tenn. § 1574, subd. 4, provides that when any person or other obstruction appears on a railroad the alarm whistle shall be sounded, the brake put down, and every possible means employed to stop the train and prevent an accident. *Held* that, in order to recover for the death of a person under such act, it must be proved that decedent appeared on the road in front of the engine, as an obstruction thereto, and that the engineer failed to sound the alarm, put down the brakes, and employ every possible means to stop the train and prevent the accident.

2. SAME—BURDEN OF PROOF.

The burden of proof of such elements of a right of action under such act is on plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1341-1343.]

3. TRIAL—DIRECTION OF VERDICT—SUBSTANTIAL EVIDENCE.

In order to entitle plaintiff to go to the jury, he must introduce substantial evidence to establish the elements of his cause of action, which consists of something of substance and relevant consequence, and not mere vague, uncertain, or irrelevant matter, insufficient to induce conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 338.]

4. RAILROADS—PERSONS ON TRACK—DEATH—EVIDENCE—QUESTION FOR JURY.

In an action against a railroad company for death of plaintiff's intestate under Shannon's Code Tenn. § 1574, subd. 4, providing that when any person or other obstruction appears on the road the alarm whistle should be sounded, the brake put down, and every possible means employed to stop the train and prevent an accident, evidence showing the manner of intestate's death held too indefinite and uncertain to justify submission of the case to the jury.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

C. J. St. John, for plaintiff in error.

Robert Burrow, for defendant in error.

Before SEVERENS and RICHARDS, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. This is an action brought by the defendant in error against the plaintiff in error to recover damages for the alleged wrongful death of the former's intestate, caused by one of defendant's trains. It resulted in a verdict and judgment for \$1,000. But one ruling of the lower court is assigned as error, and that is its refusal at the close of all the evidence to give peremptory instruction to find for the defendant.

The action is based on subdivision 4, § 1574, Shannon's Code of Tennessee, which requires that, "when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brake put down, and every possible means employed to stop the train and prevent an accident." In order to a recovery on this statute for the injury or death of a person, two things are essential. One is the person injured or killed must have appeared—i. e., been in sight or view from the engine upon the road in front thereof, and it seems as an obstruction thereto. This is essential in order that a duty may have existed to do the things required by the statute. The other is the engineer must have failed to sound the alarm, put down the brakes, and employ every possible means to stop the train and prevent an accident—i. e., have breached the duty so imposed. The burden is on the plaintiff to show both these things. In order to be entitled to go to the jury he must introduce substantial evidence favoring them. What is meant by "substantial evidence" is thus indicated by Judge Severens in *Minahan v. Grand Trunk Western Railway Co.*, 138 Fed. 37, 70 C. C. A. 463.

"Something of substance and relevant consequence and not vague, uncertain, or irrelevant matter, not carrying the quality of proof, or having fitness to induce conviction."

There was not much, if any, contrariety in the evidence introduced before the jury. It was in substance this: The deceased was 19 years of age. One witness testified that he was tolerably fleshy, weighing 150 or 160 pounds; another, that he was a heavy man, weighing about 170 pounds; and another, that he was big and muscular, a little less than 6 feet high, and thick through the chest and shoulders. The last time that he was seen alive was about 8 o'clock the evening before his death, which occurred on July 14, 1905, in Bristol, Tenn., going up Main street. That place is in the line of defendant's railroad, and it runs from thence in a southeasterly direction to Bluff City, a distance of 11 or 12 miles. He was discovered the next morning at half past 7 o'clock, dead, on defendant's track, about $3\frac{1}{2}$ miles northwest of Bluff City and 7 or 8 miles from Bristol. He was lying between the rails with top and back of his head mashed, and one wrist and one of his legs broken. At that point there is a curve in the track to the right going from Bristol. Towards Bristol from the body was found a pistol lying in the center of the track, and opposite it, about four feet from the track, a hat. According to one of plaintiff's witnesses, the distance from the body to the pistol was a rail or rail and a half, or 30 to 40 feet, but according to the testimony of defendant's section foreman the distance was about 100 feet. According to one of plaintiff's witnesses, where the pistol and hat were, there was on the rail and end of the ties brains, little pieces of skull, and a little blood; according to another one, towards where the body was found, brains were scattered along on the ends of the ties and some on the rail, and according to defendant's superintendent, who reached the scene after the body had been removed from the track to a point on the outside opposite the place where it had lain, the ballast 75 to 100 feet from where the body was lying towards Bristol, and at two or three other points, was torn up; 15 feet from the first place where it was so torn up there was flesh and hair against the side of the rail; 25 feet from there was a pool of blood and brains and hair about the outside rail of the curve; and 25 or 30 feet from there to a point opposite to which the body lay on the outside was a pool of blood, as if the body had lain there for a while, and the body had the appearance of having been rolled. In the deceased's pocket was a broken bottle, and it and his clothes were wet with and smelt of whisky. A train had passed from Bluff City to Bristol, leaving the former place the evening before at 9:45, and one had passed from Bristol to Bluff City that morning, leaving the former place at 4 o'clock, and reaching the place where the decedent was struck at about 4:30 a. m., central time. It was then getting tolerably light and the engine had a first rate headlight. The train was running at a rate of 20 miles an hour, and the engineer was on the inside of the curve and could see about 100 feet ahead. There seems to be no question that this was the train which struck and killed decedent. The engineer testified that he was on the lookout and had his eyes on that particular place because considerable

stock grazed there, and he saw no one, and that at Elizabethton, a point on the road—just how far from the scene of the accident not appearing—in pursuance to a telephone message from the superintendent, he examined the engine carefully, and found no blood or flesh on it. In certain of his answers on cross-examination, he indicated that, in saying that he was on the lookout and saw no one, he may have been speaking from habit, rather than from recollection, but, in another, he said that he remembered distinctly that he was on the lookout at that place on that occasion. The superintendent testified that there was a place under the slats of the pilot where a man could ride and he had seen men riding there—that the distance from the top of the ties to the bottom of the average running pilot was $7\frac{1}{4}$ inches and he had made a test of this pilot, not giving the time, but under similar conditions with a small man, and the pilot struck him a little back of the forehead when his head was against the point thereof and about the middle of the face when the body lay across the track with face toward it, and that in his opinion, if deceased had been struck by the pilot, he would have been mashed all to pieces, and, if his body had gotten under the pilot, it would have been literally ground up and either have hung on the pilot and been dragged along with it or kicked aside.

Was this evidence then sufficient to entitle plaintiff to have this case submitted to the jury? Did any of it tend to a substantial degree to establish that the deceased before he was struck by said train appeared on the road in front of it as an obstruction? It might be thought that if some of it did so tend it is overthrown by the testimony of the engineer that he was on the lookout, and did not see the deceased, and that he shortly afterwards examined the engine and there was no flesh or blood on it, and of the superintendent that the pilot of the engine could not have passed over the deceased without grinding his body up, and the test he made tending to show this. But notwithstanding this, if other of the evidence did so tend, the case was still for the jury. It was for them to weigh the opposing constituents of the evidence and determine which had the greater weight. *Jenkins & Reynolds Co. v. Alpena Portland Cement Co.*, 147 Fed. 641, 77 C. C. A. 625. There was no direct evidence tending to establish said fact. No one ever saw the decedent on the defendant's road at any place alive, much less at the place where his dead body was found, in front of the train that killed him as an obstruction thereto. So far as there was any evidence tending so to do it was purely circumstantial and the only circumstances that can be relied on as having such tendency are the position of the body, pistol and hat, relatively to the track and to each other, the wounds on deceased's body, the location of the brains and blood and the disturbances of the ballast. But no inference can be drawn from these facts that the deceased before he was struck appeared on the road in front of the train that struck him as an obstruction. They have no fitness to induce conviction of such fact. The jury were told that it was the contention of plaintiff that "the circumstances here show that he must necessarily have been on the track or within striking distance, and that to find for plaintiff they would have to be satisfied that the circumstances show that that is the strongest probability

in this case—that it is stronger than any other probability.” Their attention was called to other ways, possible, if not probable, in which he may have been killed without appearing on the track as an obstruction, especially if he was drunk, such, for instance, as being caught by the wheels of the engine, being dragged thereunder whilst trying with or without reason to get thereon, or falling from, getting knocked off or attempting to get off the train whilst thereon stealing a ride.

Counsel for defendant in error concedes as possible, but wholly improbable, ways in which he may have been killed, his being under the pilot and falling off, falling from the train, or trying to jump on the train; and a possible way was by his stumbling before the engine or between the cars as the train passed, or possibly even by getting so close thereto as it passed as to be drawn under it by suction. We do not understand the lower court to have been of the opinion that it is legitimate to infer from said circumstances that deceased before he was struck was in such position as to give rise to the duty imposed by the statute in question, but that of all the possible ways in which he may have been killed, this way was the strongest probability, and it left it to the jury to weigh the probabilities presented by the circumstances proven and told them if this way was a stronger probability than any other way, they should find for the plaintiff. But a case should never be left to a jury simply on a question of probabilities with a direction to find in accordance with the greater probability. Probabilities may help out items of evidence from which an inference can be drawn, but cannot take their place. To allow a jury to dispose of a case simply upon a weighing of probabilities is to turn them loose into the field of conjecture, and to have the rights of the parties determined by guess. In his charge to the jury in the case of *Snyder v. Mutual Life Ins. Co.*, Fed. Cas. No. 13,154, Judge Cadwalader said:

“The most improbable things are sometimes true, and the most probable things sometimes don’t happen.”

In the case of *Day v. Boston, etc.*, R. R., 96 Me. 207, 52 Atl. 771, 90 Am. St. Rep. 335, Judge Emery said:

“Quantitative probability—is only the greater chance. It is not proof, nor even probative evidence of the proposition to be proved. That in one throw of dice there is a quantitative probability, or greater chance, that a less number of spots than sixes will fall uppermost is no evidence whatever that in a given throw such was the actual result. Without something more, the actual result of the throw would still be utterly unknown. The slightest real evidence that sixes did in fact fall uppermost would outweigh all the probability otherwise. * * * However confidently one in his own affairs may base his judgment on mere probability as to a past event, when he assumes the burden of establishing such event as a proposition of fact, as a basis for a judgment of a court, he must adduce evidence other than a majority of chances.”

In the case of *Patton v. Texas & P. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, Mr. Justice Brewer said:

“And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the

negligence of the employer was the real cause where there is not satisfactory foundation in the testimony for the conclusion."

It is urged on behalf of defendant in error that the possibility that deceased came to his death by falling off the train whilst stealing a ride either under the pilot or elsewhere on the train, or, by throwing himself under the car for the purpose of taking his own life is removed from the case by the presumption against misconduct on the part of any individual. It seems to be a criminal offense in Tennessee for one to steal a ride on a train. But one who walks on the track of a railroad is guilty of misconduct. He is a trespasser, and not in the exercise of due care. There is no reason why there should not be a presumption against such misconduct as well as against other kinds thereof. Our attention has been called to several cases that have arisen under the statute, as having a bearing on the question we have here. They are the cases of Knoxville, C., G. & T. R. Co. v. Wyrick, 99 Tenn. 500, 42 S. W. 434; Felton v. Newport, 105 Fed. 332, 44 C. C. A. 530; Hackney v. C., N. O. & T. P. Ry. Co. (Tenn.) in which no opinion was filed.

In the Wyrick Case, the issue was whether the deceased had appeared as an obstruction upon the track in front of the train, or either fell from the train while stealing a ride, or met his death while attempting to board the train in motion. He had stolen a ride on a freight train from Luttrell Station to Maloneyville, where he was ejected therefrom. In a short time this train was followed by a second section thereof. After it had proceeded about a mile from Maloneyville, it was stopped and the remains of the deceased were found bruised and mangled lying on the track some 15 or 20 feet in the rear of the train. The body had been partially denuded of its clothing and there were signs on the roadbed that it had been dragged. In this case there was no claim that it was not for the jury, and the circumstances stated were not all the evidence having a bearing on the question as to how he came to his death. It was shown that the deceased after he was ejected from the first section of the train walked forward along the track in the direction in which he was afterwards found and along which he was shortly afterwards followed by the second section. This fact in connection with the mangled remains and the signs on the roadbed that the body had been dragged might well be deemed sufficient to require a submission to the jury. Here, the deceased was never seen on the track alive, his remains were not mangled, and there were no signs on the roadbed that the body had been dragged.

In the Newport Case which was regarded as controlling by the lower court, it is clear that it was considered that it was a close question whether it was one for the jury. Judge Severens in his opinion stated that the court "had some doubts from the beginning whether the facts and circumstances disclosed by the evidence were such as to remove the case from the region of mere conjecture as to how the accident occurred, and particularly whether it was shown with sufficient certainty that Newport, the deceased, appeared upon the road as an obstruction within the meaning of subdivision 4, § 1574, Shannon's Code." There, the deceased had left the depot at Helenwood at

8:30 or 9 p. m., going north on the track in an intoxicated condition. As said in *C., N. O. & T. P. Ry. Co. v. Davis*, 127 Fed. 933, 62 C. C. A. 565: "He had left the station, walking upon the track." He was found dead on the track about 500 feet north of the depot the next morning about 6 o'clock. Between the time he was last seen alive, and his dead body was discovered, six trains had passed over the track where it lay, the first three of which went north and the next three south. It was the first train going north that probably struck him. The body was mangled, and was recovered in pieces. Of course, in view of the number of trains that had passed this circumstance was of no help in determining how he met his death. It is said that "perhaps the probabilities favored the conclusion that Newport had laid down upon the track intoxicated, and was struck in that place and condition." A circumstance existed, however, that had some tendency to show that he was detained there against his will. That circumstance was that one of his feet was found drawn fast into the frog of a switch opening to the south. From this it might be inferred that he had been caught in the switch. But it is urged that this could not have been so as he was going north and the switch opened to the south. It seems to us that there would have been less likelihood of his foot having been so caught had it opened the same way he was going than opening in the opposite direction as it did. It is possible that the force of one or more of the trains passing over him caused it to wedge in tighter than it otherwise would. This case then had these two facts which are not in this case, to wit, the deceased had been seen not a great while before the arrival of the train that struck him walking on the track and his foot was found drawn fast in the frog.

These two cases then, Wyrick and Newport, had circumstances existing before and after the deceased was struck tending to show that he appeared on the track as an obstruction in front of the train that struck him. Indeed it would seem that the circumstance that the deceased was seen walking on the track, shortly before the arrival of the train that struck him, in the same direction in which it was going has such a tendency alone and by itself. Whilst so walking he is an obstruction on the track and in front of the train that strikes him. Until the train comes in sight of him, he does not appear as such. But in view of the fact that he is finally struck by the train and there is nothing showing that he had ever quit walking in front thereof, it is not unreasonable to infer that he continued to walk until the train did come in sight of him and appear, to wit, as an obstruction. This inference was helped out in those cases by the after circumstances referred to, and it was further helped out by the probabilities. In such a case, there is room for the strongest probability to have an effect.

In the Hackney Case the action of the lower court in peremptorily instructing the jury to find for the defendant was upheld. There the deceased was last seen about 20 minutes after 10 o'clock in the evening, sitting near a post about 10 feet from the track in an intoxicated condition. About 11 o'clock he was found in a path or private road that ran along the main track a short distance down the track from where he was last seen alive, unconscious, with severe wounds upon his

head and shoulders, which resulted in his death in a few hours afterwards. In the meantime a train had passed. There was no evidence that he was on the track or within striking distance of a train at any time. The case was stronger than here, in that no blood was found upon the track or signs that anything had been dragged along it by the train. It might be claimed that it was weaker, in that the body was found off the track and not on it, as the tendency of a train striking a body in front of it is to throw it from the track. It is like it in that there was no evidence that the decedent had been on the track before he was struck. The conclusion of the court is stated in these words:

"The burden was upon the plaintiff to show that the deceased did appear upon the track or was near to it so as to be an obstruction, and, having failed to do this, no *prima facie* case was made out."

For the reasons stated, we feel constrained to hold that the court erred in refusing to instruct the jury to find for defendant. The judgment is reversed, and case remanded for a new trial and further proceedings consistent herewith.

LANG et al. v. CHOCTAW, OKLAHOMA & GULF R. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 8, 1908.)

No. 2,536.

1. **COURTS—CONFLICT OF JURISDICTION—COURT WHICH FIRST ACQUIRES CUSTODY EXCLUDES JURISDICTION OF OTHERS.**

The lawful custody of specific property by a court of competent jurisdiction withdraws that property, so far as necessary to accomplish the purpose of that custody and until that purpose is accomplished, from the jurisdiction of every other court.

The court which first acquires the lawful jurisdiction of specific property by the seizure thereof, or by the due commencement of a suit, from which it appears that it is, or will become, necessary to a determination of the controversy involved or to the enforcement of its judgment or decree therein for the court to seize, to charge with a lien, to sell, or to exercise other like dominion over it, thereby withdraws that property from the jurisdiction of every other court so far as necessary to accomplish the purpose of the suit, and entitles that court to retain the control of it requisite to effectuate its final judgment or decree therein free from the interference of every other tribunal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 1386-1398.

Jurisdiction as dependent on possession of the subject-matter, see note to *Adams v. Mercantile Trust Co.*, 15 O. C. A. 8.]

2. **SAME—JURISDICTION INCLUDES POWER TO PROTECT AND ENFORCE DECREES AND TITLES THEREUNDER.**

The jurisdiction of specific property once lawfully acquired by a court by reducing it to its lawful custody in a suit or other proceeding before it includes the power to protect and effectuate its decrees or judgments therein and the titles of purchasers and others thereunder against attempts to annul or impair them by proceedings in other courts or elsewhere, and a court may lawfully retain jurisdiction after its surrender of its possession of the property for that purpose.

[Ed. Note.—Supplementary and ancillary proceedings and relief in federal courts, see note to *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 36 C. C. A. 195.]

2. SAME—INJUNCTION—NATIONAL COURT MAY ENJOIN PROCEEDINGS IN STATE COURTS INSTITUTED TO IMPAIR ITS JURISDICTION.

Where a national court is acting to enforce or protect its lawful decrees, or the titles thereunder, it may notwithstanding section 720, Rev. St. (U. S. Comp. St. 1901, p. 581), restrain all suits and proceedings in state courts which would have the effect to defeat or impair its jurisdiction.

[Ed. Note.—Federal courts restraining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.]

4. EQUITY—PRACTICE—DEPENDENT BILL WILL LIE TO ENFORCE OR PROTECT FORMER DECREES AND TITLES THEREUNDER.

A dependent bill or a supplemental bill in the original suit will lie,

(1) to aid, enjoin or regulate the original suit,

(2) to restrain, avoid, explain, or enforce the judgment or decree therein,

or,

(3) to enforce, to enjoin the enforcement of, or to obtain an adjudication of liens upon or claims to property to which the court acquired jurisdiction in the original suit.

5. COURTS—JURISDICTION AND CUSTODY—NOTICE OF PURPOSE TO ACQUIRE REQUISITE.

Neither jurisdiction nor custody of specific property can be conferred upon a court or acquired by it by the commencement and prosecution of a suit which contains no notice, either in the pleadings or other proceedings therein, of any purpose to affect such property thereby.

Nor do purchasers of such property pendente lite who are not parties to such a suit take it subject to subsequent judgments or decrees therein that attempt to affect it.

6. SAME—FACTS—CONCLUSIONS.

The Gulf Company was the grantee of the purchaser in 1898 of a railroad from Little Rock to Hopefield, under a decree of foreclosure sale made by the federal court in 1894, by which the purchaser was required to pay such claims filed in that court and such only as that court should adjudge prior in lien to the mortgage foreclosed which was made in 1887, and in which decree the court reserved to itself the right to retake and resell the property to satisfy such claims if the purchaser failed to discharge them. That suit in foreclosure was commenced in 1893, and the federal court then took possession of the railroad by its receivers, and held and operated it until it delivered it to the purchaser under the decree after the sale in 1898. In 1872 the defendants owned interests in 90 acres of land on the bank of the Mississippi river at Hopefield opposite Memphis, which the predecessors in title of the mortgagor had for some time prior to 1887 used for railway purposes without making compensation therefor, but all of which except 1½ acres caved into the Mississippi river prior to 1902. In 1880 the defendants brought a suit in a state court in Arkansas against one of the predecessors in title of the mortgagor to recover compensation for the taking of that land, and to enjoin that predecessor from the use of it until such compensation was made, and in 1902 they recovered a judgment in that suit against the predecessor for \$17,966.33 and some interest. After they recovered this judgment they exhibited a dependent bill in the state court against the Gulf Company to obtain a decree therein that their judgment was secured by a lien upon the entire railroad superior to its title and to the lien of the foreclosed mortgage, and the federal court upon a supplemental bill filed in the foreclosure suit enjoined them from proceeding with their dependent suit. The defendants had filed their claim in the foreclosure suit in the form of an intervening petition in 1895 and had prayed that court for a decree that they were secured by a lien superior to that of the mortgage, and that their lien should be paid out of the property or out of its proceeds in preference to that of the mortgage.

Held (1) the state court acquired no jurisdiction or custody of any part of the railroad or its appurtenances, except the 90 acres, by the

suit of 1880, and it surrendered its jurisdiction over those 90 acres when it entered its decree in 1902.

(2) The federal court acquired exclusive jurisdiction and custody of the railroad by the commencement of the foreclosure suit and its seizure by its receivers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 1386-1396.]

(3) The defendants by their intervening petition became parties to the foreclosure suit and filed their claim therein before the foreclosure sale.

(4) The federal court reserved to itself by its decree exclusive jurisdiction to determine what claims filed in that case were prior in lien to the mortgage and should be paid by the purchaser.

(5) The dependent suit brought by the defendants against the Gulf Company in the state court to enforce their claim of a lien superior to its title and to the lien of the mortgage was an attempt to avoid the decree of foreclosure and the title thereunder and to impair the jurisdiction of the federal court, and the power was conferred and the duty imposed upon it to enjoin the prosecution of that suit.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

This is an appeal from an order which granted a temporary injunction against the prosecution by certain judgment creditors of a suit in the chancery court of Crittenden county, in the state of Arkansas, to subject a railroad and its appurtenances, which were owned by the complainant, the Choctaw, Oklahoma & Gulf Railroad Company, under a decree of foreclosure rendered by the United States Circuit Court for the District of Arkansas, to a lien alleged to be paramount to the mortgage foreclosed and to satisfy their judgment, which had been rendered after the foreclosure against the predecessor in title of the mortgagor, by a sale of the railroad. Neither the mortgagor, the mortgagee, nor the Gulf Company were parties to the action which resulted in that judgment.

The chief subject of this controversy is the railroad from Little Rock, in the state of Arkansas, to Hopefield, upon the west bank of the Mississippi river opposite Memphis. In 1887, the Little Rock & Memphis Railroad Company, hereinafter called the Little Rock Company, succeeded to the title to this railroad of the Little Rock & Memphis Railroad Company as reorganized, and mortgaged the railroad and its appurtenances to secure its bonds to the amount of \$3,186,000. The reorganized company, and its predecessor in title, had at various times between 1872 and 1887 appropriated to the use of its railroad without compensation about 90 acres of land on the west bank of the Mississippi river at Hopefield, to undivided interests in which the defendants had title. This land was used for a time by these predecessors, and it then caved into the river and disappeared so that little of it is, or ever has been, in the possession or use of the Gulf Company. In 1880 the defendants commenced a suit in the circuit court of Crittenden county against the old reorganized company, in which they prayed that the amount due them for the use of this land and for the removal of earth and timber therefrom by that company and by its predecessor in title might be ascertained and paid, and that the reorganized company might be enjoined from using this land until this amount was paid. There was no claim to or prayer for any lien upon the railroad in the bill in that suit, or in the amended bill therein, which was subsequently filed. The final decree in that suit was rendered on February 27, 1902, and it was that the defendants should recover from the reorganized company \$17,956.36, and interest from September 23, 1901, and costs, and it granted no other relief. Between the commencement of that suit in 1880 and the final judgment in 1902, it had been dismissed, and its dismissal had been reversed (*Organ v. Memphis & Little Rock R. R. Co.*, 51 Ark. 235, 11 S. W. 96); a judgment had been recovered against the reorganized company by the defendants for \$13,868.80, and that judgment had been reversed (*Memphis & Little Rock Railroad Company v. Organ*, 67 Ark. 84, 55 S. W.

952); the defendants had brought a suit on September 12, 1895, to enforce their judgment of \$13,868.80 by subjecting the railway and other property to an alleged lien, had obtained a decree, and that decree had been reversed (Memphis & Little Rock Railroad Company v. Organ, 70 Ark. 195, 66 S. W. 922), and that suit had been abandoned.

On June 1, 1893, the Central Trust Company, the trustee named in the mortgage of the railroad and its appurtenances made by the Little Rock Company in 1887, filed its bill in the court below to foreclose that mortgage, and on that day the court appointed a receiver of the railroad and its appurtenances who took immediate possession thereof and held the same until he delivered this property to the purchaser under the foreclosure sale, which was made on October 25, 1898. The Little Rock Company was a party defendant to this foreclosure, and the decree which was rendered on October 22, 1894, provided that the property should be sold, that all equity of redemption of the Little Rock Company and all persons claiming under it should be thereupon foreclosed and forever barred, that in addition to the purchase price which should be bid the purchaser should pay "all claims filed in this cause, but only when the court shall allow such claims and adjudge the same to be prior in lien to the mortgage foreclosed in this suit, and in accordance with the order or orders of the court allowing such claims and adjudging with respect thereto." The decree also contained these provisions: "The court reserves the right to retake and resell said property in case of the failure or neglect of the purchaser or purchasers, or his or their assigns, approved by the court aforesaid, to comply with any order of the court in respect to the payment of receiver's certificates, debts, or obligations, or of prior liens or claims above mentioned within 20 days after service of such order upon such purchaser or purchasers, or his or their assigns. * * * And, further, the said purchaser or purchasers shall have and be entitled to hold the said railroad and property free and discharged of and from all lien of the mortgage foreclosed by this suit, and from the claims of the parties to this suit, or any of them, except the claim of the complainant, Central Trust Company of New York, by reason of the payment of \$45,000 made by it to the State of Arkansas, as hereinabove mentioned. All questions not hereby disposed of and determined are hereby reserved for further adjudication, the settlement of the same being held not to be necessary for the purposes of this decree. And the court reserves all right to make such further order at the foot of this decree as may seem just and proper." While this suit was pending and the railroad and its appurtenances were in the possession of the receiver, and on September 28, 1895, the defendants filed their petition of intervention therein, in which they alleged that by virtue of their claim against the old reorganized company, for which they had then secured the judgment for \$13,868.80, which was subsequently reversed, they had a lien upon the line of railroad between Little Rock and Memphis, which the Little Rock Company had mortgaged to the Central Trust Company, which was prior in lien and superior in equity to the lien of the mortgage, and prayed that the railroad should be first applied to the satisfaction of that lien. On August 7, 1896, they filed an amended and supplemental petition in this foreclosure suit, and prayed that the railroad then in the possession and under the control of the receiver of the court below should be adjudged by that court to be subject to their alleged lien for their claim against the old reorganized company, that such lien be declared to be superior and paramount to all other liens and claims, and that the railroad and its appurtenances be sold for the payment thereof, or that a sufficient amount of the proceeds of the sale in the foreclosure suit be segregated, set apart, and applied to the amount due them in preference to all other claims and demands whatsoever. The foreclosure sale was made on October 25, 1898, to Frederick P. Olcott. It was confirmed by the court, and certain allowances were made and directed to be paid out of the proceeds of the sale on November 19, 1898, but no order or decree was ever made that the prayer of the petitioners in their intervening petition should be granted, or that they were entitled to a lien paramount to that of the mortgagee and of the purchaser at the foreclosure sale. Olcott, the purchaser, conveyed the railroad to the Choctaw & Memphis Railroad Company, which subsequently and on June 30, 1900, conveyed it to the Gulf Company, which now owns it.

On September 8, 1902, the defendants in this suit filed a bill in the chancery court of Crittenden county, against the Gulf Company and others, in which they alleged that their judgment of \$17,956.36 against the reorganized company was secured by a lien upon the entire railroad from Little Rock to Memphis and its appurtenances, which was paramount and superior to the title of the Gulf Company under the foreclosure sale, and prayed that the railroad and all its appurtenances and franchises be sold to satisfy that lien. They also alleged that the old reorganized company had certain specific real estate upon which they had levied an execution under their judgment, that the reorganized company was insolvent, and prayed that a receiver of its assets and property be appointed, and that its property be sold and the proceeds distributed among its creditors. Thereupon the Gulf Company and the Choctaw & Memphis Railroad Company, its predecessor in interest under the foreclosure, exhibited their supplemental bill in the foreclosure suit, in which they set forth the material facts which have been recited, and also the fact that on March 12, 1897, in this foreclosure suit, the court after hearing, enjoined the defendants from levying an execution upon the specific property upon which they aver in their bill that they have levied an execution, and prayed that the defendants be enjoined from prosecuting their suit in the state court to establish a lien upon the railroad paramount to their title under the foreclosure decree, and to sell the specific property which they had theretofore been enjoined from selling, and the court granted a preliminary injunction in accordance with this prayer.

Wm. M. Randolph (George Randolph and Wassell Randolph, on the brief), for appellants.

Thomas S. Buzbee (Edward B. Peirce and John T. Hicks, on the brief), for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge (after stating the facts as above). The concurrent jurisdiction in this country of many courts, national and state, and the conflict, confusion, and uncertainty that their simultaneous exercise of their powers over the same subject-matter would entail, have caused the adoption of this salutary rule of practice and administration, the strict observance of which comity, courtesy, and necessity alike demand. The legal custody of specific property by one court of competent jurisdiction withdraws it, so far as necessary to accomplish the purpose of that custody, until that purpose is completely accomplished from the jurisdiction of every other court. The court which first acquires jurisdiction of specific property by the lawful seizure thereof, or by the due commencement of a suit in that court, from which it appears that it is, or will become, necessary to a complete determination of the controversy involved, or to the enforcement of the judgment or decree therein, to seize, charge with a lien, sell, or exercise other like dominion over it, thereby withdraws that property from the jurisdiction of every other court and entitles the former to retain the control of it requisite to effectuate its judgment or decree in the suit free from the interference of every other tribunal. *Farmers' Loan & Trust Company v. Lake Street Railroad Co.*, 177 U. S. 51, 61, 20 Sup. Ct. 564, 44 L. Ed. 667; *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981; *Central Bank v. Stevens*, 169 U. S. 432, 18 Sup. Ct. 403, 42 L. Ed. 807; *Williams v. Neely*, 67 C. C. A. 171, 185, 134 Fed. 1, 15, 69 L. R. A. 232;

Barber Asphalt Company v. Morris, 66 C. C. A. 55, 58, 132 Fed. 945, 948, 67 L. R. A. 761; Gates v. Bucki, 53 Fed. 961, 969, 4 C. C. A. 116, 128, 129.

When a court has by lawful proceedings taken possession of specific property, it has during that possession, and as incident thereto, jurisdiction to hear and determine all questions respecting the title, possession, and control thereof, and courts of co-ordinate jurisdiction are powerless to render any judgment or decree that will invade or disturb the possession of the property while it is in the custody of the court which has thus first acquired it. Moreover, the court which has thus acquired dominion over specific property, and which by its decree adjudges its sale or other disposition, may lawfully retain, after the sale and delivery of the possession of the property to the purchaser, the requisite jurisdiction to adjudicate claims for liens upon it, to make its decree effective, and to protect the title of its purchaser under its decree against the disregard or avoidance thereof by means of suits in other courts or other proceedings. The jurisdiction of a court over a subject-matter or a cause once lawfully acquired includes the power to enforce its judgment or decree, and to protect the title of those holding under it from every attempt to avoid or annul it. *Chicot Co. v. Sherwood*, 148 U. S. 529, 533, 534, 13 Sup. Ct. 695, 37 L. Ed. 546; *Julian v. Central Trust Company*, 193 U. S. 93, 112, 24 Sup. Ct. 399, 48 L. Ed. 629; *Wabash Railroad Company v. Adelbert College* (Supreme Court, January 6, 1908) 28 Sup. Ct. 182, 52 L. Ed. —; *Barber Asphalt Paving Co. v. Morris*, 132 Fed. 945, 949, 66 C. C. A. 55, 59, 67, 67 L. R. A. 761; *Brun v. Mann*, 80 C. C. A. 513, 151 Fed. 145.

A bill in equity dependent upon a former suit in the same court may be maintained by the purchaser under the decree or by any other party interested therein (1) to aid, enjoin, or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; or (3) to enforce, to enjoin the enforcement of, or to obtain an adjudication of liens upon or claims to property involved in the original suit. *Brun v. Mann*, 151 Fed. 145, 80 C. C. A. 513. And where a Federal Court acts in aid of its own jurisdiction to render its decree or the title under it effectual it may, notwithstanding section 720, Rev. St. (U. S. Comp. St. 1901, p. 581), restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. *Sharon v. Terry*, 36 Fed. 337, 1 L. R. A. 572; *French v. Hay*, 22 Wallace, 250; *Dietsch v. Huidekoper*, 103 U. S. 494, 26 L. Ed. 354; *Julian v. Central Trust Company*, 193 U. S. 112, 24 Sup. Ct. 399, 48 L. Ed. 629.

In the case last cited the Southern Railway Company was the purchaser of a railroad under a decree of foreclosure rendered by a federal court on May 2, 1894, wherein that court reserved to itself jurisdiction over the allowance of claims to liens upon the property in the terms of the decree in the case at bar. It provided in its decree that the purchaser should pay "all claims filed in this cause, but only when the court shall allow such claims and adjudge the same to be prior in lien to the mortgage foreclosed in this suit, and in accordance with the order or orders of the court allowing such claims and adjudging with re-

spect thereto," and contained the provision regarding the retaking and reselling of property which appears in the decree in this foreclosure suit. Page 110 of 193 U. S., and page 406 of 24 Sup. Ct. (48 L. Ed. 629). The Supreme Court of North Carolina had held that under the Constitution and laws of that state the railroad in the hands of the purchaser under this decree was subject to levy and sale to satisfy judgments against the mortgagor on claims against it which had accrued subsequent to the foreclosure sale and the sheriff had accordingly levied executions issued upon such judgments upon the property of the purchaser at that sale and was about to sell it to satisfy those judgments. Thereupon the purchaser and the complainant in the foreclosure suit exhibited a supplemental bill therein in which they set forth these facts. The circuit court enjoined the sheriff from proceeding to sell the property under the executions and the Supreme Court affirmed its decree, and said:

"It is obvious that by this decree of sale and confirmation it was the intention and purpose of the federal court to retain jurisdiction over the cause so far as was necessary to determine all liens and demands to be paid by the purchaser. It accepted the purchaser and thereby made it a party to the suit. *Blossom v. Railroad Co.*, 1 Wall. 655, 17 L. Ed. 673. The court reserved the right to retake the property if necessary to enforce any lien that might be adjudged against the same. On the other hand, the purchaser agreed to pay only such demands as the circuit court might declare and adjudge to be legally due, with the right of appeal from such judgment. These provisions make apparent the purpose of the court to retain jurisdiction for the purpose of itself settling and determining all liens and demands which the purchaser should pay as a condition of security in the title which the court had decreed to be conveyed. If the sheriff is allowed to sell the very property conveyed by the federal decree, such action has the effect to annul and set it aside, because in the view of the state court it was ineffectual to pass the title to the purchaser. In such case we are of opinion that a supplemental bill may be filed in the original suit with a view to protecting the prior jurisdiction of the federal court and to render effectual its decree. *Central Trust Co. of New York v. St. Louis, Arkansas, etc., Railroad Co.* (C. C.) 59 Fed. 385; *Fidelity Ins. Trust & Safe Deposit Co. v. Norfolk & W. R. R. Co.* (C. C.) 88 Fed. 815; *State Trust Co. v. Kansas City, etc., R. R. Co.* (O. C.) 110 Fed. 10."

In *Wabash Railroad Co. v. The Adelbert College*, a case in which the Supreme Court delivered its opinion on January 6, 1908, the college had brought a suit in one of the state courts of Ohio on April 28, 1883, upon certain equipment bonds which were issued in 1862 and which the college averred were secured by a lien upon a part of the railroad of the Wabash Company, which was paramount to the liens of certain mortgages thereon which were given subsequent to 1862, and the college prayed for an establishment of this lien and for a sale of the road to satisfy it. In 1897 it secured a decree to that effect which was affirmed on appeal to the Supreme Court of Ohio and was then challenged by an appeal to the Supreme Court. The great objection to the decree was that the state courts were without jurisdiction to render it because the United States Circuit Court, in suits commenced after 1883 to foreclose mortgages made subsequent to 1862, had taken possession of the railroad by its receivers meanwhile, and in 1889 had rendered a decree of foreclosure sale wherein it had reserved to itself the power to adjudge the superiority to the mortgages, of all alleged

liens, and the right of their holders to enforce them against the property in the hands of its purchasers. The Supreme Court reversed the decisions of the Ohio courts, held that although the federal court had delivered over the possession of the property to the purchasers under its decree more than 15 years before, yet it still retained the exclusive jurisdiction to determine all claims to liens upon it superior to the liens of the mortgages foreclosed and to the title of the purchaser under the decree, and that the College had no remedy but to present its claim to that court.

The principles and decisions to which reference has now been made seem to leave little doubt of the proper disposition of the issue before us. Counsel for the defendants, however, contend that the state court first acquired jurisdiction of this railroad and of the lots upon which the defendants made their levy in 1902 by the commencement of their suit in 1880 and that because the subjection of all this property to a lien to secure the payment of the judgment which they recovered in that suit against the old reorganized company on February 27, 1902, is necessary to satisfy that judgment, and because a court which once acquires jurisdiction of the parties to and the subject-matter of a controversy may retain them against all other courts until its judgment or decree is executed, the court in Crittenden county still has jurisdiction under the defendant's dependent bill to subject this property to the payment of that judgment notwithstanding the intervening foreclosure in the federal court. Another contention of counsel is that because the defendant's suit of 1880 was pending before the foreclosure, the mortgagor, the mortgagee, the purchaser, and the Gulf Company, his grantee, were parties by representation to that suit, and their title to the railroad and to the property levied upon was thereby subjected to the lien of the defendant's judgment.

A clear conception of the nature of the suit of 1880 and of the relations of the parties will do much to determine the soundness of these positions. That was a suit by the defendants against the old reorganized company to recover of it the damages which the defendants had sustained from the taking and use by it, and its predecessors in title, of 90 acres of land, and to enjoin that company from using that land until it paid for it. No lien or claim upon the railroad or upon any other property than the 90 acres of land was ever made in that suit. The final decree therein which was rendered in 1902 granted no injunction against the use of the land, found that most of this land had caved into the river, and that "the railroad is not using any of the remaining part of said land except what is known as the 'grave-yard-track' which covers about $1\frac{1}{8}$ acres of land," and rendered a personal judgment against the old reorganized company alone and no other relief. The state court undoubtedly had jurisdiction of the 90 acres of land from the commencement of the suit in 1880 until it rendered its decree. But when it refused to enjoin the use of this land or to make any other decree concerning it, and its final decree was a mere personal judgment against the old reorganized company, it thereby completely renounced and surrendered its custody and jurisdiction of every part of the 90 acres, and the suit of 1880 may now be treated as though that

land was never affected thereby. The title of the Gulf Company is the title of the mortgagee perfected by the decree of foreclosure. The mortgagor, the Little Rock Company, derived its title to the railroad and its appurtenances from the reorganized company, and if in 1887, when it made its mortgage to the Central Trust Company, there had been a suit pending, the object of which fairly disclosed by the bill or other pleadings or proceedings therein had been to subject that property to a lien for the claims of the defendants, the court in which that suit was pending might thereby have acquired jurisdiction and custody of that property, and the mortgagor, and the mortgagee, and the subsequent purchaser might have taken their title subject to the execution of the final adjudication of that claim by that court. But jurisdiction of specific property may not be conferred upon a court by a suit in which neither the court nor any of the parties seek to affect it or its title. Pending suits which disclose no purpose of any one to change or to affect in any way the title to specific property of parties to them may not subject the purchasers or grantees thereof pendente lite to subsequent judgments or decrees therein which attempt to affect them. Such grantees are not parties by representation to such adjudications because the suits give no notice of an intention to seek such judgments when they take their titles. A court does not acquire jurisdiction of the specific property of a debtor by an action against him for a personal money judgment, and a purchaser from the debtor pendente lite takes it free from a subsequent judgment against him. A suit to enjoin a debtor from using specific property until the creditor's claim is paid confers on the court no jurisdiction over other property of the debtor, and a purchaser of the latter from the debtor pendente lite takes it free from any subsequent decree therein which attempts to affect it. The trustee and the bondholders in this case were bona fide purchasers of this railroad and its appurtenances for value in 1887 when they took their mortgage and paid more than \$3,000,000 for it. There was no suit then pending against the Little Rock Company, the mortgagor. The suit against the reorganized company, its predecessor in title, contained no notice of any claim or intention to affect the railroad or its appurtenances or the title of the Little Rock Company thereto, and asked the court for no relief against them. That suit therefore failed to invoke the jurisdiction of the Circuit Court of Crittenden county over the railroad and its appurtenances or to bring them into its legal custody, and it did not subject the mortgagee, the mortgagor, or the Gulf Company, neither of whom were ever parties to it, to any adjudication that the court in Crittenden county might subsequently render concerning that property, or its title.

It necessarily follows, therefore, that on June 1, 1893, when the suit was commenced in the federal court to foreclose the mortgage of 1887 and the railroad and its appurtenances were seized by the receiver of that court, no other court had either actual or potential jurisdiction or custody of any part of that property except possibly the "graveyard-track," the dominion over which the state court subsequently renounced. The receiver took actual possession of the property, and the

exclusive jurisdiction over it vested in the federal court. While this property was in its possession and on October 22, 1894, it rendered a decree that the railroad and its appurtenances should be sold to the highest bidder, that in addition to his bid the purchaser should pay all claims filed in that cause, but only when that court should allow such claims, and adjudge the same to be prior in lien to the mortgage foreclosed, that it reserved to itself the right in case he failed to pay any claims so adjudged to retake and resell the property to satisfy them, and that the purchasers should take and hold the railroad and its appurtenances free from the claims of all the parties to the suit except a certain claim of the trust company, and that all questions not disposed of by the decree were reserved for further adjudication.

After the defendants had obtained their judgment of \$13,868.80 in their original suit of 1880, which was subsequently reversed (*Memphis & Little Rock Co. v. Organ*, 67 Ark. 84, 55 S. W. 952), and on September 12, 1895, they exhibited a dependent bill in the state court to fasten a lien for their claim, then evidenced by that judgment, upon the railroad superior to that of the mortgage and to sell the railroad and its appurtenances to discharge that lien, and they obtained a decree in that dependent suit to that effect. That suit and decree are, however, immaterial now, because (1) the federal court had the exclusive jurisdiction and the actual possession of the railroad and its appurtenances when that suit was filed, and the state court was powerless to affect that property by any adjudication in conflict with the decree of the federal court regarding it; and (2) because the decree in that suit was subsequently reversed. *Memphis & Little Rock Company v. Organ*, 70 Ark. 195, 66 S. W. 922.

On September 28, 1895, while the property was still in the possession of the federal court and before the sale under the decree, the defendants filed their claim in that cause in the form of an intervening petition, which they subsequently amended and supplemented by another petition on August 7, 1896. In each of these petitions they prayed the court below to decree that they had a lien upon the entire railroad and its appurtenances for the amount of their claim which was prior in time and superior in equity to the lien of the mortgage, and that this lien should be paid out of the property or out of its proceeds in preference to the lien of the mortgage. One who intervenes in a suit before the disposition of specific property in the custody of the court, after the decree of sale and before the sale and a distribution of the proceeds, and prays for a lien thereon and the payment of his claim from the proceeds of the property, thereby becomes a party to the suit, and is bound by the decree and the subsequent proceedings thereunder. *Savannah v. Jesup*, 106 U. S. 563, 565, 1 Sup. Ct. 512, 27 L. Ed. 276; *Wiswall v. Sampson*, 14 How. 52, 14 L. Ed. 322; *French v. Gapen*, 105 U. S. 509, 525; *Ex parte Jordan*, 94 U. S. 248, 251, 24 L. Ed. 123; *Ingraham v. Dawson*, 20 How. 486, 15 L. Ed. 984; *Gumbel v. Pitkin*, 113 U. S. 545, 547, 5 Sup. Ct. 616, 28 L. Ed. 1128. More than two years after the defendants had filed their amended petition in that suit and had become parties thereto, the property was sold under the decree. That decree and the accepted bid

constituted a contract of sale between the court and the purchaser. They also became a contract of sale between the parties to the suit, including the defendants, and the purchaser, because in the sale the court was the agent and representative of those parties, and it sold the property for them. One of the terms of that contract was that the purchaser in addition to his bid should pay such claims filed in that cause as the court should adjudge to be prior in lien to the mortgage and that the court reserved to itself exclusive jurisdiction to determine what claims were so prior in lien. The federal court which was then in the exclusive custody of the property had the undoubted right to retain exclusive jurisdiction to determine this question. That it effectually made this reservation is demonstrated by the fact that it did so in the very terms which the Supreme Court held sufficient to accomplish that purpose in *Julian v. Central Trust Company*, 193 U. S. 110, 24 Sup. Ct. 399, 48 L. Ed. 629. The agreement of the court that it reserved to itself and would exercise exclusive jurisdiction to determine the priority of the claimed liens which the purchaser promised to pay was one of the material terms of the contract of sale. One might be willing to pay a certain price for a railroad in addition to the claims against it which a specified court should adjudge prior in lien to the mortgage when he would hesitate long to pay that price or to purchase at all subject to claims which unknown tribunals might thus adjudge. Courts should not be less solicitous than private parties to strictly comply with the terms of their agreements, and the contract of sale in this case required the court below to exercise the exclusive jurisdiction which it reserved and to prevent any other court or party from imposing upon the property which it had sold any lien or charge on account of any claim filed in the foreclosure cause which had not been adjudged by the court which conducted that suit to be prior in lien to the mortgage. The power was conferred and the duty was imposed upon the court below to restrain all further proceedings in the state court which might have that effect. "The courts of the United States are bound to proceed to judgment and to afford redress to suitors in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." *Hyde v. Stone*, 20 How. 170, 175, 15 L. Ed. 874; *Barber Asphalt Paving Co. v. Morris*, 132 Fed. 945, 950, 952, 66 C. C. A. 55, 59, 60, 67 L. R. A. 761.

The result is that by the seizure of the railroad and its appurtenances in the foreclosure suit, and by the injunction which it issued in that cause against the levy of any execution upon the specific lots and tracts of land upon which the defendants subsequently caused the levy to be made, the court below acquired legal custody and exclusive jurisdiction of all this property; that by the terms of its decree it agreed with the purchaser and his subsequent grantees that they should not be required to pay any claim filed in that cause against this property, which that court should not adjudge to be secured by a lien thereon superior in equity to the lien of the mortgage; that by the terms of the decree that court reserved to itself the exclusive jurisdiction to determine the superiority of such alleged liens; that the claim of the

defendants to a lien upon this property superior to the lien of the mortgage was filed in that cause before the bid or the sale; that the defendants' dependent suit in the chancery court of Crittenden county commenced in 1902 to enforce their claim of a lien upon this property superior to that of the mortgage was violative of the contract of foreclosure sale and an attempt to avoid the terms of the decree, and to unlawfully incumber the title of the purchaser thereunder, that the chancery court of Crittenden county had no jurisdiction to adjudge the priority of the alleged lien of the defendants to that of the mortgage or to the title of the purchaser and of the Gulf Company his grantee; and that the only remedy of the defendants was the presentation and enforcement of their claim for this lien in the court below, which alone has jurisdiction to adjudge that they have a lien upon this property prior or superior to that of the mortgage, or to the title of the Gulf Company.

In the dependent bill in the state court the defendants prayed for the appointment of a receiver of the property of the old reorganized company, but the bill fails to aver that that company has any property except that which passed under the decree of foreclosure, and that upon which the defendants were enjoined in the foreclosure suit from levying any execution. If at the final hearing the fact should be made to appear that the reorganized company has other property, the permanent injunction should be limited to the prohibition of the prosecution of any suit to establish or enforce any lien or claim superior to that of the mortgage upon any of the property which passed to the complainants under the decree of foreclosure. As it does not as yet appear that there is any other property, the temporary injunction which restrains the prosecution of the dependent suit in the state court until the final hearing of this suit was not too broad, and the order which directed its issue must be affirmed.

It is so ordered.

HOOK, Circuit Judge. I concur in the result except as to the 90 acres. There are broad statements of principles in the opinion which it seems to me are not involved in the case. As to them, I express no opinion.

SULLIVAN et al. v. ALGREM et al.

Circuit Court of Appeals, Eighth Circuit. March 8, 1908.)

No. 2,669.

1. COURTS—CONFLICT OF JURISDICTION—COURT WHICH FIRST ACQUIRES CUSTODY EXCLUDES JURISDICTION OF OTHERS.

The lawful custody of specific property by a court of competent jurisdiction withdraws that property, so far as necessary to accomplish the purpose of that custody and until that purpose is accomplished, from the jurisdiction of every other court.

The court which first acquires the lawful jurisdiction of specific property by the seizure thereof, or by the due commencement of a suit, from which it appears that it is, or will become, necessary to a determination of the controversy involved or to the enforcement of its judgment or

decree therein for the court to seize, to charge with a lien, to sell, or to exercise other like dominion over it, thereby withdraws that property from the jurisdiction of every other court so far as necessary to accomplish the purpose of the suit, and entitles that court to retain the control of it requisite to effectuate its final judgment or decree therein free from the interference of every other tribunal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1386.]

2. SAME—CONFLICT OF DOMINION TO BE AVOIDED, BUT CASE TO PROCEED.

When a court of co-ordinate jurisdiction secures by proper process the custody or dominion of specific property, which it is one of the objects of a suit in a federal court to subject to its judgment or decree, the latter suit should not be dismissed, but should be stayed until the proceedings in the court which has obtained the prior custody or dominion are concluded, or ample time for their termination has elapsed, or the custody or dominion is released.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1386.]

3. SAME—FEDERAL COURT DECLINES TO APPOINT RECEIVERS OF, OR TO INTERFERE WITH, PROPERTY IN CUSTODY OF STATE COURTS—FACTS.

After two suits by different holders of contracts of an insolvent company for a receiver, an injunction, the sale of its property, and the distribution of the proceeds thereof among its creditors and contract holders had been brought in two state courts, respectively; after a receiver had been appointed, and an injunction had issued in the first court; after that receiver had taken possession of property of the company worth \$60,000, had been removed, and another receiver had been appointed in his place; after the order appointing the second receiver had been challenged by an appeal and a supersedeas bond had been given; after process had been served in the second suit, and the second state court had issued a restraining order which had been served upon the defendants, and that court had been temporarily restrained from proceeding further by an order of the Supreme Court of Missouri—a third suit for the same purpose was brought by two contract holders of the company in the United States Circuit Court for the Eastern District of Missouri, and that court appointed a receiver of the property and issued an injunction.

Held, the property of the company was temporarily withdrawn from the jurisdiction of the federal court by the custody and dominion of one of the state courts over it, and the order of the federal court appointing its receiver and enjoining the defendants was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 1407–1409.

Jurisdiction of federal courts as dependent on possession of subject-matter, see note to *Adams v. Mercantile Trust Co.*, 15 C. C. A. 6.]

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Thomas C. Hennings and Robert F. Walker, for appellants.

Claud D. Hall (Herbert S. Hadley, Atty. Gen., State of Missouri, and Jones, Jones, Hocker & Davis, Solicitors for Wm. L. Watkins, supervisor and receiver, on the brief), for appellees.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. This is an appeal from an order of the court below whereby it appointed a receiver of the property of the Home Co-operative Company, an unincorporated association, owned and operated by William B. Sullivan, and issued the usual injunction

in such cases. The reason for the appeal is that a receiver of this property had previously been appointed by the circuit court of St. Louis county and had taken possession of a part of the property, an injunction had issued from that court, and a similar suit for the same purpose had been commenced against the same defendants, and a restraining order had been issued in another court of the state of Missouri, before this suit was commenced.

The business of the Home Company was to issue contracts to their holders to purchase homes for them at future times on numerous mysterious conditions, and one plain condition that the holders should pay certain sums of money to the company monthly. On June 10, 1907, Algre and Cameron, the appellees here, holders of some of these contracts, exhibited their bill in the court below against William B. Sullivan, William B. Sullivan, trustee, William L. Watkins, and three other defendants who were never served with process, and who will accordingly be treated as strangers to this suit henceforth, for the appointment of a receiver of the Home Company, the customary injunction, and the sale of its property, and the distribution of the proceeds thereof to its creditors and contract holders. An order to show cause why the injunction should not issue, returnable on June 18, 1907, was served on the defendants, and Sullivan filed a return with which he presented a transcript of the proceedings in a similar suit in the circuit court of St. Louis county, Mo. The state of Missouri filed an intervening petition. Sullivan insisted in the court below, and still insists, that that court had no jurisdiction to appoint a receiver of this property or to enjoin the defendants from disposing of it, because it was in the legal custody of the courts of Missouri, one of which had appointed a receiver of it. The state, on the other hand, prayed that Watkins, the receiver appointed by the state court, should be appointed by the court below, and that court appointed him.

Counsel for the appellees interpose many objections to Sullivan's return to the order to show cause, which in our view of this case are not material, because all that is necessary to its determination appears upon the face of their bill. The question here is not whether this suit was barred or abated by the fact that there was another action pending between the same parties for the same cause, or concerning the same property, and the discussion and determination of that issue are respectfully declined. The only question in this case is, was the property of the Home Co-operative Company withdrawn, at the time the order challenged by the appeal was made, for the time being from the jurisdiction of the court below by the prior acquisition of jurisdiction and legal custody of it by one of the courts of the state of Missouri. The bill discloses these facts: On July 3, 1903, Herman H. Wehrs, who alleged that he was a holder of one of the Home Company's contracts, brought a suit for a receiver of its property, for an injunction, for the sale of the property, and the application of its proceeds to the payment of its contract holders and creditors, in the circuit court of St. Louis county, against William B. Sullivan and William B. Sullivan as the Home Company. Sullivan appeared and consented, Francis A. Tillman was appointed receiver, the usual injunction was issued and Sullivan delivered to the receiver, pursuant to the order of the

court, property estimated to be worth \$60,000. On April 21, 1906, that court removed Tillman and appointed the defendant Watkins receiver of the company and its assets, in his official capacity as Supervisor of Building and Loan Associations of the State of Missouri. Sullivan appealed to the Supreme Court of Missouri from an order of that court refusing to vacate the order appointing Watkins, and a supersedeas appeal bond was given by him and accepted by the court. At the time this appeal was taken that court made an order that all creditors and contract holders of the Home Company who desired to avail themselves of the benefits of that suit might do so and might be heard therein. The complainants averred in this bill that they were informed, believed, and charged that Wehrs never was a contract holder, that he had been paid the amount claimed on his contract, that his suit was instituted and maintained by Sullivan for the latter's use and benefit, and that Wehrs had tried to dismiss and had dismissed it. The bill shows that on May 1, 1907, two other contract holders exhibited another bill in another court of the state of Missouri against the defendants in the suit in hand, in behalf of themselves and all other contract holders and creditors of the Home Company, for a receiver of the property of that company, an injunction, the sale of its property, and the distribution of the proceeds thereof among its creditors and contract holders, that process was served in that suit on Sullivan and Watkins, that the court restrained them in that suit from transferring or disposing of the property of the company, ordered them to show cause on May 6, 1907, why it should not issue the injunction and appoint the receiver sought, and that the judge of that court was subsequently temporarily restrained from proceeding in that court and ordered to show cause before the Supreme Court of Missouri why he should not be permanently prohibited from proceeding further therein. This was the state of the case presented to the court below by the bill, and conceding, as counsel for the appellees contend, but not deciding, that Sullivan's return was so irregular and insufficient, that it presented no facts and no denials which the court below could, or this court can, consider, it is difficult to perceive how the United States Circuit Court could have lawfully acquired or exercised any jurisdiction over the property in question until the state courts renounced or surrendered their custody of it.

The legal custody of specific property by one court of competent jurisdiction withdraws it, so far as necessary to accomplish the purpose of that custody, until that purpose is completely accomplished from the jurisdiction of every other court. The court which first acquires jurisdiction of specific property by the lawful seizure thereof, or by the due commencement of a suit in that court, from which it appears that it is, or will become, necessary to a complete determination of the controversy involved, or to the enforcement of the judgment or decree therein, to seize, charge with a lien, sell, or exercise other like dominion over it, thereby withdraws that property from the jurisdiction of every other court, and entitles the former to retain the control of it requisite to effectuate its judgment or decree in the suit free from the interference of every other tribunal. When a court has by lawful proceedings taken possession of specific property, it has dur-

ing that possession and as incident thereto jurisdiction to hear and determine all questions respecting the title, possession, and control thereof, and courts of co-ordinate jurisdiction are powerless to render any judgment or decree that will invade or disturb the possession of the property while it is in the custody of the court which has thus first acquired it. *Lang v. Choctaw, Oklahoma & Gulf R. R. Co.* (C. C. A.) 160 Fed. 355 (filed by this court March 2, 1908); *Farmers' Loan & Trust Company v. Lake Street Railroad Co.*, 177 U. S. 51, 61, 20 Sup. Ct. 564, 44 L. Ed. 667; *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981; *Central Bank v. Stevens*, 169 U. S. 432, 18 Sup. Ct. 403, 42 L. Ed. 807; *Williams v. Neely*, 134 Fed. 1, 15, 67 C. C. A. 171, 185, 69 L. R. A. 232; *Barber Asphalt Paving Co. v. Morris*, 132 Fed. 945, 948, 66 C. C. A. 55, 58, 67 L. R. A. 761; *Gates v. Bucki*, 53 Fed. 961, 969, 4 C. C. A. 116, 128, 129.

Here were three suits in three courts against the same real defendant Sullivan to appoint receivers of the same property, to sell it, and to distribute the proceeds thereof among the same creditors and holders of contracts. The first two were commenced in the state courts, the third in the federal court. The first court, the circuit court of St. Louis county, appointed a receiver who took possession of a part, perhaps of all, of the property of the company. Even without that possession that court acquired plenary jurisdiction and dominion over all the property of the Home Company by the commencement of the suit, the appearance of the defendant, the issue of its injunction, and the appointment of its receiver. Counsel urge that this suit should be disregarded because it was collusive, and they invoke the rule that fraud vitiates all transactions and proceedings. A court of equity may interpose as effectually to undo, or to prevent, a fraud by the use of a judgment or a suit in another court, as it may to strike down or prohibit one by the use of a deed, a written or oral misrepresentation, or by any other device, but the bill itself shows that no fraud or deceit could have been practiced in the first suit at or after that bill was filed, and that there was nothing which the federal court could do to remedy any fraud that had already been wrought thereby, which the state court, in which that suit was pending, could not have as effectually performed. The bill contained an averment that that court had made an order that all creditors and holders of contracts of the company who desired might share the benefits of the suit and be heard therein.

Another contention of the appellees is that by the acceptance of the supersedeas bond on the appeal from the order refusing to set aside the removal of the first and the appointment of the second receiver that court renounced its jurisdiction over and surrendered the property; that it took the bond in lieu of the property and released it to Sullivan. The court below sustained this position, and appointed its receiver in reliance upon the decision of the Supreme Court of Missouri in *State ex rel. v. Hirzel*, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961, where that court held that a supersedeas bond on an appeal from an order overruling a motion to vacate an order appointing a receiver restored the property, during the pendency of the appeal, to the party

from whom the receiver had taken it. But the order challenged in that case was the original order appointing a receiver in the case. The order assailed by the appeal from the court of St. Louis county was not the original order of appointment of a receiver, but the order removing Tillman and appointing Watkins, and if the effect of the supersedeas had been to restore the property which Watkins received to the party from whom he obtained it, it would have been to restore it to Tillman as receiver, and it would still have remained in the custody of that court. Receivers are but the hands of the court. The order challenged here is not an order taking property from one of the parties to the suit into the hands of the court, but an order transferring property which had long before been taken by an order which has not been challenged by appeal, from one hand of the court to another. It does not seem that a supersedeas bond upon an appeal from such an order could have the effect to renounce the jurisdiction of the court over the property in its custody. Since the court below appointed its receiver, the Supreme Court of Missouri has decided that this supersedeas bond and an order which was made thereon by the court of St. Louis county that the receiver should return the property to Sullivan did not deprive that court of the custody and dominion of the property of the company. *State ex rel. Sullivan v. Reynolds* (filed December 24, 1907) 107 S. W. 487. Undoubtedly, if the court below had had the benefit of the opinion in this case it would have refused to appoint its receiver or to issue its injunction. The question before this appellate court, however, is whether or not the order for the receiver and the injunction was rightly made in July, 1907, in the light of the law and the decisions as they then stood. For the purpose of answering this question let all that counsel for the appellees here claim regarding the surrender of the custody of the property by the court of St. Louis county be conceded. Let it be conceded that the court of St. Louis county renounced its jurisdiction and released its custody of the property by the acceptance of the supersedeas bond and the order it made thereon, that Wehrs had no interest in the suit before it and that he had dismissed that suit. What then? Then the second state court acquired and it still retained exclusive jurisdiction and custody of the property before the suit in the federal court was instituted. Process was served on the defendants and a restraining order was issued therein more than a month before the suit in the federal court was commenced. Whether the first or the second state court had the custody of the property when the federal court appointed its receiver is immaterial to the issue in the case before us. That question is left without decision or further discussion, for the determination of the courts of the state of Missouri, upon which the duty to decide it is imposed. The only question this case presents to this court is, was the jurisdiction over this property withdrawn from the court below when it appointed its receiver?

It seems that the first state court acquired and continued to retain jurisdiction and legal custody of the property, which is the subject-matter of this suit, at the time that appointment was made. If so, neither the second state court nor the federal court had any right or power to interfere with or control its possession or dominion of that property

until that court relinquished them. If not, then the second state court acquired and retained exclusive jurisdiction and dominion of the property. In either event, the property of the Home Company was temporarily withdrawn from the jurisdiction of the federal court and that court should have withheld its hand until the state court, which had acquired jurisdiction and custody of the property, concluded its proceedings regarding it, or ample time for their termination had elapsed, or that court had relinquished its dominion. When a court of co-ordinate jurisdiction secures by proper process the custody or dominion of specific property, which it is one of the objects of a suit in a federal court to subject to its judgment or decree, the latter should not be dismissed, but it should proceed as far as may be necessary or convenient without creating a conflict concerning the possession or disposition of the property, and should then be stayed until the proceedings in the court of co-ordinate jurisdiction regarding the property have been concluded, or ample time for their termination has passed, or that court has relinquished dominion. *Barber Asphalt Paving Co. v. Morris*, 132 Fed. 945, 948, 66 C. C. A. 55, 58, 67 L. R. A. 761; *Williams v. Neely*, 134 Fed. 1, 15, 67 C. C. A. 171, 185, 69 L. R. A. 232; *Boatmen's Bank v. Fritzlen*, 135 Fed. 660, 667, 68 C. C. A. 288, 305.

The order appointing the receiver and enjoining the defendants is in all things reversed, and the case is remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion.

WALKER et al. v. CROSS.

(Circuit Court of Appeals, Eighth Circuit. March 6, 1908.)

No. 2,624.

PRINCIPAL AND AGENT—CONTRACTS—LIABILITIES OF AGENT.

Defendants were real estate agents, and in the belief that they were authorized by the nonresident owner to sell a farm they wrote out a form of temporary contract for its sale to plaintiff, naming themselves as vendors. The paper was not signed, but was taken by plaintiff to his home in another state as he still had the purchase under advisement. A correspondence followed between the parties, in which defendants continually referred to the fact that they were acting as agents, and spoke of the necessity of the concurrence of their principal if certain suggested changes should be made in the contract. They forwarded an abstract of title which was approved by plaintiff's attorney, and plaintiff then signed and forwarded the contract with some changes made by him to a bank with a first payment to be delivered to defendants when they signed and recorded the contract. This they did not do because of its having been altered, but they procured deeds to be executed by their principal, and sent to the bank from which they were accepted by plaintiff and full payment made, the money being disbursed by the bank under direct instructions from the vendor, and defendants receiving only their commission. It was subsequently ascertained that the vendor had no title, the apparent conveyance to him being fraudulent. *Held*, that defendants having acted only as agents for a known principal, and in good faith were not liable to plaintiff for the damages sustained by him, through the failure of his title.

not having signed any written contract valid under the statute of frauds binding themselves as vendors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 476-479.]

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Ben. Eli Guthrie and Samuel S. Dunham (Ben. Franklin, on the brief), for plaintiffs in error.

C. A. Carpenter (Arthur Springer, on the brief), for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. This action was brought by Cross to recover damages from Walker Bros. for the alleged breach of an alleged contract for the sale of real estate. The trial was had before the court sitting with a jury. At the close of all the evidence, counsel for Walker Bros. requested the court to instruct the jury as follows:

"The jury are instructed that under the law and the evidence in this case the plaintiff cannot recover, and your finding should be for the defendants."

This request was refused and an exception taken. The jury returned a verdict in favor of the plaintiff in the sum of \$5,756.92, upon which a judgment was duly entered. To reverse said judgment a writ of error was sued out from this court. The ruling of the court above mentioned together with many others made during the trial are assigned as error. In the view we take of the evidence, however, we do not deem it necessary to consider any other ruling than the one above mentioned, as all the evidence has been certified in a bill of exceptions. From such bill of exceptions the following facts appear: In 1902, Walker Bros. were engaged in the real estate business at Macon, Mo. At this time Edward Gould was the owner of the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, sec. 14, t. 57, r. 12, Shelby county, Mo. Gould lived at Sunnysdale, Wash. October 2, 1902, Walker Bros. wrote the following letter:

"Edwin Gould, Seattle, Wash.

"Dear Sir: Is your 160 acres of land N. E. of Clarence for sale? If so, at what price and how much cash, with balance 1st of March when I suppose possession can be given, and if we sell, what commission will you allow us?"

No reply to this letter was received from Edwin Gould. Walker Bros. had a trade-name of "Iowa Real Estate Exchange." On October 10, 1902, one Nelson O. Nailen wrote the following letter:

"Seattle, Wash. October 10, 1902.

"Iowa Real Estate Exchange, Macon, Mo.

"Gentlemen: I am about to make a trade for the east half of the northwest quarter and the west half of the northeast one-quarter, being 160 acres of land and all in section 14, township 57, range 12, Shelby county, state of Missouri. Title to this land is now of record in the name of Edwin Gould. Should I make the deal I will sell the land. I wish that you would be kind enough, on receipt of this letter, to let me know the value of the land; and also try and find a buyer for the same. Stamp inclosed for reply. Thanking you in advance for an immediate reply, I remain."

Walker Bros. replied to this letter as follows:

"Mr. Nelson O. Nailen, Seattle, Wash.

"Dear Sir: Your favor of the 10th at hand. We are acquainted with the land you write about, and believe it can be sold at \$45 per acre and if you can trade for it on this basis, we don't think you would be hurt. We would be pleased to handle it for you at a reasonable commission. Please reply on receipt, and oblige."

Not hearing from Nailen, Walker Bros. on October 16, 1902, wrote the following letter:

"Mr. Nelson O. Nailen, Seattle, Wash.

"Dear Sir: You wrote us in October in regard to the value of a quarter section of land in section 14, township 57, range 12, Shelby county, Missouri. Did you make the deal for this land, if so please give us your price on the same as you stated in your letter that you would like to sell the land if you closed the deal."

Nailen answered this letter as follows:

"Messrs. Walker Bros., Macon, Mo.

"Gentlemen: Yours of the 16th ult. at hand. I would have written you some time ago regarding the matter, but the deal was being deferred from time to time, but now the matter is in such shape it may go through. I think the transfer will be made next Monday and as soon as I get deed I will send on at once to be placed of record. If you have any one in mind who would like to have the land, let me know; otherwise, I will trade for it. I can make a very fine thing out of it on trade. Address me at General Delivery here.

"Dated Seattle, Wash., Nov. 8, '02."

To which letter Walker Bros. replied as follows:

"Nelson O. Nailen, Seattle, Wash.

"Dear Sir: Your favor of November 8th duly received, and I note that you do not fix any price on the Shelby county land, so that I am at a loss to know what price to ask for it. Please inform me by return mail at what price you hold the land and on what terms. When so advised I think I can find you a purchaser, if price and terms are reasonable."

This last letter ended the correspondence with Nailen directly but on December 22, 1902, one J. C. Calhain wrote Walker Bros. as follows:

"Seattle, Wash., Dec. 22, 1902.

"Walker Bros., Macon, Mo.

"Mr. Nailen, after thinking the matter over, says that he will take cash for the land, exclusive of your commission, the sum of \$45.00 per acre. A couple of parties just over the county line from you has made him some such offer; somehow, he has either lost or misplaced the letters, and I don't know their contents. However, if you wish to handle the land on these terms, do so. Mr. Nailen says he wants to go north to Alaska soon after Jan. 1st next as possible."

On the evening of January 7, 1903, Cross was at Macon, Mo., and met James Walker of the firm of Walker Bros. Their conversation resulted in a visit by James Walker and Cross, on the next day, to the land in question. Cross on this visit learned that the land was in possession of a tenant by the name of Stallcup. That Walker Bros. were simply acting as real estate agents in negotiating a sale thereof for the owner. Cross and James Walker returned to Macon, Mo., the evening of January 8 and Cross agreed to buy the farm at \$47 per acre, if Walker Bros. would write out a contract, so that he could take

it home and show it to his wife, and if it suited her he would send the contract back to Walker Bros. with a draft for \$600, whereupon William G. Walker dictated to a stenographer the following paper:

"This agreement made and entered into this eighth day of January, 1908, by and between W. G. Walker and James M. Walker, composing the firm of Walker Bros. of Macon county, and state of Missouri, party of the first part, and David Cross of Louisa county and state of Iowa, party of the second part, witnesseth: That for and in consideration of the covenants and agreements hereinafter contained, the said party of the first part hereby agrees to sell and by these presents does sell to the said party of the second part, the following premises situated in Shelby county and state of Missouri, to wit: The west half of the N. E. one-fourth ($\frac{1}{4}$), and the east one-half ($\frac{1}{2}$) of the northwest one-fourth ($\frac{1}{4}$), each in section 14, twp. 57, range 12, and containing 160 acres, more or less according to the government survey, for the sum of \$7,520.00 to be paid at the time and in the manner following: \$600.00 on the execution and delivery of these presents, receipt of which is hereby acknowledged; the balance to be paid as follows: \$6,920.00 on or before the fifteenth day of March, 1908. None of the amounts above described shall draw interest until after the fifteenth day of March, 1908, but thereafter at the rate of 6 per cent. Party of the second part hereby agrees to purchase said premises above described and to pay therefor the sum of \$7,520.00 at the times and in the manner above set forth. Either party failing to perform the conditions of this agreement shall forfeit to the other the sum of _____ in addition to the amount already paid. Said party of the first part hereby agrees that upon the receipt of the final payment he will execute and deliver to said party of the second part a good and sufficient warranty deed, conveying title in fee simple to the above-described premises and to furnish abstract of title showing good and merchantable title to said lands and clear of all liens and incumbrances whatever, * * * to pay all taxes and interest that may be due up to and including the year 1902, and that he will give possession of the said premises on the fifteenth day of March, 1908, in as good condition as the same now are, ordinary wear excepted, or when final payment is made.

"In witness whereof, the said parties have hereto set their hands on the day and date first above written."

Cross returned home with the above unsigned paper in his possession on January 9th, and on January 10th wrote the following letter:

"Walker Bros., Macon, Mo.

"Dear Sirs: I got home yesterday evening. I am not feeling very well; have not been out much. I saw P. T. McVay; he is my legal adviser. He thought we had better have you send up the abstract of title of that farm for inspection and have the contract signed and recorded before there is any money paid; that is, if the abstract is all right we will sign the contract and send it to you and send a draft for \$600.00 to the bank, and when you return the contract to the bank properly recorded, you can get your money. It seems to satisfy my wife better. For my own part, I have all confidence in you gentlemen, and thank you again for your kindness to me while there. I have not seen those prospective land buyers, but will soon."

In reply thereto Walker Bros. wrote Cross as follows:

"Jan. 12, 1908.

"David W. Cross, Letts, Iowa.

"Dear Sir: Your favor of Jan. 10th duly received and in reply thereto will say: It occurs to us that a proper and satisfactory arrangement can be made as follows: Let your attorney, Mr. McVay, write such stipulations in the contract as may be satisfactory to you. He might say something like this: That upon the approval of the abstract showing good title to the land, approval to be made by your attorney, Mr. McVay and, when so approved, contract to be returned to the bank with instructions to have the same recorded when signed by us, and, when so recorded, the \$600.00 to be paid; and if ab-

abstract should prove unsatisfactory after due examination and is not made satisfactory by March 1st, 1903, contract to become void and of no effect. And, further if you wish, require the owner to deposit in said Exchange Bank of Macon, Mo., a good and sufficient warranty deed, conveying title in fee simple to said land; said deed to be delivered to Mr. Cross, the purchaser, upon final payment therefor. The arrangement you speak of is entirely satisfactory with us, *but the party owning the land might hesitate or object to incurring this trouble and expense of procuring and making abstract and a deed; unless we have some kind of an agreement, though conditional besides, he is taking the land out of the market until March 15, 1903.*

"We hope you may see the reasonableness of this request, and have your attorney write a contract that is satisfactory to you and return to bank, when we will sign the same and have the bank place it on record, or as you may direct."

(The italics in this opinion are ours.)

On the same day P. T. McVay wrote Walker Bros. the following letter:

"W. G. Walker, Esq., Macon, Mo.

"Dear Sir: In reference to the contract of purchase of land, Mr. David W. Cross wishes me to inform you that if you will send abstract of title to the land to him for examination, and if, after examination, he is satisfied with the title and same shows your recorded power of attorney or right to convey, he will send \$600.00 to the State Exchange Bank and contract signed by him, and when the same is signed and acknowledged by you and recorded to the bank, the bank will be instructed to pay said sum to you."

"If this is satisfactory, you may forward abstract for examination; abstract also to be delivered to the bank with contract recorded, and to be brought down showing record of contract and premises free from all liens and incumbrances and perfect title."

Walker Bros. replied thereto as follows:

"Perry T. McVay, Letts, Iowa.

"Dear Sir: Your favor of January 10th duly received and contents noted. We will send abstract of title to the lands purchased by Mr. Cross as soon as we receive it from the owner who resides in the state of Washington, which fact may delay sending for a few days. It is perfectly satisfactory with us that Mr. Cross should make a thorough examination of abstract, and be satisfied with the title before he pays any money. We have no power of attorney for the sale of this land, but have authority to do so by letter received from the owner. We are following in this case our usual way of making sales. We have little trouble here in procuring good titles, as there are very few bad ones, and have no doubt, whatever, as to the correctness of the owner's title, and have no hesitancy in submitting it to you. We think it but fair that Mr. Cross should make a contract conditioned upon good title, and without payment of any money until it is satisfied with the same. Prior to the receipt of your letter, we wrote Mr. Cross fully in regard to the contract. *The gentleman who owns the land bought it without ever seeing it or knowing its value, in consequence of which, Mr. Cross secures an excellent bargain in this land, and if he does not wish to keep it, he can turn it for more money. We would be pleased without consulting our banks here to refer you to them as to our responsibility and reliability, to wit: The State Exchange Bank, the Citizens' Bank, First National Bank, all of Macon, Missouri.*"

On January 14, 1903, McVay wrote the following letter to State Exchange Bank:

"Dear Sirs: I herewith inclose to you as per arrangement with Walker Bros. a contract and also a draft for \$600.00 payable to the said Walker Bros. being a part of purchase price under said contract of the following described land in Shelby county, Missouri, to wit: The W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, all in sec. 14, twp. 57 of range 12. Said draft for six

hundred dollars herewith inclosed is to be held by you until all of the following conditions have been complied with, namely, until you have received notice from me that the abstract furnished by Walker Bros. for said land is satisfactory up to date of certificate on abstract, and *until they have properly executed and acknowledged and had recorded in the recorder's office in your county the inclosed contract, and have returned the same to you together with a warranty deed with full covenants of warranty properly executed and acknowledged by the owner of the land and his wife, conveying said land to David W. Cross, and when all the above things have been done, you are to deliver inclosed draft to Walker Bros.*"

The same day McVay wrote as follows to Walker Bros:

"Dear Sirs: I have inclosed draft to State Exchange Bank with letter of advice as herein inclosed. When the second and last payment comes due, according to the contract as signed by Mr. David W. Cross you will be required to bring abstract up to the time of the recording of deed showing perfect title free from all liens and incumbrances at that date. You will see that the bank having the \$600.00 will insure our performing our part of contract. All Mr. Cross wants is to be certain that the title is good, he knows what the land is—and all he asks is a perfect title to same for the consideration which he agrees to give you. I hope this will be satisfactory to you. Please make the abstract as full as possible, not failing to show record of notary seal, notary or officer acknowledging the deed, name and date, revenue stamps and amount affixed to deed, and amount of consideration for each conveyance. In probate, set out copy of wills and probate proceedings in full. In order to be satisfactory to me, the abstract must be a full exemplification of the records on every material point in order that I may determine the sufficiency of the title."

The contract returned to the State Exchange Bank was the same paper taken by Cross from Walker Bros. and hereinbefore set out except the same was signed by Cross and had the following interlineations:

"And the first parties agree to furnish an abstract showing good and perfect title to above premises, and satisfactory to P. T. McVay, the second party's attorney.

"Provided said abstract and title to said premises is satisfactory to P. T. McVay or is made satisfactory to him by March 16, 1903.

"But if said abstract is not satisfactory to P. T. McVay or made so by March 15, 1903, first parties agree to return the \$600.00 paid to second party.

"Said abstract to be subject to the approval or disapproval of P. T. McVay and if not approved, said \$600.00 to be returned to second party and he not to be required to take or pay for premises."

The paper taken by Cross to Iowa from Missouri with these interlineations constitutes the alleged contract set out in the petition. January 16, Cross wrote Walker Bros. as follows:

"Sirs: I signed the contract and inclosed draft for \$600.00 made payable to Walker Bros. when you have complied with what Mr. McVay has written. I would like if you would make two deeds; that is, make deed to Harriet L. Cross for the east 80 and the west 80 to David W. Cross, if it is not too much trouble. If you make only one, make it to Harriet L. Cross. You can charge me with the expense of one deed and I will settle with you for it when I come down. Let me hear from you soon. The east 80 would be the west $\frac{1}{2}$ of N. E. $\frac{1}{4}$ and the west 80, the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$."

January 16, 1903, Walker Bros. replied as follows:

"David W. Cross, Letts, Iowa.

"Dear Sir: Your favor of the 15th inst. duly received. We will have two deeds made as you request as the expense of so doing will be very small. We have ordered abstract to the land made, and will send same to your attorney

as soon as completed. The arrangement with the bank is entirely satisfactory."

January 17, 1903, Walker Bros. replied to McVay as follows:

"Dear Sir: Your favor of Jan. 14th inst. duly received and contents noted. The arrangement made with the State Exchange Bank is entirely satisfactory. We are having abstract prepared and will send it as soon as it is finished. Mr. Cross instructs us in his letter of the 15th inst. that he desires one eighty of the land deeded to his wife and the other eighty to himself. We suppose that will not contravene your instructions to the bank wherein you say, 'lands shall be conveyed to David W. Cross.'"

On January 23, 1903, Walker Bros. forwarded an abstract of the land to McVay. On February 11, 1903, Walker Bros. wrote to Cross as follows:

"D. W. Cross, Letts, Iowa.

"Dear Sir: Your favors of the 20th ult., and the 6th inst., duly received and contents noted. *We have not been able so far to get into direct communication with the owner of the land, as he has been away from home, and his attorney did not seem advised as to the exact amount of rental he was getting.* We made a trip yesterday to ascertain the facts in the case, and the tenant informs us that he has the land rented this year for the sum of \$375.00. We also found that both houses were occupied and will be during the summer, so I suppose we will have to look you up a house in Clarence, which we will do in a few days. It was understood, you remember, when you were here, that this man has the land (tenanted) for this year, and that you would have possession only through him as your tenant, and not in person. You will remember, also, that at our price \$47.50 per acre, we agreed to make the rental \$400.00, but after giving you a cut of 50 cents per acre, that you should be entitled to whatever rental tenant on the place was to pay. We have abstract about perfected, and as soon as we can *get deed from owner* (if you should require it) we will send abstract to your attorney for reinvestigation."

On February 21, 1903, Walker Bros. wrote to Cross as follows:

"Dear Sir: Your favor of the 19th is at hand and contents noted. We have delayed writing to you for some time, thinking that we would be able to give you some definite information, *when we heard from our man in the west who owns the land.* The deed from the party of whom the present owner bought is not joined in by his wife, nor does it state whether he is single or married. With a view of getting title straightened out as quickly as possible, I mailed a deed of correction, and requested that owner have the party of whom he bought, and if he was married, to have him and wife to execute deed and send me; if single, to procure affidavit to that effect. I also send separate deeds to owner to be executed to you and wife for the land you bought when here. This has been some ten days ago, and as yet have heard nothing from him. It may be the mail has been delayed by storms in the west. I thought I would not send abstract up until I had procured these corrections. Will write you fully as soon as I hear from owner. My brother who is looking for a house for you, is out of town to-day, and I may not be able to ascertain whether party wants to rent house and land, or simply house on land, I do not think there would be any objection to your building on the place next summer. I shall try to obtain this information and inform you in my next letter, when I will also write you in regard to trade for this little farm."

There was some further correspondence about defects in the title, but the correspondence was finally closed by the following letter from Walker Bros. to Cross:

"D. W. Cross, Letts, Iowa.

"Dear Sir: Answering your favor of the 9th inst., will say: That a few days will make no difference in closing the deal, and we would not expect you,

under the circumstances spoken of in your letter, to leave your son-in-law in his condition, and come here. In relation to the abstract, would like to say that we do not believe a straighter title can scarcely be found here in Missouri, or anywhere else, for that matter. Mr. McVay, no doubt is a good attorney, and would probably be a good judge of titles in Iowa, but it is very plain from his objections that he does not understand the law in Missouri in relation to land titles. You may submit to Mr. Rubey, the man whom you spoke about when here, and we are perfectly willing to make any corrections that he may suggest. If this should require much time, we would like of course to have you grant us that. You need not hurry away from your stricken people, as we will not require you to come until you can leave them in a better condition."

The abstract furnished by Walker Bros. to Cross on January 23, 1903, showed the title of the land in question to be in Nelson O. Nailen. On March 12, 1903, Cross reached Macon, Mo., for the purpose of consummating the purchase of the land. He had brought the abstract of the title with him from Iowa. Walker Bros. had never signed the so-called contract for the sale of the land unless their letters amounted to such signature. Walker Bros. between Jan. 8, 1903, and March 12, 1903, had procured Nelson O. Nailen to send two deeds for different portions of the land in question to the State Exchange Bank, Macon, Mo.

Taking the testimony of Cross as the true version of what occurred after he arrived at Macon on March 2d, the facts in relation thereto appear as follows: Cross went to the State Exchange Bank with W. G. Walker. Robey, the cashier, produced two deeds for the land in question, one from Nelson O. Nailen to Harriet L. Cross and one from same party to David W. Cross. Cross produced the abstract of title. After some unimportant corrections in the same Cross was satisfied therewith and thereupon delivered to cashier Robey a draft for the balance of the purchase money. The deeds for the land were delivered to Cross. The so-called contract was not produced at this time, and nothing was said about it. The bank was instructed by Cross to pay any liens that might be upon the land and deliver balance of purchase money to Walker Bros. as follows:

Abstract	\$ 21 00
Commission	320 00
Recording deed.....	85
Writing three deeds.....	1 50
Attorneys fee sent J. C. Callain at Seattle.....	300 00
Loan on land.....	2,120 00
Exchange and collection charges.....	500 00

Draft sent to Nailen direct \$4,751.65, making total of \$7,520, the purchase price of the land. These amounts were paid under instructions direct from Nailen. Walker Bros. did not receive any of this money, excepting their commission of \$320. They indorsed the draft of \$600 so that it could be collected. Walker Bros. refused to sign the so-called contract when it was sent with the \$600 draft by Cross to the State Exchange Bank, for the reason that the interlineations had changed the contract. The contract was presented by the bank to Walker Bros. for signature about January 18th or 20th. About April 20, 1903, Cross learned by a letter from Edward Gould written from Sunnysdale, Wash., that he (Edward Gould) had never conveyed the

land in question to any one. Whereupon, Walker Bros. made an investigation of the facts, and ascertained that Nelson O. Nailen had never had any title to the land. That his pretended title was fraudulent and void. Cross got no title by the Nailen deeds, and hence never obtained possession of the land. Counsel for Cross in their brief make the following statement:

"Both Walker Bros. and David W. Cross completed this contract of sale under the assumption and belief that the owner of the land, Edward Gould, had transferred the land to Nelson O. Nailen, that Nailen was the bona fide owner, and that Cross was getting good title to the land. They both believed that Edward and Edwin Gould were identical."

This statement is fully sustained by the record and it relieves Walker Bros. from any charge of fraud in connection with the sale of the land. There remains but little to be said to show that the trial court erred in submitting the case to the jury.

Cross brought his action upon a written contract which is set out in his petition. If no such contract was entered into by Cross and Walker Bros., no recovery can be had thereon. As the sale of the land was within the statute of frauds of Missouri, the acceptance, ratification, or other act equivalent to a signing of the contract sued upon must be found in some writing of Walker Bros. Rev. St. Mo. 1899, § 3418 (Ann. St. 1906, p. 1951); Hackett v. Watts, 138 Mo. 502, 511, 40 S. W. 113; Allen v. Richard, 83 Mo. 55, 57, 60; Williams v. Morris, 95 U. S. 444, 458, 24 L. Ed. 360; Grafton v. Cummings, 99 U. S. 100, 25 L. Ed. 366.

In Williams v. Morris, supra, the Supreme Court used the following language:

"Unless the essential terms of the sale can be ascertained from the writing itself, or by reference in it to something else, the writing is not a compliance with the statute; and, if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute was intended to prevent. 2 Kent, Com. (12th Ed.) 511; Norris v. Lain, 16 Johns. (N. Y.) 151; Dung v. Parkers, 52 N. Y. 494; Baltzen v. Nicolay, 53 N. Y. 467; Wright v. Weeks, 25 N. Y. 153; Parkhurst v. Van Cortlandt, 1 Johns. Ch. (N. Y.) 273."

This requires an examination of the correspondence between the parties and is a question of law for the court. Cross took the memorandum of agreement from Missouri back to Iowa unsigned by either party, and subsequently wrote the letter of January 10, 1903. In reply thereto Walker Bros. wrote the letter of January 12, 1903. In this letter Walker Bros. told Cross to have such stipulations written in the contract as would be satisfactory to Cross, and suggested some stipulations that might be proper. This letter also contained this clause:

"The arrangement you speak of is entirely satisfactory with us, *but the party owning the land might hesitate or object to incurring this trouble and expense of procuring and making abstract and deed, unless we have some kind of an agreement, though conditional; besides he is taking the land off the market until March 15, 1903. We hope you may see the reasonableness of this request, and have your attorney to write a contract that is satisfactory to you and return to bank, when we will sign the same, and have the bank place it on record, or as you may direct.*"

Taking this letter as a whole it not only did not ratify or confirm the paper taken by Cross, but suggested the making of a new contract in accordance with the wishes of Cross. It also told Cross that Walker Bros. did not own the land, which fact he (Cross) already knew. At the date of this letter then neither party had signed any contract. On January 12, 1903, in reply to a letter written by McVay, the attorney of Cross, Walker Bros. agreed to send abstract of title as soon as they received it from the owner who they said resided in Washington. They also said they had no power of attorney to sell the land, but had authority to do so by letter received from the owner. Without reviewing every letter that constituted the correspondence between the parties it may be stated that there is not a line of it that assumes or states that Walker Bros. are selling the land as their own. On the contrary Walker Bros. are particular to state that they do not own the land but are simply acting for another who is the owner. It appears from the evidence that Walker Bros. did not sign the contract sued upon, and that every declaration in writing made by them was in direct opposition to the idea that they were selling the land as the owners thereof. Not only this, but both Cross and Walker acted on this theory. When Cross first received the abstract on January 23, 1903, he knew the title appeared therefrom to be in Nelson O. Nailen. Notwithstanding this he makes no complaint, and finally on March 12, 1903, he goes to Missouri, and without objection receives deeds from Nailen for the land. No conveyance was demanded from Walker Bros., and as Cross testifies the alleged contract now sued on was not produced or even mentioned, and in accordance with the statement of counsel for Cross in their brief both Cross and Walker Bros. honestly believed "that Nailen was the bona fide owner." Walker Bros. received none of the purchase price except the sum of \$320 as their commission for making the sale, and Cross was entirely satisfied with the deed from Nailen until about April 20, 1903, when he learned from Edward Gould that he had never conveyed the land to Nailen. The case presents the ordinary sale of land by a real estate agent with a disclosed principal, the vendee dealing directly with the vendor. In such case the remedy of the vendee for defects in the title are upon such covenants as are contained in the deed which he accepts. There is no claim in the petition or evidence in the record that Walker Bros. ever warranted in any way the title of Nailen. It therefore clearly appears that the paper sued upon never became the contract of Walker Bros.

The instruction requested should have been given, and its refusal was error, for which the judgment must be reversed, and a new trial ordered.

CONNECTICUT FIRE INS. CO. v. MANNING et al.*

(Circuit Court of Appeals, Eighth Circuit. March 26, 1908.)

No. 2,688.

1. INSURANCE—WARRANTIES—REPRESENTATIONS—WARRANTIES MATERIAL TO RISKS.

Sections 7973, 7974, and 7975, Rev. St. Mo. 1899 (Ann. St. 1906, pp. 3791, 3792), provide that warranties of facts or conditions in certain applications for and in certain policies of insurance shall, if not material to the risks insured, be deemed representations only.

Warranties of facts or conditions in the applications for or in the policies of insurance specified in these sections which are material to the risks thereunder are unaffected by these provisions of the statutes.

2. SAME—MATERIALITY OF WARRANTY WHEN QUESTION FOR COURT AND WHEN FOR JURY.

The materiality of any such warranty to the risk taken under it is a question for the court as a matter of law in every case where the character of the warranty or the entire evidence relative to the materiality is such that a decision but one way may be lawfully sustained by the court.

It is for the jury when all the admissible evidence is such that a decision either way may be lawfully sustained by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1735, 1758.]

3. SAME—WARRANTY REGARDING INCUMBRANCE MATERIAL AS A MATTER OF LAW.

A warranty regarding the existence or the amount of the incumbrance upon the property insured thereunder is material to the risk as a matter of law.

Knowledge by the underwriter whether or not there is an incumbrance upon the property he insures and of the amount of any existing incumbrance thereon is always material to the risk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 636-651.]

4. SAME—FACTS—CONCLUSION.

One of the conditions of a policy was that "if the interest of the assured be or become other than the entire unconditional, unincumbered and sole ownership of the property, * * * this policy shall be void, unless otherwise provided by agreement indorsed hereon." It was not otherwise provided by agreement indorsed thereon, and there was an incumbrance of \$400 and interest upon the property. Conceding, as counsel for the plaintiff claimed, that this condition constituted a warranty, it was material to the risk as a matter of law, and the court erred in submitting the question to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 636-651.]

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the South-eastern Division of the Western District of Missouri.

Thomas T. Fauntleroy (Shepard Barclay, R. B. Oliver, and R. B. Oliver, Jr., on the brief), for plaintiff in error.

Edward Robb, for defendants in error.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

*Rehearing denied May 4, 1908.

SANBORN, Circuit Judge. The defense to an action upon a policy of insurance against fire upon property in the state of Missouri was that the policy contained a condition that "if the interest of the assured be or become other than the entire unconditional, unincumbered and sole ownership of the property, * * * this policy shall be void, unless otherwise provided by agreement indorsed hereon," that the interest of the assured was incumbered by a trust deed made to secure the payment of a promissory note of \$500, upon which more than \$400 was owing, and there was no provision indorsed upon the policy regarding the incumbrance. The property insured by the terms of the policy was the interest of the assured in a dwelling house. The amount of the insurance was \$3,000. The land on which the house stood and the other buildings thereon were worth \$500. Certain statutes of the state of Missouri read in this way:

"Sec. 7973. That the warranty of any fact or condition hereafter made by any person in his or her application for insurance against loss by fire, tornado or cyclone, which application, or any part thereof, shall thereafter be made a part of a policy of insurance, by being attached thereto, or by being referred to therein, or by being incorporated in such policy, shall, if not material to the risk insured against, be deemed, held and construed as representations only, in any suit brought at law or in equity in any of the courts of this state, upon such policy to enforce payment thereof, on account of loss of or damage to any property insured by such policy.

"Sec. 7974. That the warranty of any fact or condition hereafter incorporated in or made a part of any fire, tornado or cyclone policy of insurance, purporting to be made or assented to by the assured which shall not materially affect the risk insured against, shall be deemed, taken and construed as representations only in all suits at law or in equity brought upon such policy in any of the courts of this state.

"Sec. 7975. No insurance company, corporation or association of persons doing a fire, cyclone or tornado insurance business in this state, shall have the right, power or authority, by contract or otherwise, to contract against or in any manner whatever evade the provisions of sections 7973 and 7974 of this article." Revised Statutes of Missouri 1899 (Ann. St. 1906, pp. 3791, 3792).

Upon this state of facts and statutes the court below refused to instruct the jury to return a verdict for the defendant below, and charged them that, if they believed from the evidence that the incumbrance was material to the risk, they should return a verdict for the defendant, and if they found from the evidence that the mortgage effected by the trust deed was not material to the risk they should return a verdict for the plaintiff. They found for the plaintiff, and the ruling of the court is assigned as error.

For the purpose of the determination of this case it will be conceded, but it is not decided, that the contention of counsel for the plaintiff below that the stipulation quoted from the policy constituted a warranty is sound, although it seems that it was a mere description by exclusion of the property insured, and not a warranty of any fact or condition relating thereto. *Syndicate Ins. Co. v. Bohn*, 12 C. C. A. 531, 537, 65 Fed. 165, 171, 27 L. R. A. 614, and cases there cited. The plaintiff's counsel argue that the ruling challenged is not open to consideration in this court because there was no pleading that the mortgage was material to the risk, but no objection of this nature was made in the court below, and the issue of its materiality was tried and de-

cided by the jury at the request of counsel for the plaintiff. It is too late to object for the first time in an appellate court to the sufficiency of a pleading to raise an issue which was tried and submitted to the jury below with the consent of the objector. *Dolan v. Mo. Town Mutual Ins. Co.*, 88 Mo. App. 666, 673, 675.

The statutes of Missouri which have been quoted provide that warranties in applications for and in policies of insurance of facts or conditions that are not material to the risks taken thereunder, shall be deemed representations. As the expression of one is the exclusion of the other, warranties of facts or conditions which are material to the risks cannot be deemed representations, they remain what they in fact are—warranties by the terms of these sections. But how shall the question whether a given warranty is material or immaterial be determined? Evidently by the course of the common law, for there is no statute which modifies it, by the court when the nature of the warranty is such, or the entire evidence regarding the materiality is so conclusive that a decision but one way may be lawfully sustained, by the jury where all the competent evidence is so inconclusive that a decision either way may be lawfully sustained. *Aloe v. Ins. Co.*, 147 Mo. 561, 579, 49 S. W. 553; *March v. Ins. Co.*, 186 Pa. 629, 40 Atl. 1100, 1101, 65 Am. St. Rep. 887; *Brown v. Greenfield Life Ass'n*, 172 Mass. 498, 503, 53 N. E. 129; *Dolan v. Mo. Town Mutual Fire Ins. Co.*, 88 Mo. App. 666, 673; *White v. Merchants' Ins. Co.*, 93 Mo. App. 282, 288; *Hanna & Co. v. Orient Ins. Co.*, 109 Mo. App. 152, 156, 82 S. W. 1115.

Thus in *Aloe v. Ins. Co.*, 147 Mo. 561, 579, 49 S. W. 553, the Supreme Court of that state held under these statutes that false warranties by the assured that he had applied and been rejected by 2 insurance companies when he had been rejected by 6, and that he had not consulted or been treated by a physician for 30 years, were material to the risk of his life insurance as a matter of law, and it reversed a judgment for the plaintiff which had been rendered on the ground that these were representations, and entered a judgment for the defendant. In *Dolan v. Mo. Town Mutual Ins. Co.*, 88 Mo. App. 666, 672, the Court of Appeals held that a false warranty of the amount of insurance was material to the risk as a matter of law, and reversed a judgment because the trial court submitted that question to the jury. On the other hand, in *Hanna & Co. v. Orient Ins. Co.*, 109 Mo. App. 152, 82 S. W. 1115, there is a decision that the question whether or not the iron-safe clause is material to the risk taken under a policy which contained it is for the jury, and the court said that the consensus of judicial opinion in Missouri was that the question of what is material to the risk is for the jury, except in such clear cases as can be determined by the court as a matter of law, and it cited several decisions to that effect.

The question in this case, then, is whether the materiality to the insurance risk of a false warranty of no incumbrance upon the property insured is a question of law for the court or a question of fact for the jury. It is not, however, in reality whether or not the amount of the incumbrance actually existing is material, but whether or not a knowl-

edge by the underwriter of the condition of the title regarding incumbrances is material to the risk as a matter of law, for this contract is that the company insures the interest of the assured unincumbered, save as specified in writing in the policy, and no incumbrance was specified.

The property insured against fire in this policy, and in like policies of insurance ordinarily, is not the real or personal property described therein, but it is the interest of the assured in that property. The extent of his interest is therefore necessarily material to the risk which the underwriter assumes. The moral hazard is one of the main elements, if not the chief element, of an insurance risk, and it is never negligible. It is always material to the risk. Moral hazard is but another name for a pecuniary interest in the assured to permit the property to burn. Statistics, experience, and observation all teach alike that the moral hazard is least when the pecuniary interest of the assured in the protection of the property against fire is greatest, and the moral hazard is greatest when the assured may gain the most by the burning of the property. The extent of the interest of the assured in the property insured measures the moral hazard, and hence is always material to the risk of the insurance. But any incumbrance upon the interest of the assured diminishes that interest by the amount of the incumbrance and thus becomes itself material to the risk. The responsibility of the assured, his ability to pay the premiums upon his policy, is another important consideration to the underwriter, and the extent of his interest in the insured property, the incumbrance upon it, and his indebtedness on account of that incumbrance tend clearly to show his responsibility, and in that way are material to the risk. The parties to a contract are as important as its terms, and the parties interested in property insured are little less material than the parties to the policy itself. *Equitable Life Assur. Society v. McElroy*, 83 Fed. 631, 641, 28 C. C. A. 365, 375. An insurance company might willingly insure unincumbered property of a citizen of high character when it would hesitate or refuse to insure it when it was incumbered, unless it knew that the mortgagee was also of good reputation and neither a fire bug nor a rascal. Moreover, courts cannot be, and ought not to be, blind to the common knowledge and judgment of men engaged in a long-established and familiar business upon a business question, and their opinions, whenever they are evidenced by a well-known and uniform practice, and are portrayed by the decisions of the courts, are always persuasive, if not convincing. Insurance contracts and applications for insurance, the opinions of the courts regarding them for more than 50 years, and the familiar practice of the present day, demonstrate the fact that parties to contracts of insurance during all this time have deemed knowledge by the underwriter and a warranty and representation by the assured regarding the incumbrances upon the property insured material to the risks of its insurance, for they have given and received statements or agreements concerning them as bases for policies of indemnity during all this time. Finally, the parties to this contract were of the same opinion, for by the terms of this policy they limited the insurance to the unincumbered interest of the assured.

In *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25, 48, 7 L. Ed. 335, the Supreme Court held that a misrepresentation regarding title to insured property was material to the risk as a matter of law, and said:

"Underwriters do not rely so much upon the principles as upon the interest of the assured, and it would seem therefore to be always material that they should know how far this interest is engaged in guarding the property from loss."

The question whether the knowledge of the underwriter and the warranty or representation regarding the amount of incumbrance upon insured property are material to the risk as a matter of law has arisen and been decided most frequently in cases involving representations, because the materiality of a warranty in the absence of modifying statutes like those of Missouri is legally unquestionable. We turn therefore to those decisions for authoritative declarations of the law upon this subject.

In 1846, a corporation of the state of New Hampshire issued a policy of insurance upon an application in which the assured had answered in the negative the question, "Is the property incumbered," when there were two mortgages upon the insured property which was situated in the state of Massachusetts. The plaintiff met the defense that the policy was avoided by the misrepresentation with the assertion that it was immaterial because the corporation would have no lien upon the property for its premiums in any event. The Supreme Judicial Court of Massachusetts answered this contention in these words:

"But, irrespective of the lien, whether the defendants would or would not have one, the misrepresentation was clearly a material misrepresentation. It was material for the insurers to know of the incumbrances, in reference to the responsibility of the insured, and his ability to meet his engagements to the company; it was material to know who was interested in or had any title to the estate; but more particularly and especially was it material for the defendants to know what interest the plaintiff himself had in the premises, and whether his estate was incumbered or unincumbered. It is manifest that the defendants deemed this information material; and they put the direct question, and it was a proper and a practical question; and it was material that the plaintiff should answer it truly. The plaintiff, having given an untrue answer, whether by accident, mistake, or design, it matters not, to a direct, plain, and practical question, cannot now be heard to say it was immaterial." *Davenport v. New England Mutual Fire Ins. Co.*, 6 Cush. (Mass.) 840, 841.

In 1859, one Patten had stated falsely in his application for insurance in answer to an inquiry made by the underwriter that the property insured was not incumbered by mortgage or otherwise, and the application contained a covenant that his answers were true so far as material to the risk. His counsel contended that the misrepresentation was not material, that "whether there has been such a misrepresentation as will avoid the policy is for the jury," and cited *Ins. Co. v. Snyder*, 16 Wend. (N. Y.) 482, 30 Am. Dec. 118; *Fletcher v. Ins. Co.*, 18 Pick. (Mass.) 420; *Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 73, 22 Am. Dec. 567. But the Supreme Judicial Court of New Hampshire said:

"We think it clear that, when the title of the insured is made the subject of special inquiry by the insurers, in reference to the existence of incumbrances upon it, the matter becomes material, and the representation is material to the risk, not so much because, if false, the property as represented would

seem to be less exposed to conflagration than it actually is in its true condition, but because the matter which is the subject of the misrepresentation is material to be fairly and truly disclosed, in order to enable the company to judge correctly in reference to the propriety of assuming the risk, and the terms upon which it is to be taken. The article of the rules and regulations which declares that the policy shall be void if the application does not contain a full, fair, and substantially true representation of all the facts and circumstances respecting the property, so far as they are material to the risk, is to be construed in the same sense, as equivalent to saying, so far as it may be material to the company to know them, in order to estimate the risk correctly. The materiality of the facts and circumstances is not to be understood as limited to their direct effect, in exposing the property to more or less danger from fire, but as extending to all other considerations necessarily affecting the nature and character of the risk. These views are fully sustained by the authorities cited by the defendants' counsel, and they would seem to be decisive of the case. There is nothing for the jury upon this point, as the falsity of the representation is admitted, and its materiality appears as matter of law." *Patten v. Ins. Co.*, 38 N. H. 338, 345.

In 1883 one Brehm made the same answer to the same question when there was a mortgage of \$450 and interest upon the property insured. The Supreme Court of Indiana quoted with approval a paragraph which appears in the second edition of Wood on Fire Insurance at section 120, and the cases which have been reviewed and held that the representation was material to the risk as a matter of law. *Indiana Insurance Co. v. Brehm*, 88 Ind. 578, 581.

In *Vankirk v. Citizens' Ins. Co.*, 79 Wis. 627, 48 N. W. 798, 799, a case in which no question had been asked or answered, and no condition or stipulation regarding incumbrances had been made, but in which there was an alleged breach of a covenant that no fact material to the risk had been concealed, the Supreme Court of Wisconsin said of an incumbrance of \$1,035 which had not been disclosed:

"The existence of the mortgage was a fact material to the risk and no proof of its materiality was necessary. Hence it was not error to exclude such proof which the circuit court did. Such proof would have been inconsequential."

In *Byers v. Ins. Co.*, 35 Ohio St. 606, 614, 35 Am. Rep. 623, the condition in the policy was that any false representation material to the risk should avoid it. The assured had represented that a mortgage on the property was \$2,000 when it was \$3,440. The Supreme Court of Ohio held that this misrepresentation was material to the risk as a matter of law.

In *Lee v. Agricultural Ins. Co.*, 79 Iowa, 379, 44 N. W. 683, 684, error was assigned because the court below refused to admit evidence that a chattel mortgage for \$125, to secure the mortgagee as surety for the debt of another which he had not yet been called upon to pay, was immaterial to the risk, and to submit that question to the jury, but the court said:

"The giving of the chattel mortgage is, beyond question, an increase of the risk, and a decrease of the defendant's security, because thereby the assured lessened his interest in the insured property. It makes no difference that a right of action had not accrued upon the mortgage. It was a depletion of the assured's interest in the property, to the extent thereof, from its execution and delivery."

To the same effect are *Shoemaker v. Glens Falls Ins. Co.*, 60 Barb. (N. Y.) 84, 101; *Hinman v. Hartford Fire Ins. Co.*, 36 Wis. 159; *Fuller v. Madison Mutual Ins. Co.*, 36 Wis. 604; *Ryan v. Fire & Marine Ins. Co.*, 46 Wis. 671, 1 N. W. 426, 428.

And in *Brennen v. Connecticut Fire Ins. Co.*, 99 Mo. App. 718, 720, 74 S. W. 406, a case decided in 1903, six years after the statutes on which the plaintiff relies were enacted, the Court of Appeals held that a false warranty of no incumbrance, when there was a mortgage of \$421 upon the property, was material to the risk as a matter of law and fatal to the policy, unless it was waived, and said:

"It has been repeatedly held that the existence of a mortgage upon property at the time of insurance, contrary to the terms of the policy and contrary to the warranty in the application that the property was not so mortgaged, rendered the policy void. *Walker v. Ins. Co.*, 62 Mo. App. 209; *American Ins. Co. v. Barnett*, 73 Mo. 364, 39 Am. Rep. 517; *Crook v. Ins. Co.*, 88 Mo. App. 582; *Boggs v. Ins. Co.*, 30 Mo. 63."

In opposition to this array of authorities counsel cite *Phenix Ins. Co. v. Coomes* (Ky.) 20 S. W. 900, in which that court held as a matter of law that a lien of \$600 on the insured property was not material to the risk of the insurance, and there is a decision of the Supreme Court of South Dakota that as a matter of law a slight variance in the amount of an incumbrance from the amount stated by the assured is not material to the risk in *McNamara v. Dakota Fire & Marine Ins. Co.*, 1 S. D. 342, 47 N. W. 288. It may be that from the multitude of decisions upon insurance policies opinions may be found to the effect that the materiality to the risk of a warranty or a representation regarding the incumbrance upon the property insured is a question for the jury. However that may be, the long-established and familiar rule of law, the more convincing reasons, and the great weight of commanding authority are otherwise, and after a careful consideration of the question which is involved in this case our conclusions are these:

Under sections 7973, 7974, and 7975 of the Revised Statutes of Missouri 1899 (Ann. St. 1906, pp. 3791, 3792), warranties of facts or conditions in applications for or policies of insurance there specified which are material to the risks taken thereunder are unaffected by these provisions of the statutes. The materiality of any such warranty to the risk taken under it is a question for the court as a matter of law in every case where the character of the warranty, or the entire evidence relative to the materiality is such that a decision but one way may be lawfully sustained by the court. It is for the jury where all the admissible evidence is such that a decision either way may be lawfully sustained by the court.

The materiality to the risk of a warranty regarding the existence or the amount of an incumbrance upon the property insured thereunder is a question of law for the court. A warranty regarding the existence, or the amount of an incumbrance upon property insured thereunder is material to the risk as a matter of law. Knowledge by the underwriter whether or not there is an incumbrance upon the property he insures, and of the amount of any existing incumbrance thereon, is always material to the risk as a matter of law. The court below fell into an error in submitting the question of the materiality of the warranty that there

was no incumbrance upon the insured property to the jury, and the judgment must be reversed, and the case must be remanded to the court below for another trial.

It is so ordered.

BLAFFER v. NEW ORLEANS WATER SUPPLY CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 31, 1908.)

No. 1,746.

1. COURTS—FEDERAL PRACTICE—CIRCUIT COURT OF APPEALS—TIME FOR TAKING APPEAL.

Under the express terms of Act Cong. March 3, 1891, c. 517, § 11, 26 Stat. 829 (U. S. Comp. St. 1901, p. 552), establishing the United States Circuit Court of Appeals, that court has no jurisdiction to review a judgment where more than eight months intervened between the day of judgment and the day on which the appeal was taken.

2. APPEAL AND ERROR—ORDER NOT APPEALABLE—REFUSAL TO PERMIT INTERVENTION.

An order refusing to allow one to intervene is not an appealable order, being an exercise of discretion, and not final in character. He is left free to assert his rights in any other tribunal of competent jurisdiction, the order not being in any sense a determination of the merits of his claim.

3. SAME—DEFECTIVE APPEAL BOND—EFFECT.

An appeal will not be dismissed because the bond is not payable to all the adverse parties, where, on the hearing of a motion to dismiss, appellant tenders a new bond conditioned to meet the objections.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2077-2083.]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Benjamin Rice Forman and Chas. F. Buck, for appellant.

Edgar H. Farrar, for appellee New Orleans Water Supply Co.

Before McCORMICK, Circuit Judge, and NEWMAN and BURNS, District Judges.

BURNS, District Judge. The New Orleans Water Supply Company moves to dismiss the appeal in this case upon the following grounds: First, the appeal was not perfected within six months after the rendition of judgment; second, there was no order permitting appellant to intervene; third, failure to make the appeal bond payable to all adverse parties.

The act of Congress approved March 3, 1891, being an act to establish Circuit Courts of Appeals, and to define and regulate the jurisdiction (section 11), provides:

"No appeal or writ of error by which any order, judgment or decree may be reviewed in the Circuit Court of Appeals under the provisions of this act shall be taken or sued out, except within six months after the entry of the order, judgment or decree sought to be reviewed." Chapter 517, 26 Stat. 826 (U. S. Comp. St. 1901, p. 552).

The final decree was entered and signed in this cause on the 10th of January, 1907. Thereafter, on March 29th, appellant filed his peti-

tion for appeal, coupled with an assignment of errors. This petition was denied May 20, 1907. On September 21st a new petition was presented to one of the circuit judges and allowed on the day last named. The bond was approved, and citations in error signed on the same day, and thereupon the bond and petition were filed with the clerk of the court on September 23, 1907. Thus it appears that the appeal was not allowed within the statutory period of six months, as required by the act above referred to; more than eight months intervened between the final decree and the allowance of appeal. It was incumbent upon appellant to obtain an allowance of the appeal within the time fixed by the statute. *Green v. City of Lynn*, 87 Fed. 839, 31 C. C. A. 248. In this case the Circuit Court of Appeals, First Circuit, said:

"We are of the opinion that this appeal was not taken within six months after the entry of the decree sought to be reviewed, as required by the act of March 3, 1891, and that for this reason we have no jurisdiction thereof. The date of the entry of the decree in the Circuit Court was February 24, 1897; the six-months period expired August 24, 1897; the petition below with assignment of errors was filed in the office of the clerk of the Circuit Court August 17, 1897. Nothing further was done within the six-months period. December 11, 1897, the following indorsement was made upon the petition: 'This appeal is allowed, although I doubt whether it was seasonably perfected (Putnam, Circuit Judge).' On the same date the judge signed a citation dated December 11, 1897, and approved an appeal bond dated November 2, 1897. In *Barrel v. Transportation Company*, 3 Wall. 424, 18 L. Ed. 168, a petition for appeal had been filed in due time in the office of the clerk of the Circuit Court. Nevertheless, the court said the filing of it in the clerk's office, even if it could be regarded as addressed to the Circuit Court, would be of no avail, unless accompanied by allowance of appeal by that court, and, to the same effect, see *Pierce v. Cox*, 9 Wall. 786, 19 L. Ed. 786."

The opinion concludes with this statement:

"Although the Supreme Court has often said that signing a citation or approving a bond is equivalent in law to the allowance of appeal, it has never said, so far as we can discover, that an allowance in some form can be dispensed with, or intimated that the limitation of time could be disregarded, and allowance made after its expiration be effectual. The act of March 3, 1891, by its provisions recognizes the necessity for an allowance; and the uniform practice of filing both the petition and the allowance before the expiration of the statutory period seems to be in accordance with the views of the Supreme Court as to the essential requirements, which must be complied with before an appeal can be said to be taken."

This holding is supported by the following cases: *Credit Co. v. Arkansas Cent. Ry.*, 128 U. S. 258, 9 Sup. Ct. 107, 32 L. Ed. 448; *Edmonson v. Bloomshire*, 7 Wall. 306, 19 L. Ed. 91; *Evans v. Bank*, 134 U. S. 330, 10 Sup. Ct. 493, 33 L. Ed. 917; *Brooks v. Norris*, 11 How. 204, 13 L. Ed. 665; *The Dos Hermanos*, 10 Wheat. 306, 6 L. Ed. 328; *Seymour v. Freer*, 5 Wall. 822, 18 L. Ed. 564; *Yeaton v. Lenox*, 7 Pet. 220, 8 L. Ed. 664; *The Enterprise*, 2 Curt. 317, Fed. Cas. No. 4,497; *Warner v. Railway Co.*, 54 Fed. 920, 4 C. C. A. 670.

We think it may be announced as the settled doctrine that the Circuit Court of Appeals has no jurisdiction, where more than six months intervene between the day of judgment and the day on which the appeal is "taken" or the writ of error is "sued out." *Fire Ins. Co. v.*

Oldendorf, 73 Fed. 88, 19 C. C. A. 379; Condon v. Trust Co., 73 Fed. 907, 20 C. C. A. 110; White v. Iowa National Bank, 71 Fed. 97, 17 C. C. A. 621; Threadgill v. Platt (C. C.) 71 Fed. 1; Stevens v. Clark, 62 Fed. 321, 10 C. C. A. 379; Desvergers v. Parsons, 60 Fed. 143, 8 C. C. A. 526; Union Pacific v. Colorado Ry., 54 Fed. 22, 4 C. C. A. 161; U. S. v. Baxter, 51 Fed. 624, 2 C. C. A. 410; Couilliette v. Thomason, 50 Fed. 787, 1 C. C. A. 675.

In the case of Threadgill, *supra*, it is said:

"A writ of error from the Circuit Court of Appeals to review a judgment issued from such court, and, in granting the writ, the judge to whom it is presented must exercise the power of the Circuit Court of Appeals, and is bound by its limitations."

In the Stevens Case, *supra*, the court makes this declaration:

"To give the appellate court jurisdiction of a writ of error, the writ must be issued and filed with the court below within the time prescribed by the law, and this requirement cannot be waived by the parties."

In Waxahachie v. Coler, 92 Fed. 284, 34 C. C. A. 349, this court said:

"A writ of error is not 'sued out' within the meaning of this section by the filing of the petition and bond therefor, and the allowance of the writ by the court below. The writ must be obtained and issued within the time named to give the court jurisdiction. Whether the failure to obtain and issue the writ named resulted from the negligence of the plaintiff in error, or was the fault of the clerk, appears to be immaterial."

In the Threadgill Case, *supra*, it is said:

"When a writ of error from the Circuit Court of Appeals is allowed within the six months, but is not actually issued by the clerk until after the expiration thereof, it will be dismissed, for, in a legal sense, the writ of error is not brought until it is filed in the court below."

Where the last day of the six months falls on Sunday, the appeal cannot be "taken," or writ of error "sued out" on a subsequent day. Johnson v. Meyers, 54 Fed. 417, 4 C. C. A. 399. "The time for suing out a writ, or praying an appeal, cannot be enlarged by stipulation of the parties, nor by an order of the court." Stevens v. Clark, *supra*.

The second ground of the motion to dismiss the appeal is based upon the fact that the intervener failed to obtain an order permitting him to intervene, and thereby making himself a party to the suit, from which it follows that he is not in an attitude to appeal from the decree entered in the cause, or from the refusal of the court to permit him to intervene. The action of the court in declining to make an order allowing appellant to intervene was an exercise of purely discretionary power, and was not final in its character. Appellant, failing to obtain the right to intervene, was left free to assert such other rights as he might possess in any other tribunal of competent jurisdiction. The order of the court was equivalent to a denial of the application of the appellant for leave to intervene, and should not be regarded in any sense as a determination of the merits of his claim. Credits Commutation Company v. United States, 177 U. S. 311, 20 Sup. Ct. 636, 44 L. Ed. 782.

In the case of *Guion v. Insurance Company*, 109 U. S. 173, 3 Sup. Ct. 108, 27 L. Ed. 895, Guion claiming to have an interest in the bonds of the appellant, which were the subject of controversy in a suit of the Indiana Southern Railroad Company v. Liverpool, London & Globe Insurance Company, filed his petition in that suit in the court below praying to be admitted as a party to the suit for his own protection. This petition was denied. Guion was allowed an appeal on giving bond and security for costs. The Chief Justice in delivering the opinion said:

"The petition of Guion was for leave to appeal from the decree of a suit to which he was not a party. We decided, in *Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49, that such an appeal could not be taken. He had applied for leave to become a party, but this leave was not given, so he was not a party to the decree from which he appeals, and the appeal is dismissed for want of jurisdiction."

In *Ex parte Cutting*, supra, it is said:

"It was claimed by Cutting and others that they were admitted as parties to the main suit when they filed their petition therefor, and that subsequently they were in a position to demand an appeal as parties; but, as a matter of fact, the parties presenting the petition never did become parties. They filed their petition to become defendants in the suit, but it was never granted. Not only was no express order made to that effect, but there is nothing to show that they were ever in any manner recognized as parties. We are aware that there are cases in which parties have been treated as parties to the suit after having filed the petition for leave to come in when no formal order admitting them appears on the record, but in all such cases it will be found that they have acted or have been recognized as parties in the subsequent proceedings in the case."

In *Myers v. Fenn*, 5 Wall. 205, 18 L. Ed. 604, the petitions were filed without any order of the court before any objection was made, and the hearing went on as if an order had been granted; and in *Railroad Company v. Bradley*, 7 Wall. 575, 19 L. Ed. 274, it was held that, where the appeal had been prayed for and subsequently an appeal bond, approved by one of the judges, had been filed in the court, it would be inferred that the appeal had been allowed, although there was no express order to that effect on the record. The court concluded with the statement:

"From this it appears that if one wishes to intervene and become a party to a suit in which he is interested, he must not only petition the court to that effect, but his petition must be granted."

In this case it affirmatively appears from the statement of the trial judge that he declined to make any order upon intervenor's petition. That an appeal does not lie from the order of the court below, denying the motion in a pending suit to permit a person to intervene and become a party thereto, is supported by the following authorities: *Ex parte Cockcroft*, 104 U. S. 579, 26 L. Ed. 856; *Guion v. Insurance Co.*, 109 U. S. 173, 3 Sup. Ct. 108, 27 L. Ed. 895; *Elwell v. Fosdick*, 134 U. S. 513, 10 Sup. Ct. 598, 33 L. Ed. 998; *Credits Commutation Company v. U. S.*, 177 U. S. 317, 20 Sup. Ct. 636, 44 L. Ed. 782; *Fitzgerald v. Evans*, 49 Fed. 428, 1 C. C. A. 307; *Aiken v. Smith*, 54 Fed. 895, 4 C. C. A. 652; *Lewis v. B. & I. Railway Co.*, 62 Fed. 222, 10 C. C. A. 446; *Cook v. Last*, 704

C. A. 654; *Smith v. Glasgow Investment Co.*, 74 Fed. 335, 20 C. C. A. 432; *Hamlin v. Toledo, St. L. & K. C. R. Co.*, 78 Fed. 665, 24 C. C. A. 271, 36 L. R. A. 826; *Credits Commutation Co. v. U. S.*, 91 Fed. 573, 34 C. C. A. 12; *Toledo, etc., Ry. Co. v. Continental Trust Co.*, 95 Fed. 536, 36 C. C. A. 155; *Minot v. Mastin*, 95 Fed. 739, 37 C. C. A. 234.

The third ground assigned in support of the motion to dismiss for failure to make the bond payable to all of the adverse parties cannot be sustained. A failure to execute a bond is an irregularity, but it does not necessarily avoid the citation. The security is required, however, in the due prosecution of the appeal, and, if the case is docketed in time, it will not ordinarily be dismissed until appellant has been afforded a reasonable opportunity of curing the defect. *Brown v. McConnell*, 124 U. S. 489, 8 Sup. Ct. 559, 31 L. Ed. 495; *Richardson v. Green*, 130 U. S. 114, 9 Sup. Ct. 443, 32 L. Ed. 872; *McClellan v. Pyeatt*, 49 Fed. 260, 1 C. C. A. 241; *United States Trust Co. v. Western Contract Co.*, 81 Fed. 471, 26 C. C. A. 472; *Central Trust Co. v. Continental Trust Co.*, 86 Fed. 524, 30 C. C. A. 235; *McNulta v. West Chicago Park Com'rs*, 99 Fed. 329, 39 C. C. A. 545. An appeal may be perfected notwithstanding the security has not been given within six months after the entry of the decree sought to be reviewed. *Evans v. Bank*, 134 U. S. 330, 10 Sup. Ct. 493, 33 L. Ed. 217; *Brandies v. Cochrane*, 105 U. S. 262, 26 L. Ed. 989; *The Dos Hermanos*, 10 Wheat. 306, 6 L. Ed. 328; *Wickelman v. A. B. Dick Company*, 85 Fed. 851, 29 C. C. A. 436.

In response to this ground of the motion the appellant tendered, upon the hearing, a new bond conditioned to meet the objections raised. It follows that the motion to dismiss should be sustained, upon the first and second grounds, and it is so ordered; the costs of appeal to be taxed against the appellant.

CITY OF NEW ORLEANS v. HOWARD et al.

(Circuit Court of Appeals, Fifth Circuit. March 31, 1908.)

No. 1,662.

1. APPEAL AND ERROR—QUESTIONS NOT RAISED AT TRIAL—JURISDICTION.

An objection to the jurisdiction of a federal court may be first raised on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1166-1178.]

2. COURTS—FEDERAL COURTS—ANCILLARY JURISDICTION—PARTITION.

A United States Circuit Court having possession of the property of a waterworks company sought to be partitioned, no other court could take jurisdiction of any suit or claim affecting that property, and hence by virtue of its possession the court had jurisdiction to grant partition and determine all matters relating to the property, irrespective of the citizenship of the parties to the partition proceedings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1386. Jurisdiction of federal courts, see note to *v. Continental Trust Co.*, 36 C. C. A. 195.]

3. SAME—COLLATERAL ATTACK.

The jurisdiction of a federal court of a suit to administer the assets of a defunct corporation could not be raised in a collateral proceeding for partition of the surplus assets of such corporation.

4. APPEAL AND ERROR—SCOPE OF REVIEW—QUESTIONS NOT RAISED AT TRIAL.

The jurisdiction of a federal court of another case cannot be first raised on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1166-1178.]

5. PARTITION—SALE IN BULK.

In proceedings for partition of the assets of a defunct waterworks corporation, consisting of real estate, pumping machinery, standpipe, reservoir, water mains, hydrants, and private connections, together with supplies, etc., the court properly required a sale of all the property as an entirety.

6. SAME—UPSET PRICE.

Though the Louisiana law does not provide for the appraisement of property sold to effect a partition, a federal court, sitting in that state in a proceeding for the sale of the assets of a defunct waterworks corporation for partition, properly ordered that the commissioner appointed to make the sale must realize not less than a specified sum therefrom.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Samuel L. Gilmore and St. Clair Adams, for appellant.

Edgar H. Farrar, Wm. C. Dufour, H. Generes Dufour, and Benj. Rice Forman, for appellees.

Before McCORMICK, Circuit Judge, and NEWMAN and BURNS, District Judges.

BURNS, District Judge. The New Orleans Water Supply Company, a corporation organized under the laws of the state of Louisiana and domiciled in the city of New Orleans, filed its bill of complaint May 3, 1905, against the board of liquidation of the city debt, a corporation organized under the laws of Louisiana and domiciled in the city of New Orleans, and against the Lambert heirs, likewise citizens of the state of Louisiana and inhabitants of the Eastern District. In said bill complainant averred that the property and assets of the old New Orleans Waterworks Company, a defunct corporation, are now in the possession, custody, and control of the Circuit Court of the United States in and for the Eastern District of Louisiana, under and by virtue of the proceedings had in the case of Robert Moore v. New Orleans Waterworks Company [no opinion], to which record and the proceedings therein complainant refers and makes part of its bill for reference and proof. Complainant avers its proportionate ownership of said property and assets, also the ownership of the respective shares or parts held and owned by the several defendants, and that said parties are the sole owners indivisibly of all the property of said defunct company; that the property aforesaid consists of a system of waterworks now in operation in the city of New Orleans, comprising real estate, pumping machinery, standpipe, reservoir, 126 miles of water mains, 1,786 fire hydrants and about 10,750 private connections, and a large amount of supplies,

such as pipe fittings, tools, coal, etc., books, papers and records, and cash in the hands of the receiver appointed by this court; that said property is incumbered and covered by certain mortgage claims much less than the value of the property and assets, which claims are now due, and action to foreclose which is pending in this court. Said property is further incumbered by certain receiver's certificates issued by this court.

The complainant, as against said defendants, seeks a partition of said property, and a sale of the same to effect said partition, and, after the deduction from the proceeds of said sale, a sum sufficient to pay the mortgage debts, receiver's certificates, and costs and expenses incurred in this proceeding, and in the main case to have the residue divided among complainant and defendants as their interests may appear. The prayer asks for the appointment of a receiver for the property and assets of said company, or that Frank T. Howard, receiver of all the property and assets aforesaid, under and by virtue of his appointment and qualification in the case of Robert Moore v. New Orleans Waterworks Company et al., shall also act as receiver in this case as if he had been separately named, appointed, and qualified, and that the receivership in said case shall be extended over this cause. Complainant further prays that the property be sold in bulk for cash to the highest bidder in order to effect a partition by licitation between complainant and defendants, and for distribution of the proceeds, after the payment of the claims and debts. The Lambert heirs demurred to the bill upon the ground, first, that the court was without jurisdiction in the premises, for the reason that the complainant and all of the defendants are citizens of the state of Louisiana and residents thereof; second, that there is no federal question arising under the Constitution or laws of the United States stated in said bill. The defendant the board of liquidation of the city debt demurred because the bill is without equity; and, further, that the court is without jurisdiction by reason of all of the parties to the suit being resident citizens of the state of Louisiana. By supplemental bill, filed May 10, 1905, the city of New Orleans was made a party defendant, upon the averment that the legal title to an undivided part of said property was in the board of liquidation, the same being held for the use and benefit of the city of New Orleans and that said interest could not be sold or disposed of without the consent of the said city.

The demurrers to the jurisdiction, as well as for want of equity, were heard and overruled, and thereupon the parties answered, and as the answers admit the substantial averments of the bill the cause was set down on bill and answer. The court extended the receivership already existing in the Moore Case over this case, and referred the same to a master in chancery to examine and report: First, whether the property should be sold in bulk or in parcels, and if in parcels, in what parcels? Second, whether there should be put an upset price on the property, and, if so, what? Third, any other terms and conditions that may be appropriate to the cause. After due hearing, at which all of the parties were represented, the master reported that

the property should be sold in bulk, and that an upset price of \$700,000 should be put on the property. All of the counsel stated to the master that they had no objection to his reporting such sale in bulk and such upset price. The complainant took a rule on the parties for final decree, suggesting this report, and the acquiescence in its recommendations by all the counsel. The city of New Orleans answered the rule, saying:

"Respondent did not consent to the recommendations of said master, but respondent verily believes that, from the evidence heard before the master, the conclusion of said master in said report set out is correct, and respondent has no objections to urge against the confirmation of the report."

Final decree was entered on January 10, 1907, in accordance with the terms of the answers and the report ordering a sale of the property and assets in bulk, and fixing the upset price at \$700,000.

The city of New Orleans appeals, and assigns as error: First. On the face of the record, the Circuit Court of the United States of the Fifth Circuit and Eastern District of Louisiana has no jurisdiction, because the plaintiff and all of the defendants are all citizens of Louisiana, and there is no federal question involved which could give the United States courts jurisdiction of such a cause, and the judicial power of the United States, as granted by the Constitution, does not extend to such a cause. Second. The Circuit Court erred in overruling the demurrers filed to its jurisdiction. Third. The only pretext upon which the jurisdiction was claimed was that, in the case of *Robert Moore v. The New Orleans Waterworks Company*, the Circuit Court of the United States had appointed a receiver who had taken possession of the property and plant of the New Orleans Waterworks Company, but that no decree of sale was made, or could be made, in that case, because (1) by the judgment of the Supreme Court of Louisiana rendered on the 7th of November 1901, and which became executory on the 3d of February, 1902, the charter and corporate existence and all of the franchises of the New Orleans Waterworks Company had been forfeited, and the said suit of *Robert Moore v. The New Orleans Waterworks Company* abated as a matter of law; and thereafter the Circuit Court of the United States of the Fifth Circuit, Eastern District of Louisiana, unlawfully usurped and exercised the franchise of the defunct waterworks company in the interest of the bondholders and the stockholders, when it was the duty of the court, sitting as a court of Louisiana, to recognize the decree of the Supreme Court of Louisiana, and the statute laws of Louisiana, to wit, section 731 of the Revised Statutes of Louisiana, which provides that, when the charter of a corporation is forfeited in the manner that this was, the Governor should appoint a liquidator to wind up its affairs; that the said statute was binding, upon the Circuit Court of the United States. Fourth. It appeared in the said cause that the sole possible function of the said receiver has ceased, because the entire series of mortgage bonds due by the said waterworks company had been paid, including the plaintiffs, the board of liquidation of the city debt, and the city of New Orleans; that the board of liquidation of the city debt was entitled to control 3,900²⁷/₂₀₀₀₀ of the tangible property and plant of the late

New Orleans Waterworks Company. Fifth. The court erred in ordering and decreeing a sale of the property wholly of citizens of Louisiana in bulk, and not proceeding according to the law of Louisiana in such cases. Sixth. The court erred in fixing an upset price for which alone the property can be sold, because the law of Louisiana provides that, at the sale of property to effect a partition, it shall be sold for whatever price it may bring without appraisalment; and the United States Circuit Court, in dealing with property situated in Louisiana, and between citizens of Louisiana has no power to disregard the laws of Louisiana regulating the subject.

Assignments 1 and 2 raise the question whether the court was without jurisdiction of the cause by reason of the complainant and the defendants being citizens of Louisiana. The appellant did not present any objection to the jurisdiction of the court below, yet the question is properly presented here by reason of the fact that consent cannot confer jurisdiction upon the courts of the United States. The ground upon which the trial court maintained jurisdiction appears by reference to the order appointing the receiver, as follows:

"It appearing to the court that all of the property sought to be partitioned in this cause is in the custody of this court by its receiver, Frank T. Howard, appointed in cause No. 12,978 of the docket of this court, styled Robert Moore v. New Orleans Water Works Company et al., and that all of the parties to this bill are parties defendant in said cause, and that the bill herein is in the nature of an ancillary bill, of which the court has jurisdiction, because of its possession of the property and assets sought herein to be partitioned, and that no other court would have jurisdiction to grant the relief sought in this cause."

The United States Circuit Court having possession of the res sought to be partitioned, no other court could take jurisdiction of any suit or claim affecting that property, and by virtue of its possession the court drew to itself jurisdiction to determine all matters relating to the property, irrespective of the question of citizenship. *Compton v. Jessup*, 68 Fed. 263, 15 C. C. A. 397. The latest expression by the Supreme Court of the United States bearing upon the question of jurisdiction presented by appellant is to be found in *Wabash Ry. Co. v. Adelbert College* (decided January 6, 1908) 208 U. S. 38, 28 Sup. Ct. 187, 52 L. Ed. —, in which Mr. Justice Moody, speaking for the court, says:

"When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession, or the control of the property. In the courts of the United States, this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application, and not peculiar to the relations of the courts of the United States to the courts of the states; they are, however, of especial importance with respect

to the relations of those courts, which exercise independent jurisdiction in the same territory, often over the same property, person, and controversies; they are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property, which would be unseemly and subversive of justice; and have been applied by this court in many cases, some of which are cited, sometimes in favor of the jurisdiction of the courts of the states, and sometimes in favor of the jurisdiction of the courts of the United States, but always, it is believed, impartially and with a spirit of respect for the just authority of the states of the Union." *Hagan v. Lucas*, 10 Pet. 400, 9 L. Ed. 470; *Williams v. Benedict*, 8 How. 107, 12 L. Ed. 1007; *Wiswall v. Sampson*, 14 How. 52, 14 L. Ed. 322; *Peale v. Phipps*, 14 How. 368, 14 L. Ed. 459; *Pulliam v. Osborne*, 17 How. 471, 15 L. Ed. 154; *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Buck v. Colbath*, 8 Wall. 334, 18 L. Ed. 257; *Yonley v. Lavender*, 21 Wall. 276, 22 L. Ed. 536; *People's Bank v. Calhoun*, 102 U. S. 256, 26 L. Ed. 101; *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 672; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; *Pacific R. Co. v. Missouri P. R. Co.*, 111 U. S. 505, 4 Sup. Ct. 583, 28 L. Ed. 498; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390; *Heldritter v. Elizabeth Oilcloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135, 28 L. Ed. 729; *Gumbel v. Pitkin*, 124 U. S. 181, 8 Sup. Ct. 379, 31 L. Ed. 374; *Johnson v. Christian*, 125 U. S. 642, 8 Sup. Ct. 1135, 31 L. Ed. 820; *Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.*, 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625; *Porter v. Sablin*, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815.

The third and fourth assignments question the jurisdiction of the court in the case of *Moore v. New Orleans Waterworks Co.*, but a discussion of this assignment may be passed sub silentio, as the issue presented cannot be raised in a collateral proceeding, and the record does not disclose that this question was presented for consideration of the trial court.

The fifth assignment presents for review the action of the court in decreeing the sale of the property in bulk. This assignment cannot be considered for the reason that appellant reserved no exception to the master's report advising such sale, but upon the contrary the record discloses that appellant acquiesced therein, and said, in answer to the rule, "Respondent has no objections to urge against the confirmation of the report." The proposition contained in this assignment should be treated without avolution. It would be difficult indeed to conceive that the property sought to be partitioned by licitation should be sold other than in bulk, or as an entirety. A waterworks plant can only be conducted as a system complete in itself. Its value would be lessened, if not destroyed, should it be sold in parcels, and if a parcel purchaser should be found, say, for the standpipe, he would hardly be able to justify his investment, with the mains and laterals running to other bidders.

The sixth assignment complains of that part of the decree fixing an upset price. While the law of Louisiana does not provide for the appraisal of property sold to effect a partition, yet it would appear to be a very wholesome provision in this case, at least, that an upset, or minimum, price should be fixed by the court. The order simply means that the master commissioner appointed to make the sale, in order to effect the partition, must realize not less than \$700,000. If the bid should be in excess of this sum, appellant and other parties at interest will be the beneficiaries.

There being no error, the judgment of the Circuit Court should be affirmed, and it is so ordered; the costs of appeal to be taxed against the appellant.

BRECHT v. LAW, UNION & CROWN INS. CO.

(Circuit Court of Appeals, Ninth Circuit. March 2, 1908.)

No. 1,488.

1. **INSURANCE—LOSS PAYABLE CLAUSE—EFFECT.**

Under a clause attached to a policy and providing that any loss shall be payable to a third person, such person is only entitled to recover as insured's appointee, and, when the policy has become void as to the person effecting the insurance, it cannot be enforced by his appointee.

2. **SAME—POLICY CONSTRUED—INTEREST OF THIRD PARTIES.**

Fire policies provided that they should become void if insured's interest should be other than unconditional and sole ownership, unless otherwise provided by agreement indorsed thereon, etc. Slips were attached providing that any loss should be paid to plaintiff, to whom insured, after the policy issued, transferred the property in trust to dispose of it, and to apply the proceeds to certain expenses of conducting the business and to insured's indebtedness, plaintiff being a creditor, and to pay any residue to insured. *Held*, that the provision of the policies that when, with insurer's consent, an interest under the policy should exist in favor of a mortgagee, or of any one having an interest in the insured property other than the insured's interest, the conditions "hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto," did not change the legal effect of the slips making the loss payable to plaintiff, which was to constitute him insured's appointee to receive payment of whatever sums might be due; that such provision was only intended to apply in cases where insurer by some special agreement with the mortgagee or third person acquiring an interest under the policy has consented to a modification or waiver of the conditions in the policy; and that, as there was no such special agreement in the case at bar, plaintiff could not recover on the policies, the policies being admittedly void as to insured.

In Error to the Circuit Court of the United States for the District of Oregon.

For opinion below, see 153 Fed. 452.

W. T. Muir, for plaintiff in error.

Zera Snow and Wallace McCamant, for defendant in error.

Before ROSS and MORROW, Circuit Judges, and DE HAVEN, District Judge.

DE HAVEN, District Judge. This action was brought to recover the sum of \$7,500 and interest claimed to be due under two policies of insurance against loss by fire issued by the defendant, the Law, Union & Crown Insurance Company, to the St. Johns Lumber Company, upon certain property described in said policies. One policy is for \$5,000, dated October 5, 1904, and the other for \$2,500, dated May 19, 1905, and both contain the following provisions:

"This entire policy, unless otherwise provided, by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be

other than unconditional and sole ownership; * * * or if any change other than by the death of an insured, takes place in the interest, title or possession of the subject of insurance (except change of occupants without increase hazard) whether by legal process or judgment or by voluntary act of the insured or otherwise. * * * If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto."

There was also attached to each policy a slip in the following words: "Loss, if any hereunder, is hereby made payable to Daniel Brecht"—the plaintiff in the action, and there was not written upon, attached, or appended to said policies any other condition or provision relating to the interest of the plaintiff in the policy or in the property thereby insured, or expressing in what manner or to what extent the conditions contained in the body of the policies should apply to the interest of Daniel Brecht therein. The action was tried by the court without a jury. The court, in addition to the foregoing facts, found that the property described in the policies was destroyed by fire, as alleged in the complaint; that, after the issuance of said policies, the St. Johns Lumber Company, by a contract entered into by and between that company and the plaintiff, granted, bargained, and sold unto the plaintiff all the property covered by the policies of insurance, in trust, however, "to be disposed of by plaintiff, and the proceeds to be applied to certain expenses of conducting the business, and to the indebtedness of the St. Johns Lumber Company, and the balance if any remain, to be paid over to the lumber company, which said contract operated to convey title absolute, and not as a mortgage"; that immediately thereafter the plaintiff entered into the joint possession of such property with the St. Johns Lumber Company, and continued in such possession to the time of the fire, and that such transfer and change of possession were had without the knowledge or consent of the defendant. The court also found that:

"No agreement was indorsed upon the policies, or attached or added thereto, in any manner waiving or modifying any of the terms or conditions of the policies, above set out, in relation to a change of ownership, or possession, of the property insured and that the plaintiff had an insurable interest in the property covered by the policies, as chattel mortgagee, in an amount exceeding the sum for which the property was insured and that this was known to the defendant when the policies were issued."

Upon these facts the court held that the execution of the contract of sale mentioned in the findings and above referred to rendered the policies sued on void, and judgment was thereupon rendered that the plaintiff take nothing by his action and in favor of the defendant for its costs and disbursements. The case is brought here by the plaintiff upon a writ of error.

1. It is not disputed that the policies sued on became void, as to the St. Johns Lumber Company, by reason of the change of title to, and possession of, the insured property referred to in the findings of the Circuit Court, but the plaintiff in error contends that the court erred in holding, upon the facts found by it, that the conditions of the

policy against alienation and change of possession were binding upon him, as such conditions were not indorsed upon the policies, or attached to the slip making the loss, if any, payable to him. The question thus presented requires for its decision the construction of the following provision, in the policies sued on, read in connection with the loss payable clause:

"If, with the consent of this company (the defendant insurance company), an interest under the policy shall exist in favor of a mortgagee, or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained (those against alienation and change of possession) shall apply in manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto."

The contention of the plaintiff in error, broadly stated, is that, by the terms of this provision, the conditions contained in the policy against alienation and change of possession do not affect his right to recover, because there was not written upon or attached to the policies any statement or writing showing the manner or extent to which such conditions should apply to the interest which he had in the policies as the person to whom the loss thereunder is made payable. This contention is sustained by a number of decided cases, among which are the following: *Oakland Home Insurance Co. v. Bank of Commerce*, 47 Neb. 717, 66 N. W. 646, 36 L. R. A. 673, 58 Am. St. Rep. 663; *Queen's Insurance Co. v. Dearborn Savings Ass'n*, 175 Ill. 115, 51 N. E. 717; *Christensen v. Fidelity Ins. Co.*, 117 Iowa, 77, 90 N. W. 495, 94 Am. St. Rep. 286; *Boyd v. Thuringia Insurance Co.*, 25 Wash. 453, 65 Pac. 785, 55 L. R. A. 165; *Edge v. St. Paul Fire & Marine Ins. Co. (S. D.)* 105 N. W. 281; *Welch v. British Assurance Company*, 148 Cal. 223, 82 Pac. 964, 113 Am. St. Rep. 223. These cases all hold that a stipulation in a policy like that above quoted is to be construed as an agreement upon the part of the insurance company issuing it that the conditions of the policy to which the stipulation refers shall not apply to the interest vested in a mortgagee by a memorandum clause, making the loss, if any, payable to him as his interest may appear, unless the manner in which such conditions are to be applied are expressly stated in some writing indorsed upon or attached to the policy. The contrary was however held by the Circuit Court of Appeals for the Eighth Circuit in *Delaware Ins. Co. v. Greer*, 120 Fed. 916, 57 C. C. A. 188, 61 L. R. A. 137, and by Judge Wolverson in *Vancouver National Bank v. Law, Union & Crown Ins. Co. (C. C.)* 153 Fed. 440. We think the cases last cited announce the better rule in relation to the construction of insurance policies having provisions like those sued on in this action. The contract of insurance here was between the St. Johns Lumber Company, as owner of the property insured, and the defendant insurance company, and the legal effect of the slips attached to the policies, making the loss thereunder payable to the plaintiff in error, was to constitute him the appointee of the St. Johns Lumber Company, to receive payment of whatever sums might become due, under the policies, on account of losses sustained by that company by reason of the destruction of its property by fire. It may be conceded, as

claimed by the plaintiff in error, that the slips were attached for his benefit as mortgagee of the insured property, still it is well settled that, under such form of memorandum clause, the person named as payee therein is only entitled to recover as the appointee of the insured, and, when the policy has become void as to the person effecting the insurance, it cannot be enforced by his appointee. This was so held in *Brunswick Savings Institution v. Commercial Union Ins. Co.*, 68 Me. 313, 28 Am. Rep. 56; the court saying:

"This clause in the policy 'payable, in case of loss, to the Brunswick Savings Institution to the amount of the mortgage held by them' is not an insurance of the plaintiffs' interest in the property, nor an assignment of the policy to the plaintiffs. It is merely a contingent order or stipulation, assented to by the defendant, for the payment of the loss of the assured, if any to the plaintiffs. It gives the plaintiffs the same right to recover that the assured would have if no such clause had been inserted in the policy. Any violation of the conditions and stipulations of the policy which would defeat the right of the assured to recover upon it will defeat the right of the plaintiffs."

The rule thus stated is fully sustained by the following cases: *Fogg v. Middlesex Mutual Fire Ins. Co.*, 10 Cush. (Mass.) 337; *Martin v. Franklin Fire Ins. Co.*, 38 N. J. Law, 140, 20 Am. Rep. 372; *Keith v. Royal Insurance Co.*, 117 Wis. 531, 94 N. W. 295; *Wunderlich v. Palatine Ins. Co.*, 104 Wis. 395, 80 N. W. 471; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391; *Loring v. Manufacturers' Ins. Co.*, 8 Gray (Mass.) 28; *Bates v. Equitable Ins. Co.*, 10 Wall. 33, 19 L. Ed. 882; *Bidwell v. Northwestern Ins. Co.*, 19 N. Y. 180.

The plaintiff in error does not deny that such would be the legal effect of the stipulation making the loss, if any, under the policies, payable to him, if it stood alone; but he insists that by reason of the provision in the policies, which declares that when, with the consent of the insurance company, an interest under the policy exists in favor of a mortgagee, the condition of the policy "shall apply in the manner as expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto," his rights are unaffected by such conditions, because they were not expressly made applicable to his interest as payee by a written indorsement upon the slip containing the loss payable clause, or by some writing attached to the policies. It must be admitted that the provision referred to is somewhat awkward in construction, but it cannot be given the effect claimed for it by the plaintiff in error without disregarding the well-settled legal meaning of the loss payable clause, and it was not the purpose of this provision to modify or control the terms of the contract by which the plaintiff in error was named as the person to receive payment for what might become due under the policy. The special contract by which such right to receive payment was acquired is controlling; that is to say, the true meaning of this provision is that, when the conditions named in the policy are modified by the contract under which a mortgagee or other person acquires an interest under the policy, then the conditions named in the policy shall only apply in the manner and to the extent provided in the special contract; or, if they are waived, that then they shall not apply at all. But when, as in this case, there is no special agreement modifying or waiving the conditions of the policy, and the insurance

company has simply consented to the appointment of a third person to receive payment for any loss which may be sustained by the person to whom the policy was issued, then all its conditions apply. When the policies sued on were issued, it was not unusual for insurance companies to insure the interest of mortgagees by attaching to their policies slips containing what is known as the "Union Mortgage Clause," whereby the insurance company agreed to pay to the mortgagee the amount to become due under the policy as his interest might appear, regardless of subsequent breaches of certain conditions of the policy by the mortgagor. The following cases arose under policies containing such a clause: *Magoun v. Firemen's Fund Ins. Co.*, 86 Minn. 486, 91 N. W. 5, 91 Am. St. Rep. 370; *National Bank v. Union Ins. Co.*, 88 Cal. 497, 26 Pac. 509, 22 Am. St. Rep. 324; *Hastings v. Westchester Ins. Co.*, 73 N. Y. 144; *Syndicate Ins. Co. v. Bohn*, 65 Fed. 165, 12 C. C. A. 531, 27 L. R. A. 614. Now, if it had been the intention of the defendant to insure the plaintiff in error absolutely and without reference to any breach of the conditions of the policies by the St. Johns Lumber Company, such insurance could have been effected by the use of the "Union Mortgage Clause" in defining the rights of the plaintiff in error under the policies; but, instead of doing this, the parties adopted a form merely designating him as the person to whom the loss, if any, should be payable, a form which under well-settled rules subjects the appointee to the risk of all acts and omissions of the person to whom the policy was issued.

Our conclusion, then, is that the provision of the policy upon which the plaintiff in error relies does not add to, or in any manner change, the legal effect of the slip making the loss, if any, under the policy payable to him; that such provision was only intended to apply in cases where the insurance company by some special agreement with the mortgagee or third person, acquiring an interest under the policy, has consented to a modification or waiver of the conditions in the policy; and that, as there was no such special agreement in the case before us, the Circuit Court did not err in rendering its judgment for the defendant insurance company upon the findings.

Judgment affirmed.

CHOCTAW, O. & G. R. CO. v. BOND.

(Circuit Court of Appeals, Eighth Circuit. March 18, 1908.)

No. 2,556.

1. **CONTRACTS—EQUITABLE INTERPRETATION—FORFEITURE.**

A contract should not be construed as providing for an unreasonable and oppressive forfeiture, if its language fairly admits of a more equitable interpretation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 735.]

2. **SAME—DIVISIBILITY—ILLEGAL CONSIDERATION.**

When a contract consists of distinct agreements, each founded upon a distinct consideration, it is to be regarded as divisible; and, if one of the considerations be illegal, that alone does not invalidate the entire con-

tract, but only the agreement founded thereon, and the others may be enforced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 701-712.]

2. CORPORATIONS—CONTRACTS—ULTRA VIRES—CORPORATION PRESUMED TO CONTRACT WITHIN ITS POWERS.

Corporations are presumed to contract within their powers; and when a corporate contract is not on its face beyond the powers of the corporation making it, it will, in the absence of evidence to the contrary, be presumed to be valid.

(Syllabus by the Court.)

In Error to the United States Court of Appeals in the Indian Territory.

For opinion in Court of Appeals, see 6 Ind. T. 515, 98 S. W. 335.

Charles B. Stuart, for plaintiff in error.

• W. H. Moore and E. A. Boyd, for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

VAN DEVANTER, Circuit Judge. On February 5, 1902, Bond and the railroad company entered into a written contract whereby the former sold and transferred to the latter certain property in the Choctaw Nation in the Indian Territory, consisting of a house in Hartshorne, another in Gowan, and the improvements upon certain designated lands; and wherein he released and relinquished to it his right "to the surface" of such lands to enable it to construct and maintain a reservoir thereon, and granted and conveyed to it, so far as he had, "the legal right to do so," the right to construct dams and impound water thereon. As a part of the contract Bond agreed to procure an assignment to the railroad company of an existing lease made by one Thomas, a Choctaw citizen, to one Chastian, another Choctaw citizen, presumably covering a part of the lands before mentioned; and also to procure the execution by Thomas to Chastian of another lease, for reservoir purposes for a period of 30 years, covering all of such lands, and to obtain an assignment thereof from Chastian to the railroad company. The consideration to be paid to Bond for all of this was \$3,865, and \$3,500 thereof was the consideration for the houses in Hartshorne and Gowan, deeds for which were executed on the same day. There was this further stipulation on the part of Bond:

"And I covenant and agree to protect said railroad company in the possession of said land until after its said reservoir shall be completed, and to accomplish this end I agree that the sum of \$3,500 for the property above referred to in the city of Hartshorne and at mine No. 3 (Gowan) may be retained by said company to be paid to me when it shall have completed said reservoir without any interruption by any one else, and without there being any adverse title to any of said land."

Bond fulfilled his other stipulations, and the railroad company entered upon the lands, pursuant to the contract, and completed the reservoir, without any interruption of its possession or work of construction; but there were some adverse claims to the possessory right

to the reservoir site, and the railroad company was put to an expense of \$365.15 in acquiring them. The railroad company paid to Bond \$365 on the contract shortly after it was made, and declined to make any further payment after the reservoir was completed. He then brought an action against it on the contract in one of the courts in the Indian Territory to recover the remaining \$3,500, and, upon the trial thereof, the facts before stated, with others yet to be mentioned, being conclusively established by the evidence, the court directed a verdict in his favor for that amount, less the amount expended by the company in acquiring the adverse possessory claims, interest to be computed on both. The company excepted to that ruling, and, when judgment was entered upon the verdict so directed, it appealed to the Court of Appeals in the Indian Territory, where the judgment was affirmed. 98 S. W. 335. Thereafter it sued out the present writ of error.

To a proper understanding of the transactions to which the contract relates and of the terms which it uses, it is essential that it be borne in mind that the title, properly speaking, to the lands mentioned therein, as well as to all other lands in the Choctaw Nation, was in the Indian Nation or tribe; that there was no title in any individual, and none could be acquired by the railroad company; that the right of occupancy for the time being was all that was subject to acquisition by sale, transfer, or lease; and that it was this right, and not the title, in respect of which the parties were contracting.

The principal question presented for our consideration is, was Bond's right to receive the \$3,500, the agreed consideration for the sale and transfer of the houses in Hartshorne and Gowan, made absolutely dependent upon the completion of the reservoir without interruption, and without there being any adverse title to any of the lands; or was the railroad company merely entitled to retain that sum as a security or pledge for the performance by Bond of his engagement relating to the possession and title of the reservoir site? The contract is not happily expressed in that regard, but its meaning is not doubtful. It relates to two distinct transactions, the transfer of the houses in Hartshorne and Gowan for a consideration of \$3,500, and the procurement of a designated reservoir site for a consideration of \$365. The houses were transferred before the contract was signed. This is shown by a recital therein that deeds for them "have been executed on this date," and is implied in the provision that the consideration therefor "may be retained" by the company pending the completion of the reservoir. Therefore, to say that Bond's right to receive the \$3,500 was made absolutely dependent upon the completion of the reservoir without interruption, and without there being any adverse title to any part of the reservoir site, is to say, in effect, that his right to the stipulated consideration for having transferred the houses to the railroad company was to be absolutely forfeited to it, in the event that he made default in the performance of his engagement relating to the possession and title of the reservoir site; and this regardless of whether the loss resulting to the company was little or great. A stipulation to that effect would be so obviously un-

reasonable and oppressive that it cannot be implied or inferred. *Manson v. Dayton*, 82 C. C. A. 588, 597, 153 Fed. 258, 267. None such is plainly expressed. On the contrary, the language employed is reasonably satisfied by holding, as we do, that the consideration for the transfer of the houses was to be retained by the company pending the completion of the reservoir merely as a security or pledge for the performance by Bond of his engagement in respect of the possession and title of the reservoir site, and that in the event that he defaulted therein the railroad company was to be compensated for any loss thereby sustained out of the money so retained, but was not to be entitled to the whole thereof regardless of the extent of its loss. The contention to the contrary is rested entirely upon the concluding words of the stipulation before quoted, "to be paid to me when it shall have completed said reservoir without any interruption by any one else, and without there being any adverse title to any of said land." But these words cannot be properly wrested from their connection with those which immediately precede them, "and I covenant and agree to protect said railroad company in the possession of said land until after its said reservoir shall be completed, and to accomplish this end, I agree that the sum of \$3,500 for the property above referred to * * * may be retained by said company." All must be read together, and, when that is done, it is reasonably plain that what was in the minds of the parties was the protection of the railroad company against any loss resulting from an interruption of its possession or work of construction, or from an adverse title, and not the penalizing of any default on the part of Bond. If, however, the meaning of the stipulation were doubtful, there are other considerations which would lead to the same result. The contract was not prepared by Bond, but by the then solicitor for the railroad company, and so is within the rule, that where there is doubt as to the true meaning of a written contract, and one of the parties is responsible for the terms employed, it is both just and reasonable that it should be construed most strongly against him. *Christian v. First National Bank*, 84 C. C. A. 53, 155 Fed. 705. And another rule, equally applicable, is that when a contract in writing is fairly open to two constructions it is legitimate to adopt the one which equity would favor. *Washington, etc., Co. v. Coeur d'Alene, etc., Co.*, 160 U. S. 77, 101, 16 Sup. Ct. 231, 40 L. Ed. 355; *Christian v. First National Bank*, supra. It follows that when the railroad company was given credit for the expense to which it was put in acquiring the adverse possessory claims, with interest thereon, it was accorded all that it was entitled to in that respect.

It is next contended that the stipulation relating to the procurement and assignment of the 30-year lease of the reservoir site was violative of a law of Congress relating to the Choctaw Nation (Act June 28, 1898, c. 517, 30 Stat. 507; Ind. T. Ann. St. 1899, § 57z26), and, therefore, that the entire contract was void. When the contract was made the Choctaw lands had not been allotted in severalty, the work of allotting them had not begun, and there was some uncertainty as to when it would begin and be accomplished. Because of that, it may be that

the statute relied upon was not controlling, and that such a lease would not have been void, but, under other provisions of the same law (30 Stat. 501, 504, §§ 16, 23; Ind. T. Ann. St. 1899, §§ 57z6, 57z13), would have been effective until the lands included therein should be allotted. But conceding, for present purposes only, that the stipulation relating to the 30-year lease was void, still that does not affect the railroad company's obligation to pay for the houses; for it does not admit of doubt that, when a contract consists of distinct agreements, each founded upon a distinct consideration, it is to be regarded as divisible; and, if one of the considerations be illegal, that alone does not invalidate the entire contract, but only the agreement founded thereon, and the others may be enforced. *Gelpcke v. City of Dubuque*, 1 Wall. 221, 17 L. Ed. 519; *United States v. Hodson*, 10 Wall. 395, 408, 19 L. Ed. 937; *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64, 70, 22 L. Ed. 315; *Armstrong v. American Exchange National Bank*, 133 U. S. 433, 469, 10 Sup. Ct. 450, 33 L. Ed. 747; *McCullough v. Virginia*, 172 U. S. 102, 115, 19 Sup. Ct. 134, 43 L. Ed. 382; *Western Union Telegraph Co. v. Burlington Co.*, 3 McCrary, 130, 11 Fed. 1; 9 Cyc. 569; 15 Am. & Eng. Enc. (2d Ed.) 990. As before said, the transfer of the houses and the procurement of the reservoir site were distinct transactions, and a distinct sum was to be paid for each. Bond parted with the houses, and the railroad company obtained them, on the strength of its agreement to pay \$3,500 for them. True, it was to retain that sum, for the time being, as a security or pledge for the performance of his engagement relating to the possession and title of the reservoir site, but that did not render the two transactions interdependent, or make the company's obligations in respect of them indivisible.

Finally, it is urged that the contract was void, because, as is asserted, the railroad company's right of way and station grounds were obtained under an act of Congress (Act Feb. 18, 1888, c. 13, 25 Stat. 35; Ind. T. Ann. St. 1899, § 4742), upon the express condition that it should not be permitted to acquire any right, whether of occupancy or otherwise, to any lands of the Choctaw Nation outside of such right of way and station grounds. The property to which the contract relates, including the two houses and whatever possessory right went with them, was outside of those limits. We doubt that the condition was as broad as asserted, but, if so, it was very materially modified by a later act (Act Oct. 1, 1890, c. 1252, 26 Stat. 640; Ind. T. Ann. St. 1899, §§ 4760-4772), whereby the acquisition by the company of extensive coal leasehold interests in the Choctaw Nation was assented to by Congress, and by a still later act (Act Aug. 24, 1894, c. 330, 28 Stat. 502; Ind. T. Ann. St. 1899, § 4753), whereby the company was expressly authorized "generally to do all and singular the matters and things which shall be necessary or convenient to enable said company to maintain, use, and operate their railroads and mines * * * in conformity with the provisions of the acts of Congress." In view of this legislation, we entertain no doubt that the company was empowered to acquire the property to which the contract relates, if it became necessary or convenient to do so, in the course of the legitimate opera-

tion and management of its railroads and coal mines. *Jacksonville, etc., Co. v. Hooper*, 160 U. S. 514, 523, 16 Sup. Ct. 379, 40 L. Ed. 515. There is nothing on the face of the contract indicating that the property was acquired for a purpose not authorized, and there was no evidence to that effect. In that situation the contract was rightly regarded as valid, for, as is said in *Railway Co. v. McCarthy*, 96 U. S. 258, 267, 24 L. Ed. 693:

"When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid. Corporations are presumed to contract within their powers."

We find no error in the record, and the judgment is accordingly affirmed.

UNITED STATES v. TIFFANY & CO.

(Circuit Court of Appeals, Second Circuit. January 7, 1908.)

No. 106 (4,036).

1. CUSTOMS DUTIES—CLASSIFICATION—METAL STATUARY.

In *Tariff Act July 24, 1897*, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1678), relating to "statuary * * * wrought by hand from a solid block or mass of marble * * * or from metal," the words "solid block," etc., do not refer to "metal."

2. SAME—STATUARY—COMPONENT OF MINOR VALUE, BUT OF CHIEF QUANTITY—"STATUARY * * * WROUGHT * * * FROM METAL."

In *Tariff Act July 24, 1897*, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1678), the provision for "statuary * * * wrought * * * from metal" does not require metal to be the only component, or even the component of chief value. It is enough if it so greatly predominate as to characterize the entire work.

3. SAME—"BY HAND."

In *Tariff Act July 24, 1897*, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1678), relating to "such statuary as is cut, carved, or otherwise wrought by hand * * * and as is the professional production of a statuary or sculptor only," it is not necessary that the entire work on a statue shall be "by hand," nor that the entire handiwork must be that of the statuary or sculptor personally.

4. SAME—BRONZE STATUARY.

A statue of great value and high artistic merit, in which bronze was overwhelmingly predominant in bulk, though ivory was the component of chief value, was produced by the "cire perdue" process. After the metal part was cast, it was gone over carefully by hand by a renowned sculptor, who thereby made the alterations necessary to the execution of his artistic conceptions; this being the important part, which gave the piece its distinctive personal character. The entire work, from the original conception to the last touch, was under the sculptor's constant supervision, and he did everything that a sculptor could do to make his work complete. *Held*, that this statue was within the provision of *Tariff Act July 24, 1897*, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1678), for "such statuary as is cut, carved, or otherwise wrought by hand * * * from metal, and is the professional production of a statuary or sculptor only."

5. SAME—"STATUARY"—LEGISLATIVE INTENTION—LIBERAL CONSTRUCTION.

In providing a low rate of duty on works of art in *Tariff Act July 24, 1897*, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194 (U. S. Comp. St. 1901,

p. 1678), Congress evidently intended to welcome the works of meritorious artists and sculptors, and to exclude from the low rate the productions of artisans and empirics. The definition of statuary as "the professional production of a statuary or sculptor only" was aimed against such articles as are made by machinery or unskilled labor, or are cast in large numbers from molds by ordinary workmen. Such a paragraph should be construed liberally.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 6646.]

6 SAME—STATUTORY CONSTRUCTION—DOUBTFUL INTERPRETATION.

The doctrine that duties should not be imposed upon the citizen under a vague or doubtful interpretation of the law is especially applicable to a case which is *sui generis* and relates to an article which is in a class by itself.

Appeal from the Circuit Court of the United States for the Southern District of New York.

On appeal by the United States from a decision of the Circuit Court, reversing a decision of the Board of General Appraisers, which affirmed the decision of the collector, assessing an *ad valorem* duty of 35 per centum upon Gerome's statue "La Bellona," as a manufacture of metal and ivory, ivory chief value, under Act July 24, 1897, c. 11, § 1, Schedule N, par. 450, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1678). The Circuit Court held the statue dutiable, at 15 per centum *ad valorem*, as statuary, under paragraph 454 of the same act and section 3 thereof permitting the reciprocity treaty with France thereafter concluded. 30 U. S. Stat. 151, 193, 194, 203. The paragraphs in controversy are:

"Par. 450. Manufacturers of leather, finished or unfinished, manufacturers of fur, gelatin, guttapercha, human hair, ivory, vegetable ivory, mother-of-pearl and shell, plaster of paris, papier mâché, and vulcanized india-rubber, known as 'hard rubber,' or of which these substances or either of them is the component material of chief value, not specially provided for in this act, and shells engraved, cut, ornamented, or otherwise manufactured, 35 per centum *ad valorem*."

"Par. 454. Paintings in oil or water colors, pastels, pen and ink drawings and statuary, not specially provided for in this act, twenty per centum *ad valorem*; but the term 'statuary' as used in this act shall be understood to include only such statuary as is cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone or alabaster, or from metal, and as is the professional production of a statuary or sculptor only."

For decision below, see 154 Fed. 168.

J. Osgood Nichols, Asst. U. S. Atty.

D. Macon Webster, for the importers.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The subject of this controversy is a life-size statue, *La Bellona*, the Roman Goddess of War, one of the last works of the famous French sculptor, Gerome. It is a production of wide celebrity, it was exhibited at the French Academy and at the Paris Exposition and the French government was considering its purchase for one of their museums when the appellee bought it of the sculptor's widow. *La Bellona* is an allegorical embodiment of the hate, cruelty, vengeance and excitement of war. The face, arms and feet of the

statue are of ivory and the remainder is of metal which, so far as quantity and bulk are concerned, is overwhelmingly the principal component. The entire body, the mantle, drapery, helmet, breast-plate, cobra and pedestal are of bronze. The shield is either bronze or aluminum and is highly chased. The eyes are glass with gold underneath to bring out more clearly the ferocity of the expression. As to the manner in which the statue was constructed the record is not as explicit as it should be. It seems to be conceded, however, that it was made by the "cire perdue" process under the supervision of the sculptor who gave to its construction the best effort of his genius.

The various parts of bronze were cast, from models made by Gerome, by an accomplished bronzer, who consulted with the sculptor as to all details of the work. After the various parts had been cast, the important work, that which gives it its distinctive personal character, was done by hand, the sculptor carefully going over the figure and making the alterations and changes necessary to embody his ideas. It is this artistic feature, this expression of the sculptor's intentions, which gives value to the statue, not the price paid for the bronze and ivory. No one but a sculptor of the highest merit could have cut the ivory face, so symbolic of the horrors of war, or fashioned the cloak, which is considered one of the most wonderful pieces of bronze in existence. In short, the statue was the work of Gerome and to its minutest details he gave the best work of his brain and hand. La Bellona represents a new departure in art. Nothing like it was ever produced before. Its individuality is unique. It is this statue, conceded by all to be a master work of art, which is classified as a manufacture of metal and ivory and placed in the same category with articles made of india rubber, gelatin, leather and hair. Such a classification seems almost grotesque in its ineptness.

The learned General Appraiser who wrote the decision of the board evidently appreciated the injustice of the situation for he says:

"It may be thought to be illogical to hold that it (Bellona) is not entitled to the consideration assumed to be given to works of art of this character by the statute, but if fault there be, it is in the law and can only be remedied by legislation."

Of course, if this be a true exposition of the statute, it ends the discussion, but is not paragraph 454 capable of a liberal construction, broad enough to include a statute which it would seem, is clearly within the spirit of the law? That Congress, realizing the importance of works of art to a comparatively new country, has in all the later tariff acts discriminated in favor of paintings and statuary cannot be denied. It was the evident intention of the lawmakers to welcome the works of meritorious artists and sculptors on the one side, and on the other to prevent the productions of mere artisans and empirics from taking advantage of the lower duty.

We agree with counsel for the government that:

"The purpose of paragraph 454 to provide a low rate of duty for such works of art only as may represent the direct work of the artist, would not be pursued by including the great variety of commercial metal castings which would be claimed to be statuary in the ordinary use of that term."

The definition of "statuary" in the paragraph was evidently intended to exclude such articles as were made by machinery, or unskilled labor, or were cast in large numbers from molds by ordinary workmen. Such a statue as La Bellona is excluded from the paragraph only by the most strict and illiberal construction—a construction which by adhering closely to the letter of the law defeats the very purpose for which the law was enacted.

The Supreme Court has repeatedly said that this should not be done. In *Holy Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, the court held that the contract made by the plaintiff in error, though clearly within the letter was not within the spirit of the act of February 26, 1885, designed to prevent the importation of aliens under contract of employment. The court says (page 459 of 143 U. S., page 512 of 12 Sup. Ct. [36 L. Ed. 226]):

"It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, not within the intention of its makers."

Again, in the recent case of *Tobacco Co. v. Werckmeister* (decided December 2, 1907) 207 U. S. 284, 28 Sup. Ct. 74, the court, construing the copyright law, says:

"But in construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the conditions of affairs which led to its enactment so as to effectuate rather than destroy the spirit and force of the law, which the Legislature intended to enact. * * *. As we have said in the beginning, the statute is not clear, but read in the light of the purpose intended to be effected by the legislation, we think its ambiguities are best solved by the construction here given."

See, also, *Taylor v. U. S.* (decided by the Supreme Court November 18, 1907, 207 U. S. 120, 28 Sup. Ct. 53, *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969, and *United States v. Perry* (C. C.) 133 Fed. 841.

It cannot be pretended that the words "a solid block or mass" refer to metal, first, because that is not the grammatical reading of the sentence, and, second, because such an interpretation would exclude all metal statuary as it is not contended that statuary is at present cut or wrought from a solid block or mass of metal. The paragraph then, so far as it is necessary to consider it in the present case, reads as follows:

"Paintings * * * and statuary * * * twenty per centum ad valorem; but the term 'statuary' as used in this act shall be understood to include only such statuary as is cut, carved, or otherwise wrought by hand * * * from metal, and as is the professional production of a statuary, or sculptor only."

La Bellona answers every requirement of the statute. It is carved and wrought by hand from bronze and is the professional production of Gerome, a sculptor of world-wide fame. The paragraph does not say that the statue must be wrought exclusively by the hand of the sculptor, it recognizes the well-known fact that the great bulk of the carving is done by skilled workmen. Here the entire work

was done under the supervision of the sculptor and the finishing touches were added by his own hand, at least the evidence warrants such a presumption. Neither does the paragraph require that the entire work on the statue must be by hand. Bronze statues, as is well known, are cast from models precisely as marble statues are cut from models, the finishing being done by the sculptor or under his supervision. It cannot be assumed that Congress intended to exclude bronze statuary from the benefits of this paragraph, indeed, the exact contrary is to be presumed, otherwise nothing would have been said regarding metal statuary. Congress must have had bronze statuary in mind and the manner in which it was made when it used the language in question. If bronze statuary, which is the metal chiefly used in the art, be not included it is difficult to understand to what the language applies.

The case of *Tiffany v. U. S.*, 71 Fed. 691, 18 C. C. A. 297, is principally relied on by the appellant. But it appeared in that case that the government's contention was that the importations were known as "commercial bronzes," some of them being reproduced many times and none of them receiving more than perfunctory attention from the original sculptor. There was also evidence that there were bronze statues made not by casting but by hand "beating." In the present case there is no such testimony and as we have before seen, the entire work, from the original conception until the last touch was placed upon the statue, was under the direct and constant supervision of Gerome. He did everything that a sculptor could do to make his work complete.

In a recent case relating to the importations of the Italian sculptor, Angelo del Nero, the Board of General Appraisers used language which, we think, is peculiarly applicable to the case in hand and which distinguishes it from the *Tiffany Case*, *supra*. The decision is written by the same General Appraiser who wrote in the present case, but nearly a year afterward. He says:

"When the metal comes from the mold it is in an extremely rough state, having upon its surface protuberances left by the hardening of the metal in the conduits through which it is poured into the mold, and incrustations resulting from the peculiar admixture of the alloy, which is made by a secret formula, designed to give the statue an antique tone or patina. In consequence of this the entire statue must be gone over carefully with the tool of the sculptor, the incrustations and protuberances removed and practically all the details chiseled out by hand. This mass of metal which comes from the mold may be compared with the block of marble after it has been chiseled by artisans to a shape roughly approximating that of the marble statue when it is taken in hand by the sculptor, who does the work which characterizes it and impresses the marble with his idea. The board is of the opinion that the quantity of hand work actually done by the sculptor on this metal statuary is as great if not greater than that done by the artist himself on the average marble statue. If such statuary it not 'wrought by hand from metal' there would seem to be no modern metal statuary to which paragraph 454 could apply. While in ancient and mediæval times a method existed of making metal statuary by hammering sheets of copper or bronze into the desired shape, that method is practically unknown at the present day. We accordingly hold that the statuary in question is entitled to assessment as such under the reciprocity agreement with Italy, at 15 per cent. *ad valorem*." G. A. 6,346 (T. D. 27,302).

It is asserted in the appellee's brief that no appeal has been taken by the government from the board's decision.

Convinced as we are that La Bellona is a bronze statue, we are of the opinion that the importer does not lose the benefit of the lower duty because the face, arms and feet are of ivory. Paragraph 454 does not say that a marble statue must be exclusively of marble, or a metal statue exclusively of metal. The limited use of ivory does not make La Bellona an ivory statue any more than the limited use of glass makes it a glass statue. It is enough that the metal so greatly predominates as to characterize the entire work. Any other interpretation would exclude a bronze statue supported on a stone pedestal or a marble statue carrying a metal shield or spear. The distinction is important when considering "manufactures" but it becomes insignificant when considering works of art. The fact that we are dealing with a metal statue overrides minor considerations.

Were it necessary to do so the well-known doctrine that duties should not be imposed upon the citizen upon a vague or doubtful interpretation of the law might be invoked in favor of the appellee. *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. 1240, 30 L. Ed. 1012. Especially is this doctrine applicable to a case which is sui generis and which relates to a work of art which is in a class by itself.

The judgment is affirmed.

KNAPP & SPENCER CO. v. DREW.

(Circuit Court of Appeals, Eighth Circuit. March 17, 1908.)

No. 2,620.

1. APPEARANCE—JURISDICTION ACQUIRED.

Where, in a summary proceeding to recover money paid to a bankrupt's creditor, the creditor made a general appearance, filed an answer to the merits, and afterwards frequently recognized the court's jurisdiction over it, it could not thereafter assert that the court had no jurisdiction over its person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appearance, § 79.]

2. BANKRUPTCY—FUNDS OF BANKRUPT—ACCEPTANCE AFTER BANKRUPTCY.

A creditor of a bankrupt, in taking money from him after the institution of bankruptcy proceedings, not only violated the spirit and purpose of the bankruptcy act by attempting to prevent the administration of the estate by the court, having taken jurisdiction through the actual possession of its receiver, but if the creditor took the money knowingly and fraudulently, it thereby violated Bankr. Act July 1, 1898, c. 541, § 29b, subd. 4, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), declaring that a person shall be punished on conviction of having knowingly and fraudulently received any material amount of property from a bankrupt after the filing of a petition with intent to defeat the act.

3. SAME—RECOVERY—SUMMARY PROCEEDINGS.

Where, after money belonging to a bankrupt's estate, in the hands of a receiver, had been returned to the bankrupt because of the receiver's failure to qualify, and then, pending the bankruptcy proceedings, was paid to a creditor, the latter had no such adverse claim or right to the money

as exonerated it from liability to summary proceedings for its restoration to the estate.

4. SAME—REFERENCE—POWER OF REFEREE.

Bankr. Act July 1, 1898, c. 541, § 38, 30 Stat. 555 (U. S. Comp. St. 1901, p. 3435), empowers referees in bankruptcy to perform such part of the duties, except as to questions arising out of applications for bankrupts for compositions or discharges, as by the act are conferred on courts of bankruptcy, as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts. Supreme Court bankruptcy rule 12 declares that, after a case had been referred to the referee, all the proceedings except such as are required by the act or by the general orders to be had before the judge shall be had before the referee. *Held*, that such provisions, with the provision for review by the judge on certificate from the referee, authorized by Bankr. Act July 1, 1898, c. 541, § 39 (6), 30 Stat. 556 (U. S. Comp. St. 1901, p. 3436), and general order 27, conferred jurisdiction on a referee to entertain a proceeding by a bankrupt's trustee against a creditor to recover money received from the bankrupt after the institution of the proceedings.

5. SAME—APPEAL.

Such sections and rules also afforded ample provision for review of the referee's decision by the judge of the District Court, from whose action alone an appeal could be prosecuted to the Circuit Court of Appeals.

6. SAME—JUDGMENT—VACATION—RECOMMITMENT—EFFECT.

In proceedings before a referee in bankruptcy to recover money paid to a creditor after the institution of the proceedings, a referee erroneously entered a personal judgment against the creditor for the amount so received instead of making the proper order for its repayment to the trustee. The District Judge determined that such action was erroneous, and caused to be entered an order that the judgment entered by the referee be vacated, and the cause remanded to the referee for further proceedings in accordance with law. *Held*, that the judgment referred to in the order was the erroneous personal judgment of the referee, and that on recommitment the referee properly refused to open the case for further hearing and permit the creditor to amend its answer and introduce new evidence.

7. SAME—AMENDMENTS—NEW MATTER—DISCRETION.

A proposed amended answer to a proceeding before a referee in bankruptcy to recover money from a creditor not having been exhibited to the referee in connection with an application to amend, and no other information being given him as to any new defense, and no showing of newly discovered evidence having been made, the application to amend was properly denied.

Appeal from the District Court of the United States for the District of Nebraska.

On December 15, 1902, Knapp & Spencer Company, the appellant, joined two other creditors of Harry Fullen in a petition filed in the court below to adjudicate him a bankrupt. Shortly thereafter the petitioning creditors secured the appointment of a receiver to take charge of the property of the bankrupt pending the proceedings for adjudication and appointment of a trustee. He took into his possession as such receiver, among other items, about \$4,000 in money belonging to the bankrupt. Subsequently in bringing about a settlement with the bankrupt the appellant and others availed themselves of the fact that the receiver had given no bond as required by law, and secured an order for his discharge and for the return of the money in his hands to the bankrupt. The settlement was then consummated, by which it is claimed the bankrupt paid most of his creditors, including appellant, 40 per cent. of their respective demands; but the bankruptcy proceedings against him had not been dismissed. Other creditors not included or provided for in the settlement intervened, as they had a right to do under the provisions of the bankruptcy act, and secured a final adjudication against the bankrupt. The appellee,

Gerald M. Drew, who was subsequently appointed trustee, filed a petition setting forth the above facts, and, amongst other things, averred that appellant had received money belonging to the estate which the receiver had turned back to the bankrupt, and asked for a summary order upon appellant to show cause why it should not turn the same over to him. The referee issued an order to that effect. Appellant appeared to the petition, and filed a response denying that it had received any of the money in question from the bankrupt. It made no objection to the proceeding on the ground that it was of a summary nature. After several continuances a hearing of the petition was had before the referee and resulted in a finding that appellant had received from the estate of the bankrupt subsequent to the filing of the petition in bankruptcy the sum of \$2,154.18, and that it was so done "without color or right." He concluded the findings with an order in the following words: "It is therefore considered, ordered, and adjudged by the court that said Gerald M. Drew as trustee have and recover of said Knapp & Spencer the sum of \$2,154.18, and interest thereon from November 20, 1903, at the rate of seven per cent. per annum and the costs of this proceeding." In due time a petition for a review of that judgment was presented to the Judge of the District Court. He, after hearing the same, made the following order: "That the judgment entered by the referee in favor of the trustee herein and against Knapp & Spencer Company be, and the same hereby is, vacated and set aside, and said cause is remanded to the referee for further proceedings in accordance with law." Simultaneously the court handed down an opinion in which, after reciting the fact that the referee rendered a personal judgment against appellant, said: "I am not aware of any provision of the bankruptcy law which authorizes a referee to render a personal judgment. It is quite probable that the referee had authority to investigate the subject-matter and to make an order for Knapp & Spencer Company to pay over to the trustee the money, which the evidence shows had been received by them from the bankrupt after the institution of the bankruptcy proceedings. If this order was not complied with, it would be the basis for a proper and appropriate proceeding to recover said money. Certainly the referee has no authority to render a judgment or issue an execution or other proceedings thereon, for its enforcement. It follows that the judgment of the referee thus entered must be vacated and set aside, which is accordingly done." Soon thereafter the trustee filed a motion before the referee asking for an order requiring appellant to forthwith turn over to him the sum of \$2,154.18 and notice was served upon appellant that the same would be taken up for a hearing on a given date. Appellant appeared and objected to the jurisdiction of the referee to hear and determine the motion. Upon this objection being overruled appellant asked leave to amend the answer originally filed. The referee refused leave to amend and ordered appellant to turn over to the trustee the sum of \$2,154.18 so originally found to have been received by it. Appellant refused to obey this order; secured a certificate from the referee, and presented the question involved to the District Judge for review. From his decision affirming the order of the referee, appellant duly appealed to this court.

Leonard B. Robinson and Edward M. Martin, for appellant.
Richard S. Horton, for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge (after stating the facts as above). 1. Appellant first contends that it was an adverse claimant of the money in question and could not be proceeded against summarily by motion, but was entitled to defend itself and justify its adverse claim in a plenary suit instituted by the trustee for the recovery of the money. This position, we think, is totally untenable. Appellant made no such claim in its original answer to the order to show cause. On the contrary it denied positively and under oath that it had ever received the money from the bankrupt as charged. Notwithstanding there was no issue

of an adverse claim to the money tendered or joined the referee took occasion to say in his finding that appellant's possession of the money was "without color or right." It is true the appellant objected to the jurisdiction of the court below on the ground that it was a citizen of a state outside the jurisdiction of that court, and claimed for that reason only that it was not amenable to its process. The appellant, however, made a general appearance to the proceeding, filed an answer to the merits, and afterwards frequently recognized the jurisdiction of the court over it. On well-recognized principles of law it cannot now be heard to say that the court had no personal jurisdiction over it. A hearing was had before the referee on the sole issue whether the appellant received money from the bankrupt as charged. By uncontradicted testimony the issue voluntarily joined by appellant was found against it. According to the pleadings and the proof the proceeding was one to secure a redelivery to the court of property formerly in its custody, and which it then had a right and duty to administer. The appellant in taking the money from the bankrupt after proceedings in bankruptcy had been instituted against him violated the spirit and purpose of the bankruptcy act by attempting to prevent the administration of the estate by the proper court after it had taken jurisdiction over it and had already taken the money in question into actual possession through its receiver. Not only so, but the officers of appellant in doing what they did, if the same was knowingly and fraudulently done, committed an offense denounced by section 29b, subd. 4, Bankr. Act July 1, 1898, c. 541, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), which reads:

"A person shall be punished by imprisonment for a period not to exceed two years upon conviction of the offense of having knowingly and fraudulently * * * received any material amount of property from a bankrupt after the filing of a petition, with intent to defeat this act."

Appellant clearly had no such adverse claim or right to the money as exonerated it from liability to summary proceedings for its restoration to the estate from which it had been improperly taken. *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183; *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; *Muelier v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; *Metcalf v. Barker*, 187 U. S. 165, 176, 23 Sup. Ct. 67, 47 L. Ed. 122. The contention now made to that effect is obviously an afterthought.

2. The claim that the referee had no power to entertain the proceeding in question, make an investigation, and report his result to the court for its action is without merit. By section 38 of the bankruptcy act of 1898 the referee is empowered to "perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts." By general order No. 12 prescribed by the Supreme Court pursuant to the power conferred by the bankruptcy act upon it, after a case has been referred to a referee, "all the proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had

before the referee." These provisions with the provision for review by the judge on certificate from the referee as contemplated by section 39(6) and general order No. 27, not only conferred jurisdiction upon the referee to entertain the proceeding now under consideration, but afforded ample provision for review of his decision by the judge of the District Court from whose action alone an appeal to this court can be prosecuted. The jurisdiction of the referee in matters of this kind is fully recognized in *Mueller v. Nugent*, supra, and *In re Rochford*, 124 Fed. 182, 59 C. C. A. 388.

3. We think there was no error in not opening up the case for further hearing after it had been returned to the referee by the District Judge. Appellant had had its day in court on the only issue joined in the case. The referee had found by evidence which seems to admit of no contradiction, against the appellant on that issue. He had in explicit terms found that the appellant had received from the bankrupt after proceedings had been instituted against him the sum of \$2,154.18 in money; but instead of making the usual and appropriate order for its repayment to the trustee by the appellant the referee undertook to enter and did enter a personal judgment for that amount. This the District Judge said in his opinion was unwarranted, and that "the judgment of the referee thus entered must be vacated and set aside." He then caused to be entered an order as follows:

"That the judgment entered by the referee in favor of the trustee herein and against Knapp & Spencer Company be, and the same is hereby, vacated and set aside, and said cause is remanded to the referee for further proceedings in accordance with law."

The "judgment" referred to in the opinion and order of court was clearly that personal judgment against appellant for the recovery of the money improperly taken by it, and has no relation to the finding of fact on which it was predicated, concerning which no fault was found or error suggested by the judge. He had in his opinion said:

"If this order [referring to the order which should have been made by the referee] was not complied with it would be the basis for a proper and appropriate proceeding to recover said money."

In view of the order as actually made by the District Judge considered by itself or as elucidated by the opinion, we think the remanding of the case was not for a further hearing of the issue of fact involved in it. The order was merely to set aside the unwarranted entry of judgment, and proceed according to law. That means, we think, to proceed to enter an order requiring appellant to pay the money found to have been unlawfully taken by it from the bankrupt subject to a possible rule for contempt in case of failure to comply with it. This was the interpretation placed upon the order by the referee, and we think he was right.

Conceding, however, that he might in his discretion on an appropriate showing, have permitted appellant to amend its answer and introduce new and relevant evidence, we are of opinion that no sufficient showing was made to warrant the exercise of discretion fa-

avorable to appellant in that particular. No proposed amended answer was exhibited to the referee, and no other information was vouchsafed to him showing what new defense, if any, the appellant desired to make. Neither was there any showing that there were any facts newly discovered, material or otherwise, that appellant desired to bring forward. All the information which the motion and accompanying affidavits gave to the referee was that appellant desired to offer a large number of papers, contracts, and receipts which, with other testimony, would show facts claimed to constitute a defense. This was very general language, and gave no facts to show or ground to believe that appellant had a meritorious defense. The learned District Judge exercising supervising control over the referee approved his action, and we discover no reason for disturbing the conclusion reached by both of them on this matter which rests largely in discretion.

The decree below was for the right party, and is affirmed.

THOMAS v. VIRDEN.

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

No. 173.

1. JUDGMENT—ACTION—JURISDICTION—APPEARANCE.

Defendant, when sued on a foreign judgment, may show that the attorneys who undertook to enter his appearance in the action in which the judgment was rendered had no authority to do so, unless such question has been determined by a court having jurisdiction of both the parties and subject-matter.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 80, Judgment, § 1469.]

2. SAME—RES JUDICATA.

Plaintiff having sued certain persons in a Florida court, defendant's agent directed certain attorneys to intervene for defendant, which they did. The agent acted without authority, and, when defendant was informed, he directed the agent to take such further steps in the litigation as should be necessary to discontinue the same, whereupon the agent employed another attorney, who obtained an order striking defendant's name from the record as an intervening party, after which, and after plaintiff had filed an amended petition by leave of the court against defendant, another petition was filed praying that defendant's name be stricken from the suit as either plaintiff or defendant, on the ground that the filing of the intervention was without defendant's knowledge or authority. This application was tried on affidavits and denied. *Held* that, defendant never having repudiated his agent's acts in employing a second attorney to procure his dismissal from the case, the order denying such relief was binding on him, so that he was not entitled, in a suit on a judgment recovered against him, to a retrial of the question of the validity of his appearance in the original suit.

In Error to the Circuit Court of the United States for the Western District of New York.

This cause comes here upon writ of error to review a judgment of the Circuit Court entered upon a verdict directed by the court in favor of defendant in error, who was plaintiff below.

Charles T. Ennis, for plaintiff in error.

C. A. Brodek and Simon Fleischmann, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The action was brought upon a judgment alleged to have been recovered against defendant in the circuit court of the Sixth judicial district of Florida. Plaintiff put in evidence a certified copy of the judgment roll containing the judgment and all other proceedings in the Florida court, and, having proved three assignments to himself from other parties in the Florida action, rested his case. The defense contended that Thomas had never been served in the Florida action, and had never appeared or authorized appearance therein. The court held that on that point it was concluded by the judgment roll. The argument here has been quite extended, but the crux of the case lies within a very narrow compass. Plaintiff does not dispute the general proposition that a party, when sued upon a judgment of a court of another state, may show by competent evidence that the lawyers who undertook to enter his appearance in the action in which such judgment was rendered had no authority from him so to do. But, although defendant in this case was not allowed to answer questions directed to that precise point, there was no error in such rulings, as will appear from a summary of the somewhat complicated facts disclosed in the record.

In November, 1903, Virden began a suit in equity in the Florida court against Preston and Kelly. Other persons intervened therein from time to time. On December 17, 1903, a petition to intervene was filed in behalf of Thomas. It purported to be signed by him and by Simonton & Turman as his solicitors. This petition was granted and Thomas made a party. The complainants thereupon filed an amended bill, naming him as a defendant, in which they sought to hold Thomas as a principal in a scheme alleged to have been devised by him and other defendants, and liable to complainants for the aggregate of their claims. This amendment of the bill was on formal order of the court. On January 20, 1904, after such amendment was made, a new solicitor, C. C. Whitaker, purporting to act on behalf of Thomas, asked that Thomas be permitted to withdraw from the files of the court the petition of intervention, and that his name be stricken either as a party complainant or defendant in the suit, and that said order be made without prejudice to the said Thomas to take such other or further steps in the litigation as he may in future see fit. Upon this application the court made an order that Thomas be permitted to withdraw his petition of intervention, and that "his name be stricken as a party complainant or defendant to this suit, without prejudice to the said Orlando F. Thomas to take such other and further steps in this litigation as he may in the future see fit." Then follows the date (Jan. 20, 1904) and signature of the judge, and immediately below it the words:

"This order is not intended in any way to affect the order of the court formerly made herein making Orlando F. Thomas a party defendant. It is further ordered that said defendant be allowed until Feb. 15th to file his answer."

This addendum is also dated January 20, 1904, and signed by the judge. In view of the contradictory directions of this order, it might

not be easy of interpretation; but we are spared the trouble of construing it. The Florida court has held that it did not operate to discharge Thomas from the suit, and has so held under circumstances which do not permit us here, in this action, to review its conclusions. Eventually judgment was entered against Thomas pro confesso for \$24,615.37. If this were all, it would have been quite proper for Thomas, when sued upon the judgment, to show that he was never served with process in the Florida suit (it is conceded that he was not); that the application for leave to intervene made in his behalf by Simonton and Turman was never signed by him, nor brought at his request, or with his knowledge or assent; and that neither himself nor any agent authorized to act for him retained Simonton & Turman to make any such application, or Whitaker to appear on the motion which resulted in the contradictory order above quoted from. These were issues on which the defendant was entitled to have his day in court, and so far as the facts above recited disclose he had never had it. Therefore he would have opportunity to present his side of such issues in the court in which action was brought upon the judgment.

But the judgment roll and defendant's testimony show something more. On February 6, 1904, a further petition, purporting to be that of "Orlando F. Thomas, by his solicitor, C. C. Whitaker," was presented to the Florida court. It averred that "he gave no authority to file the intervention filed in this cause for him, and that no one had such authority to so represent him, and that the filing of the intervention in this cause in his behalf was done without authority from him, or without his knowledge or consent, as shown by the affidavits hereto attached and made a part of this petition." It prayed that his name be stricken from said suit as either complainant or defendant. Upon such affidavits and others the court on February 10, 1904, denied the petition. It is apparent that these are the same issues which defendant sought to present and give testimony upon in the case at bar. If the defendant had elected to present such issues to a competent court for its determination, and such determination had been reached before this action was begun, it is manifest that he would have no right to try them over again in the later action.

The first question in this case, therefore, is whether Thomas authorized the submission to the Florida court of the question whether or not he had authorized Simonton & Turman to appear for him on the application to intervene in the original suit. The record in this case discloses that this application of February 6, 1904, was made by a lawyer named Whitaker, who testified that it was made by him on behalf of Thomas, in compliance with the request of one Richard Irving. The application was based upon affidavits, one of which purported to be verified in New York by Orlando F. Thomas. Thomas admitted on the stand that this affidavit was made by him. It averred that he did not authorize Simonton & Turman, or any other attorney, or any other person, to ask in defendant's name for any relief whatever in the Florida court; that he did not authorize any action to be taken for him in his name in said suit, and that he did not know that

such action had so been taken in his name until about the 5th or 6th of January, when he was so informed by Richard A. Irving, of the city of New York; that as soon as deponent was so informed he repudiated said action and refused to sanction the same, and "directed that said Irving take steps to discontinue the same and undo anything that had been done on deponent's behalf." Whitaker testified in the court below that he appeared before Judge Wall in the Florida court on February 10, 1904, when the application of February 6, 1904, was argued, "following an instruction from Mr. Irving to present this matter." Although defendant was repeatedly asked whether he ever authorized any one to appear for him in any Florida action, and whether he ever employed Whitaker to make any motion for him in any Florida case, and whether he ever gave Irving any authority to file any petition of intervention in the Florida action, all of which questions were disallowed, he was not asked any question calculated to elicit a reply contradictory of the statement in his affidavit that he directed Irving to take steps to discontinue the same and undo anything that had been done. Upon the proofs, therefore, it appears that Irving, who employed Whitaker to submit the issues raised by the motion of February 6, 1904, to the Florida court, was the attorney in fact of Thomas, instructed by the latter to "take steps" in this very matter. On this evidence it must be held that these issues were presented to the Florida court under circumstances which would make their decision of such issues binding upon Thomas.

The judgment of the Circuit Court is affirmed.

THE CLINTON et al.

(Circuit Court of Appeals, Fifth Circuit. March 24, 1908.)

No. 1,756.

MARITIME LIENS—REPAIRS IN FOREIGN PORT—CONTRACT WITH OWNER.

One who makes repairs on a vessel in a foreign port under a contract with the known owner, then present, is not entitled to a maritime lien therefor in the absence of a contract for a lien, express or implied, or a mutual understanding that the repairs were furnished on the credit of the vessel, and the burden of proving such contract or understanding rests upon the libellant asserting the lien.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, Maritime Liens, §§ 7-18.]

Appeal from the District Court of the United States for the Southern District of Florida.

The following is the opinion of LOCKE, District Judge, in the lower court:

This is an action in rem, by libellant, a Louisiana corporation, to enforce an alleged lien against the steamship Clinton, being at the time of attachment at Tampa, in this district, the same being her home port. The debt alleged in the libel was for \$7,023.39, due for repairs and materials furnished by libellant in New Orleans, under a contract with James McKay, her owner. The libel was afterwards amended reducing the debt claimed to \$2,023.39. The vessel was attached by process issued out of this court, and afterwards

released on a bond of \$8,000, libellant having at first demanded one for \$14,000. Respondent answering denied that the work and materials done and furnished was done upon the credit of the vessel, or that there was any understanding either express or implied that there should be a lien upon the vessel for the same. Other matters in defense were set up in the answer, but, as determining the above questions disposes of the case, they need not be considered.

Testimony was taken and submitted, from which it appears that the repairs were contracted for and authorized by the owner, James McKay, in a foreign port to be made by parties who had previously often rendered such service for said McKay. The manager of the libellant, Mr. Johnson, insists that he understood such work as he did gave him a lien upon the vessel. Was it a part of his proposal to do the required work, and did he make it a condition of the contract, and was it mutually understood and such conditions accepted by McKay? Testimony does not show such to have been the case, and in lack of such element in the contract the law presumes that the contract was with the owner, and upon his credit. A maritime lien is a powerful instrument. It enables a creditor without any notice to his debtor, and without giving him the protection of a bond for illegal proceedings, to attach and seize a vessel, even though, as in this case, she is loaded with freight and filled with passengers and about to proceed upon a voyage. It gives him power to inflict almost irreparable injury upon the debtor; and no prudent owner would invest his creditor with such power, except as a last resort. The history of the attempt to enforce this alleged lien as shown by the pleadings and testimony in this case illustrates the possibilities arising from the holding by a creditor of such a weapon. Respondent's vessel was seized when about to go upon a voyage, and delayed by a demand for a bond nearly four times as large as warranted by law, and it cannot be rightfully claimed by libellant that no damage was caused by this abuse of the process of the court, because his credit was sufficient to enable him at length to furnish bond twice as large as could be legally required. The vessel was released. The damage and injury to respondent's business and to his credit by being delayed and compelled to give such bond cannot be estimated. A maritime lien is not only dangerous to the owner, not to be resorted to if it can be avoided, but it is a secret lien, unfair to all persons dealing with the owner, and trusting him upon the credit arising from his ownership, possession, and control of vessels, therefore the principle is well established that such liens are not favored by the courts, and are not recognized unless conclusively shown. An owner has a right to know when a party with whom he is dealing intends to claim an admiralty lien, and have an opportunity to arrange for credit, or to be able to meet it. If the owner is informed that the creditor will demand the security of a lien, he may be able to arrange elsewhere for personal credit. There is nothing to show that if McKay has been informed that libellant would claim a lien upon this vessel he could not have had the work done elsewhere upon his own credit. It is not necessary, however, for McKay to show that there was no contract for lien. It is for Johnson to show that there was one. A consultation of the authorities referred to by libellant does not seem to me to support the view that because the manager of the libellant thought he would have a lien and he would not have done the work had he not thought so.

In *The Eclipse*, Fed. Cas. No. 4,268, it is said the lien was enforced because it was found the supplies were furnished on the credit of the boat, regardless of any intention or knowledge of the owner. No particulars of the case are given to show how this "was found." In the case of *The James Guy*, Fed. Cas. No. 7,195, the intent of the owner was shown by the declaration on the note given that the amount was to be charged to the vessel. In the case of *The Union Express*, Fed. Cas. No. 14,364, the vessel was a domestic vessel, and in the cases of *The Witch Queen*, Fed. Cas. No. 17,916, *The Plymouth Rock*, Fed. Cas. No. 11,236, the supplies were furnished upon the orders of the masters, and the liability of the vessels for repairs or supplies furnished by order of the owners were not under consideration. The case of *The Ella* (D. C.) 84 Fed. 471, cited by libellant, seems to support the contention of respondent. The court says: "The maritime law does not recognize any lien on a vessel for repairs furnished in a foreign port on the

direct order of the owner in person, unless there is an agreement, express or implied, for a lien; but if there is a common understanding on the part of the repairer and the owner that the furnishing of necessary repairs is to proceed upon the basis of a lien, or of extension of credit to the ship, as well as to the owner or master, there is an implied agreement or contract for a lien, and a lien will be recognized and enforced." This "common understanding" is the element that I find to be lacking in this case. It is not established by testimony, and is positively denied by respondent. There is no implied agreement for a lien from the circumstances of the furnishing of the supplies or repairs; nor any presumption in law of such lien simply by the furnishing of supplies upon the order of the owner. On the contrary, the presumption is that credit is given to the owner, and the burden of proof is upon the libellant who claims that the circumstances were such as to prove a contract for a lien. In *The Columbus*, 67 Fed. 553, 14 C. C. A. 522, the court says: "The question is not whether the libellant contemplated a lien, but whether it was a mutual understanding of both parties." In *The Francis* (D. C.) 21 Fed. 921, it was held that in order to hold a ship, the materialman must show either an agreement or some circumstances indicating a common intention to bind the ship. In *The Aeronaut* (D. C.) 36 Fed. 497, it is distinctly declared that a credit of the ship must be proven to be within the intention of both parties. In *The Stroma*, 53 Fed. 281, 3 C. C. A. 530, the court says: "The owner may expressly pledge the vessel, but such pledging of the ship must be within the intent of both parties. In *The George Dumois* (D. C.) 66 Fed. 353, the court dismissed a libel because it was not satisfied that there was a mutual intent to bind the ship.

In the case of *Dredge Boat No. 1* (D. C.) 135 Fed. 867, the court says: "The work was done in a foreign port, and had it been contracted for by the master, would have been a prima facie case of lien; but the libellant's difficulty is that he contracted with the owners without making any arrangement for a lien; and the fact that no lien was contemplated is shown to some extent by the two payments made by the owners as above. No lien can be sustained under the circumstance of this case. It would not matter if the libellant intended to rely upon the credit of the dredge of which the charge in their books is but slight evidence." *The Samuel Marshall*, 54 Fed. 396, 4 C. C. A. 385, declares the same principle. *The Ella* (D. C.) 84 Fed. 471, says: "The maritime law does not recognize any lien on a vessel for repairs in a foreign port on the direct order of the owner in person, unless there is an agreement, express or implied, for such lien." In *The Now Then* (D. C.) 50 Fed. 944, it is said by the court: "The presumption of credit to the vessel does not arise, and a lien does not exist except by the express contract of the parties." This was affirmed in 55 Fed. 523, 5 C. C. A. 206. In the case of *The Valencia v. Ziegler*, 165 U. S. 270, 17 Sup. Ct. 325, 41 L. Ed. 710, the Supreme Court said: "It is true the libellants delivered the coal in the belief that the vessel, whether a foreign or domestic one, would be responsible for the coal; but such belief is not sufficient in itself to give a maritime lien. If that belief was founded upon the supposition that the company owned the vessel, no lien would exist, because in the absence of an agreement, express or implied, for a lien a contract for supplies made directly with the owner in person is to be taken as made in his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived. In *The Kingston* (D. C.) 23 Fed. 200, it is held: "When materials are furnished and labor performed under a contract with the owner, no general maritime lien can be claimed."

In the case of *The Havana* (D. C.) 87 Fed. 487, very nearly parallel to this, in which the repairs exceeded largely the first estimate, and were made by the direct order, and under the supervision of the owner, the court says: "The libellants concede that to entitle them to recover the proof must show a contractual lien, not an implied lien resting on given facts as in the case of repairs on a master's order, but as one resting on a contract in the case of bottomry. * * * Of course, a mutual understanding that a lien shall exist, is a contract for a lien. Do these facts prove an understanding? The question thus presented is the only subject for consideration. The burden of proof is on the libellants; they must show the contract clearly, or fail in the

suit. Such liens are secret and not favored. I do not find anything inconsistent with the nonexistence of a lien." The libel was dismissed, and the decision affirmed upon appeal in 92 Fed. 1007, 35 C. C. A. 148. In *The Jennie Middleton* (D. C.) 94 Fed. 683, the court says: "The record fails to disclose any record of express contract for a lien." The libel was dismissed, with costs. In *The Regulator*, Fed. Cas. No. 11,665, it was held that the presence of the owner does not imply a lien—citing *The St. Jago de Cuba*, 9 Wheat. 409, 6 L. Ed. 122. In *Sarchet v. The Davis*, Fed. Cas. No. 12,857, it was held, that no implied lien was created when the owner was present with his vessel. In *Thomas v. Osborn*, 19 How. 22, 15 L. Ed. 534, it was said: "It is true this implied lien does not exist in a place where the owner is present." "It is true the libelants were unwilling to credit the owners, but it does not appear that they communicated this to the owners, or that other parties would not have furnished the articles upon the owners' credit." Libel was dismissed, with costs. In the case of *The Mary Morgan* (D. C.) 28 Fed. 196, Judge Butler said: "An owner who obtains supplies in a foreign port, not being master, deals presumptively on his personal credit, and no lien will be implied unless the libellant satisfies the court that there was a common understanding that the ship should be bound; in other words, unless the libellant proves an express lien. The debt was contracted by the owners. The presumption, therefore, is that credit was given to them personally. This presumption must stand, at least until answered by evidence sufficient to repel it. I have failed to discover any such evidence in the case. There was no agreement for a lien, nor was there anything in the situation of the vessel or her owners at the time to justify the conclusion that a pledge was usually intended."

In the case of *The Surprise*, 129 Fed. 875, 64 C. C. A. 311, the court quoted approvingly from the case of *The Iris*, 100 Fed. 104, 40 C. C. A. 301, as follows: "By the maritime law, no lien for supplies or labor furnished a vessel is presumed to arise on a contract made by the owners, and proof is required that the minds of the parties to the contract met on a common understanding that such a lien should be created. Neither is it sufficient that the party who furnished the labor or supplies gave credit, so far as his own intentions were concerned, to the vessel, or would not have furnished them except on the belief that he was acquiring a lien for them. In this respect the statute is different from what it is with reference to liens for labor and supplies furnished a vessel on the order of her master."

These few quotations from the numerous cases decided upon this particular point appear to be conclusive that the only question for consideration is whether there was a mutual understanding between the officers of the libellant company and the claimant McKay that there should be a lien upon the vessel to secure the payment for the repairs, the burden of proof being upon the libellant; and no presumption arising simply from the existence of a necessity for furnishing repairs. The testimony of the respondent is direct and positive that there was no such understanding on his part; that he had been transacting business of the same character and nature with the libellant for many years; that the accounts had always been paid; that no suggestion had ever been made to him on that occasion that the vessels were to be held under a lien. It further appears that when it was found that the repairs had exceeded by about tenfold the amount which was originally contemplated, and he was compelled to ask credit for a short time, having paid \$5,000 cash on the account of but little over \$7,000, he suggested, if desired, he would give a mortgage on the vessel, which suggestion was declined; but even then there was no idea or expression of the existence of a maritime lien. It is insisted that his subsequent representation in his letter wherein he states that the libellants are fully protected, as the vessel would be in New Orleans every two weeks, and they could take such steps as they desired to protect themselves, that that was an admission or recognition of the existence of a lien.

On the other hand, it is contended that the suggestion that action might be taken upon the presence of the vessel in New Orleans was rather a denial of an idea of a maritime lien which might be enforced at any time and place. This latter contention appears to me to be the most natural and reasonable,

and simply suggests the libellant's opportunity of enforcing a statutory or common-law attachment. Maritime liens only have risen through the necessities of the occasion, and are not favored unless such necessity is shown. While an owner may, it is conceded, contract for a lien upon his vessel for supplies or repairs, and such contract may be enforced, it is considered that in the absence of any direct evidence of such contract for a lien there is no presumption of the existence of such, and that the understanding to amount to such a contract must be mutual, and not depending entirely upon the idea or belief in the mind of the libellant that the supplies or repairs give a lien regardless of the intention or design of the owner. In this case I fail to find any evidence of any such mutual understanding or agreement that there should be a lien. While it cannot be contended that the giving of notes would render void a valid lien or constitute a new indebtedness, yet the acceptance of such may be taken into consideration as an important circumstance in determining whether or not a valid lien was existing at the time. In the case of *The James Guy*, supra, upon which the libellant largely depends, the notes taken embodied the idea of an existing lien, and therein stipulated that the amounts were to be charged to the vessel. There was nothing to that decision which conflicts, as I understand it, with the views in this case.

Failing to find that there was the existence of any such contract, either direct or implied, as would give a lien upon the vessel precludes the necessity of the consideration of the question of damages or set-off presented by the cross-bill filed herein, and the libel will be dismissed, with costs.

Harry H. Hall and F. M. Simonton, for appellant.
W. A. Carter, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and BURNS, District Judge.

PER CURIAM. As the libellant contracted with the known owner, then present, for the repairs of the steamship *Clinton*, and as no arrangement was made nor understanding had that the libellant should make the repairs on the credit of the ship, no maritime lien resulted. The libellant had a domestic lien under the laws of Louisiana, which was probably lost from failure to register and otherwise, and it does not seem to have been urged either in the court below or in this court.

The reasons and the authorities given by Judge Locke fully warrant the decree of dismissal, and the same is affirmed.

GAGE et al. v. J. F. SMYTH MERCANTILE CO. et al.

(Circuit Court of Appeals, Eighth Circuit. February 17, 1908.)

No. 2,627.

1. USURY—DEVICE TO COVER USURY—COTTON CONTRACT—FINDINGS—EVIDENCE.

Evidence held to sustain a finding that the execution of a cotton contract for alleged advances was a mere cover for the charging of usurious interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Usury, §§ 328-339.]

2. APPEAL AND ERROR—REVIEW—QUESTIONS OF FACT.

The decision of a question of fact by the trial court, which depended on the acts and intentions of the parties, and proper inferences to be drawn from the evidence, will not be reversed on appeal unless some

serious or important mistake appears to have been made in the consideration of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3955-3969.]

8. USURY—APPLICATION OF PAYMENTS.

Where cotton contracts securing a loan of money were made in Missouri, and were mere covers for usury, all payments made thereon as damages for the nondelivery of cotton thereunder should be applied as payments on the principal or legal interest on such indebtedness, under Rev. St. Mo. 1890, § 3709 (Ann. St. 1906, p. 2077), providing that, on proof that usurious interest has been paid, the sum in excess of legal interest shall be deemed payment and credit on principal debt, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Usury, §§ 219-234.]

4. EQUITY—RELIEF—CONFORMITY TO PLEADING.

Where a bill to cancel certain securities, and for an accounting as to the payment of a debt, did not complain of or ask any relief concerning a certain cotton contract executed in 1901, nor with regard to any transactions prior to March 18, 1902, when the second contract was executed, complainants were not entitled to any relief with reference to such prior transactions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 1001-1003.]

5. STIPULATIONS—AMOUNT OF RECOVERY—CONCLUSIVENESS.

Where it was stipulated between counsel for all parties that in case of the affirmance of a master's report complainant should recover \$132.81, all parties were concluded by the stipulation as to the amount due.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Stipulations, §§ 38-54.]

Appeal from the Circuit Court of the United States for the Southeastern Division of the Western District of Missouri.

On April 28, 1905, appellees brought a suit in equity against appellants in the circuit court of Pemiscot county, Mo., for the purpose of obtaining an accounting between the J. F. Smyth Mercantile Company and appellants, in regard to a certain loan made by appellants to said company on March 18, 1902. The prayer of the petition also asked that a certain deed of trust executed by J. F. Smyth and Katie Smyth and two promissory notes executed by J. F. Smyth and Katie Smyth and the J. F. Smyth Mercantile Company given to secure said loan be canceled and for naught held, and that certain insurance policies assigned to secure said loan be delivered by appellants to appellees, and that a money judgment should be rendered in favor of appellees for any balance found due said mercantile company on said accounting. In due time, appellants properly removed said suit into the United States Circuit Court for the Southeastern Division Judicial District of Missouri. In the last-named court the appellants answered the bill of appellees, and also filed a cross-bill, asking for the foreclosure of the trust deed heretofore mentioned. Such proceedings were thereafter had in said suit that on the 2d day of March, 1907, on a hearing had upon pleadings and proofs, the trial court rendered a final decree, wherein the appellees were granted all the relief asked for in their bill, so far as the deed of trust, promissory notes, and insurance policies were concerned, and also a money judgment of \$132.81. From this decree appellants appealed to this court. The record certified to this court, pursuant to said appeal, shows the following material facts:

On and prior to March 18, 1902, appellants were engaged in the cotton commission business at Memphis, Tenn., and the J. F. Smyth Mercantile Company was a corporation organized under the laws of Missouri and was doing a general merchandise business at Caruthersville, in said state. J. F. Smyth was the general manager of said business. On March 18, 1902, the J. F. Smyth Mercantile Company, was indebted to appellants in the sum of \$2,500,

growing out of a loan made by appellants to it on February 28, 1901. The mercantile company could not pay this indebtedness, and was being pressed by numerous other creditors for payment of their demands, all of which was known to appellants. In this condition of affairs, in consideration of the execution and delivery of a deed of trust by J. F. Smyth and Katie Smyth on certain lands in Missouri to appellants dated March 18, 1902, and referred to in the bill herein; in consideration of the execution and delivery of two promissory notes dated March 18, 1902, by J. F. Smyth, Katie Smyth, and J. F. Smyth Mercantile Company for the sum of \$3,000 each, due November 15, 1902, and February 1, 1903, respectively, with interest at 8 per cent. per annum; in consideration of the assignment of an insurance policy on the life of said J. F. Smyth for \$2,000, and a fire insurance policy for \$3,000 on the property belonging to the J. F. Smyth Mercantile Company; and, further, in consideration of the execution and delivery of a contract in words and figures as follows:

"Agreement.

"W. A. Gage.

W. A. Gage.

"Caruthersville, Mo., Mch. 18, 1902.

"Whereas, we are indebted to W. A. Gage & Co., of Memphis, Tenn., in the sum of six thousand dollars, as evidenced by 2 promissory notes of this date for \$3,000 each due Nov. 15 and Feby. 1, next respectively. And whereas, said advance was obtained on the faith of the representations made by us that we could deliver, or cause to be delivered, to the said W. A. Gage & Co., by the first day of January, 1903, 600 bales of cotton for storage and sale on commissions, which said representation we hereby expressly warrant to be true. Now, in consideration of the premises, and the agreements made by said W. A. Gage & Co., as hereinafter stated, we do hereby agree to deliver, or cause to be delivered to the said W. A. Gage & Co., at their warehouse in the city of Memphis on or before the first day of January, next, 600 bales of cotton, to be sold by them as such commission merchants, and from the proceeds of the first cotton shipped, or from the first payments made, said W. A. Gage & Co., shall, first, pay all charges on said cotton as storage and commission for selling; shall, secondly, pay any additional sum that may be advanced us by the said W. A. Gage & Co., which may not be secured by note; shall, thirdly, pay any storage and commission on cotton which we fail to ship as above agreed, at the rate of one dollar and twenty-five cents a bale; and shall, fourthly, apply the proceeds of the remainder of the proceeds of said cotton, or other payments, to the promissory notes above mentioned, or to any other debts with which we may stand charged. W. A. Gage & Co., having the right, at their option, to apply or change application of payments or make re-application of payments.

"And the said W. A. Gage & Co., agree, by their acceptance of this writing, to provide storage for said cotton until the same is sold, and to sell the same for the usual commission charged. And in consideration thereof, in order to compensate W. A. Gage & Co. for their trouble and expense in providing safe storage and necessary and proper means and facilities for selling said cotton, we agree in default of the delivery of said cotton, or any part thereof, to pay said W. A. Gage & Co. on January 1st next one dollar and twenty-five cents per bale as liquidated damages on the number of bales so in default. Should W. A. Gage & Co. advance us a greater sum than six thousand dollars, which additional advance shall be optional with W. A. Gage & Co., and shall be due and payable as soon as created we hereby agree and bind ourselves to ship them one bale of cotton for each ten dollars charged to us by September 1, 1902, over and above the amount originally intended to be advanced. Should we owe the said W. A. Gage & Co. anything because of our failure to comply with this agreement, then said indebtedness for deficit commission is to be regarded as a part of the indebtedness herein acknowledged, and shall be collectible hereunder. It is hereby further agreed that we are to pay interest on notes and on open account at the rate of eight per cent. per annum. To secure the payment of any balance which may be due, as shown by the books of W. A. Gage & Co., we waive exemptions as to personal property, and

agree to pay a reasonable attorney's fee, should a lawyer be employed to collect the same.

"Given under our hands, this 18th day of March, 1902.

"J. F. Smyth,

"J. F. Smyth Merc. Co.

"By J. F. Smyth, Pres."

Appellants advanced for the use and benefit of the creditors of the J. F. Smyth Mercantile Company \$3,500, which added to \$2,500, which the J. F. Smyth Mercantile Company was owing on old account, made up the amount of \$6,000, for which the two promissory notes were given, and to secure payment of which the deed of trust was executed and delivered, and the insurance policies were assigned. Not \$1 of the new money so advanced was given to J. F. Smyth or the J. F. Smyth Mercantile Company, except as paid out to the creditors of the J. F. Smyth Mercantile Company through the representative of the appellants and the representative of the creditors of said company. The J. F. Smyth Mercantile Company shipped under said cotton contract of March 18, 1902, one bale, and appellants charged to the general account of said company \$748.75, being the amount of shortage on 599 bales at \$1.25 per bale. No money was advanced by appellants under this cotton contract other than the \$3,500. On March 26, 1903, the mercantile company or J. F. Smyth having paid but little on said notes, without the advancement of any new money by appellants, executed and delivered to appellants a new cotton contract similar in substance and form to the one hereinbefore set out, except it called for 500 bales to be delivered on or before January 1, 1904, and contained the following recital:

"Whereas, we are indebted to W. A. Gage & Co., of Memphis, Tenn., in the sum of six thousand dollars, as evidenced by promissory notes of date Mch. 18, 1902, \$3,000 due Nov. 15, '02, \$3,000 due Feb. 1, '03, which indebtedness W. A. Gage & Co. have agreed to extend until the coming fall at our request. And whereas, said extension was obtained on the faith of the representations made by us that we could deliver or cause to be delivered, to the said W. A. Gage & Co., by the first day of January, 1904, 500 bales of cotton for storage and sale on commissions, which said representation we hereby expressly warrant to be true."

Under this second contract there was shipped by the Smyth Mercantile Company about seven or eight bales, and the number of bales short at \$1.25 per bale was charged to the general account of said J. F. Smyth Mercantile Company. On March 18, 1904, the notes hereinbefore mentioned not having been paid, the mercantile company and J. F. Smyth, without advancement of any new money by appellants, executed and delivered to appellants a new cotton contract similar in form and substance to the contract of March 18, 1902, except it called for 500 bales to be delivered on or before January 1, 1905, and contained the following recital:

"Whereas, we are indebted to W. A. Gage & Co., of Memphis, Tenn., in the sum of six thousand dollars, as evidenced by promissory notes of this date Mch. 18, 1902, \$3,000.00 due November 15, '02, Mch. 18, 1902, \$3,000.00 due Feb. 1, '03, which indebtedness W. A. Gage & Co. have agreed to extend until the fall of 1904 at our request. And whereas, said extension was obtained on the faith of the representations made by us that we could deliver or cause to be delivered, to the said W. A. Gage & Co., by the first day of January, 1905, five hundred bales of cotton for storage and sale on commissions, which said representation we hereby expressly warrant to be true."

Under the third cotton contract there were shipped 23 bales, and the shortage at \$1.25 per bale was charged to the general account of J. F. Smyth Mercantile Company. At the time these three cotton contracts were made the J. F. Smyth Mercantile Company or J. F. Smyth were not in the cotton business to the knowledge of appellants. The cotton contracts were executed under such conditions and circumstances as to fully warrant a finding by the trial court that the J. F. Smyth Mercantile Company and J. F. Smyth were for all practical purposes compelled to sign them to prevent a foreclosure of the trust deed, and that neither party to said contracts expected that any cotton would be shipped thereunder. The few bales that were shipped were not shipped by the J. F. Smyth Mercantile Company or J. F. Smyth with the

intention of performing said contracts, but to accommodate some parties who wished to ship a few bales to Memphis, in order to obtain a better price. Other facts tending to support the findings of the trial court appear of record, but enough has been stated to illustrate the principles involved in the decision of the case.

Thomas M. Scruggs (St. John Waddell, on the brief), for appellants.
Charles B. Faris, A. L. Oliver, R. L. Ward, and L. L. Collins, for appellees.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge (after stating the facts as above). The claim of the appellees is that the cotton contracts were a scheme or device to cover usurious interest on the loan represented by the two promissory notes of \$3,000 each. If this claim is well founded, the amount of money paid by the mercantile company or J. F. Smyth, as damages on the cotton contracts, should be credited on the notes representing the loan of \$6,000. The contracts involved in this suit are to be construed with reference to the laws of the state of Missouri, as they are Missouri contracts. Section 3709 of the Revised Statutes of Missouri 1899 (Ann. St. 1906, p. 2077) provides as follows:

"Sec. 3709. Defendant may plead usury—judgment, how rendered. Usury may be pleaded as a defense in civil actions in the courts of this state, and upon proof that usurious interest has been paid, the same, in excess of the legal rate of interest, shall be deemed payment, shall be credited upon the principal debt, and all costs of the action shall be taxed against the party guilty of exacting usurious interest, who shall in no case recover judgment for more than the amount found due upon the principal debt, with legal interest, after deducting therefrom all payments of usurious interest made by the debtor, whether paid as commissions or brokerage or as payment upon the principal or as interest on said indebtedness."

The trial court found from the evidence before it that the cotton contracts were simply a scheme or device to cover usurious interest, and directed that all payments made subsequent to March 18, 1902, by the mercantile company or Smyth to appellants should be credited on the loan of \$6,000.

After careful consideration of the evidence hereinbefore stated and the other evidence appearing in the record, we are satisfied that the trial court was justified in reaching the conclusion that it did upon the facts. The question as to whether or not the cotton contracts were a scheme or device to cover usurious interest turned wholly upon the decision of a question of fact, and as this decision depended upon the acts and intentions of the parties and the proper inferences to be drawn from the evidence this court on familiar principles will not reverse the finding unless some serious and important mistake appears to have been made in the consideration of the evidence. *Coder v. Arts*, 152 Fed. 943, 82 C. C. A. 91; *McDonald et al. v. Campbell*, 151 Fed. 743, 81 C. C. A. 101; *Snider v. Dobson*, 74 Fed. 757, 21 C. C. A. 76; *Barton v. Texas Produce Co.*, 136 Fed. 355, 69 C. C. A. 181; *Hussey v. Richardson, etc., Dry Goods Co.*, 148 Fed. 598, 78 C. C. A. 370. The same rule has been announced and acted upon by the Supreme Court of the United States. *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup.

Ct. 894, 31 L. Ed. 664; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Evans v. Bank*, 141 U. S. 107, 11 Sup. Ct. 885, 35 L. Ed. 654; *Furrer v. Ferris*, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. Ed. 649.

In the case of *Cockle et al. v. Flack et al.*, 93 U. S. 344, 23 L. Ed. 949, it was held that contracts by commission merchants similar to the cotton contracts in this case were not necessarily usurious. That commission merchants may loan their money at lawful rates of interest to such parties and on such terms as would bring them also the business which would grow out of the investment of it; that if the contract was made only with the honest purpose of securing in addition to interest, the profits incidental to handling the products as commission merchants it would not be usurious; that, on the other hand, such contracts might be used as a mere evasive device to cover usurious interest; and that in jury trials it would be the province of the jury, and in suits in equity of the chancellor, to determine on a full consideration of all the facts whether it be the one or the other. To the same effect are the cases of *Patillo v. Allen-West Commission Co.*, 108 Fed. 723, 47 C. C. A. 637; *Harman v. Lehman*, 85 Ala. 384, 5 South. 197, 2 L. R. A. 589; *McKenzie v. Garnett*, 78 Ga. 257; *Shattuck v. Clark* (Tex. Civ. App.) 34 S. W. 404; *Uhlfelder v. Carter's Adm'r*, 64 Ala. 532.

In the case of *Cockle v. Flack* and several of the other cases above cited there was no question but that the parties to the contracts could or would perform them, and the loans or advancements were to be invested in the purchase of property which was to be sold and the proceeds applied to the payments of the existing debt. In the case at bar the delivery of cotton could not have been contemplated. No money was advanced to be invested in cotton. The whole reasoning upon which such contracts as are described in *Cockle v. Flack*, *supra*, are sustained at all wholly failed. Such contracts as were made in this case were held void for want of consideration by *Caldwell, C. J.*, in *Norman v. Peper* (C. C.) 24 Fed. 405, but it is not material in this case whether they are void as a cover for usury or for want of consideration; in either event the payments made thereon as damages must be applied on the loan.

It appears in the record that there was an item of \$157.50 charged the Smyth Mercantile Company for shortage on a cotton contract of 1901. Counsel for appellants urge in their brief that this amount cannot be counted as usury or included in the decree awarded the appellees, for the reason that it is admitted that both parties intended to perform the contract of 1901. This item cannot be included in the decree awarded the appellees for much stronger reasons. The bill of appellees did not complain or ask relief in regard to any transactions prior to March 18, 1902. The decree rendered in direct terms limited the accounting between the parties to payments made subsequent to said date, that being the date of the notes. In this state of the record counsel for the respective parties made the following stipulation:

"In this cause the reference to the master to state an account under the findings and opinion of the court is by agreement of counsel hereby waived. And it appearing from the proof that upon such reference being executed the

amount due from defendants W. A. Gage & Co., to the complainant the J. F. Smyth Mercantile Company, would, under the opinion of the court, amount to the sum of \$132.81 at the date of the decree to be passed herein, it is hereby agreed between counsel for all parties, respectively, that a decree may be passed for said sum."

We have no right to suppose that the item of \$157.50 was considered in the making of this stipulation as the amount stipulated to be due the appellees was upon the expressed idea that an accounting had in accordance with the opinion and decree of the court would show a balance of \$132.81 in favor of appellees. Upon the record as it now stands all parties are concluded by the stipulation as to the amount due.

Counsel for appellants urge in support of the good faith of the cotton contracts that the Smyth Mercantile Company and J. F. Smyth warranted their representations as to the delivery of the cotton to be true. This is so, and still what could appellants think of such a warranty in the contract of 1903 when the same warranty was in the contract of 1902 for 600 bales, and only one bale was delivered thereunder? The mind of man cannot conceive or his hand frame a cover for fraud or usury that a court of equity will not look through and beyond it to see what the real transaction is, and if it finds it to be fraudulent or usurious will so declare, notwithstanding the parties may as to form have conducted themselves in a manner beyond criticism.

No error appearing in the record, the decree appealed from is affirmed.

UNITED STATES v. BLACK et al. (two cases).

(Circuit Court of Appeals, Seventh Circuit. January 13, 1908.)

Nos. 1,375, 1,376.

1. CRIMINAL LAW—FEDERAL PRISONERS—PROCEEDING FOR REMOVAL—EVIDENCE—PROBABLE CAUSE.

On an application to remove persons to another federal district where they were charged with violating Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), by conspiring to defraud the United States of public lands subject to entry under Timber and Stone Act of June 3, 1878, c. 151, § 1, 20 Stat. 89 (U. S. Comp. St. 1901, p. 1545), certified copies of General Land Office records showing that all the entries of public lands mentioned in the indictment were perfected and issued therefor prior to all the alleged overt acts under the alleged conspiracy, and more than three years before the indictment was filed, were admissible on the question of probable cause of the charge.

2. SAME—COMMISSIONER'S COMMITMENT.

Since proceedings before a United States Commissioner on the arrest of persons indicted in another district were preliminary only, for the apprehension of and to hold accused either for recognizance or pending application for removal, the commitment had completely served its purpose when such application was denied, and accused became entitled to their discharge, for which an order was needful.

3. CONSPIRACY—CRIMINAL CONSPIRACY—ESSENTIALS.

The offense of conspiracy, under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), providing punishment where persons conspire either to commit any federal offense or to defraud the United States, etc., consists in the

conspiracy alone, and not in both the conspiracy and the acts done to effect its object.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 8, p. 7613.]

4. CRIMINAL LAW—CONSPIRACY—LIMITATIONS—COMMENCEMENT OF PERIOD.

Under an indictment charging a violation of Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), providing a penalty where persons conspire to defraud the United States, and one of them does any act to effect the object of the conspiracy, by conspiring to defraud the government of public lands subject to entry under Timber and Stone Act of June 3, 1878, c. 151, § 1, 20 Stat. 89 (U. S. Comp. St. 1901, p. 1545), an averment of payment, on certain dates within three years of the filing of the indictment, to procure false application, final proof and entry for the lands, does not charge overt acts within section 1044 (U. S. Comp. St. 1901, p. 725), limiting certain federal prosecutions to three years from the commission of the offense. Any violation of section 5440 was complete before certificates of purchase covering the lands were issued, though such payment was made subsequently.

[Ed. Note.—Commencement of period of limitations against continuing offenses, see note to *Ware v. United States*, 84 C. C. A. 519.]

5. SAME.

To constitute a violation of Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), providing a penalty where persons conspire to defraud the United States and one of them does any act to effect the object of the conspiracy, by conspiring to defraud the government of public lands subject to entry under Timber and Stone Act of June 3, 1878, c. 151, § 1, 20 Stat. 89 (U. S. Comp. St. 1901, p. 1545), it is not essential that a patent for the lands be issued and delivered; a violation of the section not depending upon the success of the conspiracy, and becoming complete when the final step was taken by the conspirators in inducing fraudulent entries and the issuance of certificates of purchases.

Appeals from the District Court of the United States for the Eastern District of Wisconsin.

The United States appeals (separately) from two final orders of the District Court, entered July 27, 1906, in favor of the appellees, upon proceedings on behalf of the government to obtain an order for their removal to the District of Oregon, for trial under an indictment there found against the appellees. These orders are (1) discharge of the appellees upon returns to writs of habeas corpus and certiorari, and (2) denial of an application made before the District Judge for their removal (under section 1014, Rev. St. [U. S. Comp. St. 1901, p. 716]) to the District of Oregon, both applications being submitted and heard together—reported as *Ex parte Black* (D. C.) 147 Fed. 832—and presented in this appeal on a single record.

The indictment referred to purports to charge the appellees with violation of section 5440, Rev. St. (3 U. S. Comp. St. 1901, p. 3676), in conspiring to defraud the United States of the possession, use, and title to public lands, therein specified, described as subject to entry under congressional enactment known as the "Timber and Stone Act" of June 3, 1878, c. 151, § 1, 20 Stat. 89 (2 U. S. Comp. St. 1901, p. 1545). It embraces four counts, averring, in substance, that the appellees conspired with parties named and others who are unknown, from September 1, 1902, up to June 20, 1903, for the fraudulent purposes stated, to be accomplished by paying money to sundry persons and thereby inducing them "to make false, fraudulent, fictitious, feigned, untrue, and illegal entries" of and upon the lands described; and each count avers a payment made, in manner stated, to a person named, to accomplish the object of the conspiracy. The first, second, and fourth counts, specify as overt acts, payments made to the person named, to procure false application, final proof, and entry for the lands described, and that such false entry was thereupon obtained for the use and benefit of the appellees and other conspirators—stating the date of such payment to the entry man, without specification

of fact or date in reference to the several proceedings for entry—such payments being stated as made respectively, (1) April 4, 1903, (2) May 23, 1903, and (4) April 4, 1903. The third count differs from the others in specifying, as the overt act, that payment was made on April 20, 1903, to a United States commissioner named, before whom applications and final proofs were to be made and certified to induce him "to fraudulently certify" thereupon an entry described, and that such fraudulent certificate was thereby obtained to effect an object of the conspiracy.

The appellees were citizens of and residents in the state of Wisconsin, and upon complaint made for their commitment to answer this indictment in the District of Oregon, were brought before a commissioner for the Eastern District of Wisconsin. Upon the hearing, proof was tendered to the commissioner on behalf of the accused, in a certified copy of the records of the General Land Office, showing that all the lands mentioned in the indictment were entered and sold, and certificates of purchase issued thereupon, on or prior to March 17, 1903—all more than three years prior to the filing of such indictment. This proof was excluded by the commissioner, and the appellees were committed to the custody of the marshal on their refusal to file recognizance. Upon writs of habeas corpus and certiorari, the proceedings before the commissioner were brought for hearing in the District Court; and therewith an application was submitted to the District Judge, for a warrant of removal under section 1014. The record proof of the facts and dates of completion of entries and issuance of certificates of purchase for the lands in question (rejected by the commissioner) was received upon such hearing, and was uncontroverted. In conformity with the opinion of the District Judge, that such proof was admissible—whether upon one or the other hearing, or both, does not appear—and that the prima facie evidence of probable cause arising from the indictment was thereby disproved, the orders appealed from were entered and the prisoners discharged from custody.

William C. Bristol, for appellant.

A. S. Larson and Hugh L. Ryan, for appellees.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). When the present appeals were taken, from the orders (1) denying the application for removal of the appellees to the District of Oregon for trial under the indictment there found, and (2) discharging them from custody under the mittimus of the commissioner, no decision of the Supreme Court, as the ultimate authority, appears to have settled, in express terms, the doctrine applicable to such removal proceedings. In the recent case, however, of *Tinsley v. Treat*, 205 U. S. 20, 27 Sup. Ct. 430, 51 L. Ed. 689, these propositions were directly involved and established: That the duty of the District Judge, on an application for removal under section 1014, is judicial, not merely ministerial, in the inquiry which it involves of probable cause for the charge upon which removal is sought; that thereupon the accused is entitled "to the judgment of the District Judge as to the existence of [such] probable cause" under evidence tendered; that the indictment there presented "cannot be treated as conclusive" of such cause, and (if valid on its face) is only prima facie evidence, which may be overcome by proof; and that evidence to that end is not only admissible upon the inquiry, but must receive just consideration, in so far as it tends to disprove either jurisdiction for trial or amenability under the charge.

The appellees tendered competent evidence from the records of the General Land Office that all the entries of public lands mentioned in

the indictment were perfected and certificate of purchase issued therefor, prior to all of the alleged overt acts under the alleged conspiracy, and more than three years prior to the filing of the indictment. Such proof was clearly admissible, within the above-stated doctrine, for the purposes of this judicial inquiry of probable cause, upon the application for removal; so that error is not well assigned for such reception. With this uncontroverted fact of all the entries in evidence, the removal was rightly denied, if no foundation remains for prosecution under the indictment; and the questions for review, upon the merits of the controversy as it appears to have been presented below, are: (1) Whether the facts averred in the indictment constitute an offense; and (2) if an offense appears therefrom, whether the appellees are absolved from liability by the above-mentioned proof of entries.

The conclusion by the District Judge that no probable cause existed for a warrant of removal to answer the indictment, necessarily involved release of the accused from the commitment pending such hearing; and whether such order of discharge was thus incidental, as of course, to denial of the warrant, or is referable to the writ of habeas corpus, is not material for the purposes of this review. As the proceedings before the commissioner were preliminary only, for apprehension of and holding the accused either for recognizance or pending application for removal, the commitment had completely served its purpose when such application was denied, and the appellees became entitled to their discharge, for which an order was needful. Whatever proceedings were appropriate to that end, all parties were before the court, with the commissioner's return of the record under the writs of habeas corpus and certiorari, so that the exercise of jurisdiction for their release is unquestionable—resting alone on the finding in the order of "no legal cause" for their further restraint. The questions discussed in the appellant's brief, whether the commissioner erred in excluding the evidence offered before him, and whether either writ authorized review of his rulings, are not involved in the present inquiry; nor are the numerous authorities which are there cited for the general rule in habeas corpus proceedings—that jurisdictional defects only are cognizable for discharge from restraint under adjudication thereof by a competent court—applicable in any sense to the relief granted below.

Both orders, therefore, rest alike upon the finding of no probable cause for a warrant of removal, and if no indictable offense appears, when the facts averred in the indictment are supplemented by the proof that all entries of the lands referred to were completed on or before March 17, 1903, the orders were rightly granted, irrespective of the question discussed in the briefs, whether the indictment is sufficient on its face to authorize removal. With the procurement of these entries and purchases alleged in the indictment as the sole object of the conspiracy charged, we perceive no difficulty in the way of determining the merits of the finding on which both orders are predicated.

The offense of conspiracy, involved in these charges, is created by section 5440 of the Revised Statutes, and differs from the like offense at common law in the express provision for a so-called *locus penitentiae*—that "one or more of such parties [conspiring] do any act to effect

the object of the conspiracy." Its ingredients are well settled, as defined in *United States v. Britton*, 108 U. S. 199, 204, 2 Sup. Ct. 531, 534, 27 L. Ed. 698, and subsequent decisions (10 *Rose's Notes U. S.* 561), to consist "of the conspiracy alone," and not "of both the conspiracy and the acts done to effect" its object. No specific acts are set out in the indictment as done by either alleged conspirator to accomplish the purpose of the conspiracy, except the several payments to persons named in the counts respectively, for service and acts in carrying out the conspiracy, alleged as having been induced and procured by such payments—with the date of payment specified, but no mention of the date of service. The earliest date stated for these payments is April 4, 1903, while others are specified in May and June, respectively; and the indictment bears date April 3, 1906. Under section 1044 Rev. St. (U. S. Comp. St. 1901, p. 725), which is applicable to prosecutions under section 5440 (*United States v. Hirsch*, 100 U. S. 33, 36 [25 L. Ed. 539]), the indictment must be found "within three years next after such offense shall have been committed," so that both fact and date of the overt act upon which the offense is charged are of the utmost materiality upon the present issue. If either of these averments of payment so made can be accepted, in the light of the proven facts, as the inception of liability under the charge of conspiracy, the date stated is within this period of limitation; and if not thus applicable, the further question thereupon—raised in the opinion below and on this appeal, as to the operation of such limitation—is not involved in the consideration, namely, whether such period runs from the first disclosure of an overt act, or remains open for succeeding acts in continuation of the conspiracy, to run from the final act.

Whatever may appear from the indictment as the relation of these payments and of the payees to the alleged conspiracy, the proof of the fact and date of completion of entries and issuance of certificates of purchase establishes beyond controversy that each payment was made not as an "act to effect the object of the conspiracy," nor to procure services to that end, but in settlement or payment for a pre-existing service or obligation; that such service was necessarily completed and the obligation incurred prior to the date of the last certificate of purchase, March 17, 1903; so that neither fact nor date of the payment so made can serve as an overt act for charging conspiracy under section 5440, and thus evade the above-mentioned limitation. Assuming that such payment may be provable in support of the charge, it cannot be received by way of direct proof, as an act in the execution of the conspiracy, but as circumstantial evidence tending to show, either the fact of conspiracy or some of the participants therein. The facts that final entries were made and purchases certified are presumptive, if not decisive, under the terms of the statutory provisions therefor, known as the "Stone and Timber Act," that all proceedings or service required to be performed to that end, by either and all of the parties named as conspirators or payees, had been entirely performed, when these certificates of purchase were issued, in so far as concerns the conspiracy to defraud the United States. If the appellees were engaged, as alleged, in a fraudulent conspiracy for that object, and pro-

cured the services and action of the several entrymen and the commissioner named as payees respectively, each had then committed and completed every act, fraudulent or otherwise, to accomplish the entries and complete purchases as designed—inclusive, as of course, of the alleged engagement and service for which these subsequent payments were made. Thereafter no occasion remained for further action on the part either of the conspirators or other persons engaged to effect that object; and no opportunity was open to either conspirator for immunity under the locus penitentiae provision of section 5440. Whether settlements between the conspirators or with agents, for profits or services in the conspiracy, were then or subsequently made, or were refused, are facts of no materiality for the operation of either statute—section 5440 or 1044.

We are of opinion, therefore, that any violation of section 5440 was committed and completed before the certificates of purchase were issued, and that no overt act is charged within the period limited by section 1044, however the averments of the indictment are considered.

The contention that the object of the conspiracy was not completed until a patent was issued and delivered is untenable, as we believe, in any view of the effect of the final entries and certificates of purchase thereunder, for the twofold reasons, that violation of the statute (a) in nowise depends upon the success of the conspiracy, and (b) became complete (as before stated) when the final step was taken on the part of the conspirators. What course has been or may be adopted by the Land Office or other departments in reference to these entries, or in issuing or withholding the formal patents thereupon, is plainly immaterial under this indictment. The general doctrine in reference to public lands subject to entry, appears to be settled, that a tract "ceases to be subject to the disposal of the United States," when it is entered, paid for, and so certified by the Land Office, although no patent has been delivered (*Cornelius v. Kessel*, 128 U. S. 456, 460, 9 Sup. Ct. 122, 32 L. Ed. 482, and *United States v. Schurz*, 102 U. S. 378, 396, 26 L. Ed. 167; 9 Rose's Notes U. S. 1091); but the status of entries made as averred in the indictment is neither involved nor proper for comment in this opinion.

The orders appealed from are affirmed.

KIRKMAN v. McOLAUGHRY, Warden.

(Circuit Court of Appeals, Eighth Circuit. March 12, 1908.)

No. 2,591.

1. ARMY AND NAVY—COURTS-MARTIAL—CUSTOMARY MILITARY LAW, RATHER THAN COMMON LAW, CONTROLS THEIR PROCEEDINGS.

In the absence of a regulatory statute, the proceedings of courts-martial are controlled by the usages and customs of the military service, otherwise called customary military law, and not by the common-law rules applicable to the proceedings of civil tribunals.

[131. Note.—For cases in point, see Cent. Dig. vol. 4, Army and Navy, §§ 80-93.]

2. SAME—DIFFERENT SENTENCES AGAINST SAME OFFENDER REGARDED AS CUMULATIVE AND EXECUTED CONSECUTIVELY.

The customary military law and the army regulations unite in requiring that different sentences to imprisonment imposed by courts-martial upon the same offender be regarded as cumulative and be executed consecutively, one upon the expiration of another in the order of their imposition.

3. SAME—ARMY REGULATIONS—PARAGRAPH 981 CONSTRUED—"SOLDIERS."

In paragraph 981 of the Army Regulations, which reads, "When soldiers awaiting result of trial or undergoing sentence commit offenses for which they are tried, the second sentence will be executed upon the expiration of the first," the word "soldiers" is used in its popular sense, and embraces officers as well as enlisted men.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 6543.]

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Kansas.

For opinion below, see 152 Fed. 255.

George W. Kirkman, pro se.

Harry J. Bone, U. S. Atty., J. S. West, Asst. U. S. Atty., and W. G. Doane, Acting Judge Advocate, for appellee.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINGER, District Judge.

VAN DEVANTER, Circuit Judge. Upon two separate trials before different courts-martial upon distinct military charges, the appellant, then a captian in the regular army, was convicted and sentenced to dismissal from the service and to confinement at hard labor for stated terms in a penitentiary. The second trial was for offenses committed during an adjournment of the first. Neither sentence had been promulgated when the other was imposed, and neither contained any reference to the other. Indeed, the eighty-fourth and eighty-fifth Articles of War make it certain that neither court-martial, when imposing sentence, knew of the result of the trial before the other. Both sentences were confirmed by the President on the same day, and were then promulgated by the same order. After undergoing the confinement prescribed in the longer of the two terms, the appellant, acting upon the theory that both began to run on the same day, sought to be released from further restraint through a writ of habeas corpus. Upon the hearing the Circuit Court ruled against that theory and discharged the writ. An appeal brings the case here.

Among the army regulations, made and published under the President's direction, are these:

"977. When the date for the commencement of a term of confinement imposed by sentence of a court-martial is not expressly fixed by the sentence, the term of confinement begins on the date of the order promulgating it. The sentence is continuous until the term expires, except when the person sentenced is absent without authority.

"978. The order promulgating the proceedings of a court and the action of the reviewing authority will, when practicable, be of the same date. When this is not practicable, the order will give the date of the action of the reviewing authority as the date of the beginning of the sentence. This does not

apply to sentences of forfeiture of all pay and allowances. A soldier awaiting result of trial will not be paid before the result is known."

"981. When soldiers awaiting result of trial or undergoing sentence commit offenses for which they are tried, the second sentence will be executed upon the expiration of the first."

While conceding that, if the second sentence had so provided, the term of confinement thereunder would have begun upon the expiration of the other term, the appellant contends that, as that sentence did not so provide, both terms began on the day when the sentences were promulgated, and, therefore, that when he had undergone confinement for the longer term he had also served the shorter one. To sustain this contention he chiefly relies upon the common-law rule, that when two or more sentences to imprisonment are imposed upon the same offender, whether for offenses charged in different indictments or in different counts of the same indictment, they are to be executed concurrently, unless it be otherwise provided therein. See 1 Bishop, New Crim. Proc. § 1311; 25 Am. & Eng. Enc. (2d Ed.) 307; *Blitz v. United States*, 153 U. S. 308, 317, 14 Sup. Ct. 924, 38 L. Ed. 725; *Howard v. United States*, 21 C. C. A. 586, 590, 75 Fed. 986, 34 L. R. A. 509; *Chadwick v. United States*, 72 C. C. A. 343, 365, 141 Fed. 225. But we are not here concerned with the rules which, in the absence of a regulatory statute, control the proceedings of civil tribunals, but with the usages and customs of the military service which, in the like situation, control the proceedings of courts-martial; and that this is so is shown by the following extract from the opinion in *Smith v. Whitney*, 116 U. S. 167, 178, 6 Sup. Ct. 570, 576, 29 L. Ed. 601.

"Of questions not depending upon the construction of the statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial. military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law. This is nowhere better stated than by Mr. Justice Perry in the Supreme Court of Bombay, saying: 'And the principle of the noninterference of the courts of law with the procedure of courts-martial is clear and obvious. The ground work of the jurisdiction, and the extent of the powers of courts-martial, are to be found in the Mutiny Act and the Articles of War, and upon all questions arising upon these her Majesty's judges are competent to decide; but the Mutiny Act and Articles of War do not alone constitute the military code, for they are, for the most part, silent upon all that relates to the procedure of the military tribunals to be erected under them. Now this procedure is founded upon the usages and customs of war, upon the regulations issued by the Sovereign, and upon old practice in the army, as to all which points common-law judges have no opportunity, either from their law books or from the course of their experience, to inform themselves. It would therefore be most illogical, to say nothing of the impediments to military discipline which would thereby be interposed, to apply to the proceedings of courts-martial those rules which are applicable to another and different course of practice.' *Porret's Case*, *Perry's Oriental Cases*, 414, 419. So in *Martin v. Mott*, 12 Wheat. 19, 35, 6 L. Ed. 537, Mr. Justice Story, delivering the opinion of this court, said that the law by which courts-martial were bound to execute their duties and to regulate their mode of proceeding, in the absence of positive enactments, was 'the general usage of the military service, or what may not unfitly be called the customary military law.'"

Other cases also give support to this view. *Carter v. McClaughry*, 183 U. S. 365, 386, 22 Sup. Ct. 181, 46 L. Ed. 236; *Kurtz v. Moffitt*, 115 U. S. 487, 500, 504, 6 Sup. Ct. 148, 29 L. Ed. 458; *Dynes v.*

Hoover, 20 How. 65, 79, 82, 15 L. Ed. 838; *United States v Clark* (C. C.) 31 Fed. 710, 713.

Doubtless, in actual practice, many common-law rules, deemed applicable to the proceedings of courts-martial, have become incorporated into the customary military law, but nothing has been brought to our notice indicating that the rule relied upon by the appellant was deemed applicable to such proceedings in England, the home of the common law, or that it is recognized as a part of the customary military law of the United States. On the contrary, we learn from recognized sources of authority that, in the military service, it is a well-established and long-continued practice to regard sentences of courts-martial, such as are here under consideration, as cumulative, and to execute them consecutively, one upon the expiration of another in the order of their imposition. Dig. Op. J. A. Gen., Ed. 1901, §§ 1479-1481, 2317; 1 Winthrop, Mil. Law, pp. 570, 603; Davis, Mil. Law, p. 161; Winthrop, *Abridgment Mil. Law*, Ed. 1904, p. 182. In the last work, Col. Winthrop says:

"Where two sentences imposing terms of imprisonment are, in successive trials, adjudged the same offender, the second is cumulative, and may be, and—legally—is, fully executed upon the expiration of the term of the first."

And in the work of Lieut. Col. Davis it is said that such "is the general rule of the service"; and this "whether or not the court, in the second sentence, may have in terms specified that the second punishment should be additional to the first; such second punishment being made cumulative by operation of law irrespective of any direction in the sentence." But it is insisted that we cannot give effect to this well-established and long-continued practice, because it is contrary to the terms of paragraphs 977 and 978 of the Army Regulations, *supra*, which make the date of the order promulgating the sentence of a court-martial, or the date of the action of the reviewing authority, as the case may be, the date when "a term of confinement" shall begin, if the date be not expressly fixed by "the sentence." While the contention is not without some force, we cannot give it our approval. The paragraphs cited do not in terms relate to different sentences against the same offender, and the fact that, in the practical operation of the military law, such sentences are sometimes imposed by different courts-martial, without either court knowing the result of the trial before the other, as is illustrated in the present case, strongly suggests that these paragraphs were not intended to regulate the dates from which the confinement under a second sentence should be computed. At all events, such an interpretation of them cannot be said to be clearly erroneous, and as it is the interpretation actually put upon them for many years by those who were called upon to act under them, as also by those who were charged with the duty of supervising their enforcement, it ought not now to be overturned. *United States v. Moore*, 95 U. S. 760, 763, 24 L. Ed. 588; *United States v. Hill*, 120 U. S. 169, 182, 7 Sup. Ct. 510, 30 L. Ed. 627; *In re Brodie*, 63 C. C. A. 419, 425, 128 Fed. 665. Moreover, paragraph 981, *supra*, proceeds upon the theory that this interpretation of the other para-

graphs is the true one, for it in terms declares that the second sentence will be executed upon the expiration of the first.

Another contention advanced by the appellant is that as paragraph 981 is comparatively a recent one, and as it designates the offenders to whom it refers as "soldiers," a term usually employed in the Army Regulations as embracing enlisted men, but not officers, it restricts or confines the practice respecting the execution of different sentences against the same offender to enlisted men and excepts officers therefrom. No reason for such a distinction is advanced, and none is perceived. Indeed, it is obvious that it would be both arbitrary and offensive to the sense of justice. Besides, if there had been a purpose to partially abrogate the established practice, it is not likely that it would have been left to implication. It is difficult, therefore, to believe that the word "soldiers" is employed in paragraph 981 in the restricted or technical sense suggested. In its more popular signification it embraces both enlisted men and officers, and it is employed in that sense in some of the Army Regulations, notably paragraph 974. The immediate context presents no obstacle to regarding it as so employed in paragraph 981, and as, when that is done, the paragraph becomes reasonable in itself and in accord with the pre-existing and established practice, we think the word must be given its popular rather than its restricted meaning.

We conclude that the established practice of the service and the Army Regulations unite in requiring that sentences to imprisonment, such as were imposed upon the appellant, be regarded as cumulative, and be executed consecutively, one upon the expiration of another, in the order of their imposition.

The order of the Circuit Court is accordingly affirmed.

MISSOURI, K. & T. RY. CO. v. WILHOIT.

(Circuit Court of Appeals, Eighth Circuit. March 23, 1908.)

No. 2,554.

1. COURTS—APPEAL AND ERROR—RIGHT TO REVIEW AS AFFECTED BY MOTION FOR NEW TRIAL—COURT RULES.

Where an appeal to the Court of Appeals in the Indian Territory was perfected, and rulings to which exceptions were properly reserved upon the trial of the case were assigned as error, in conformity with rule 3 of the rules of that court then in force, which declared, *inter alia*, that such rulings would be considered "whether * * * set out especially in the motion for a new trial or not." *Ind. T. Ann. St. 1899, p. 937*, it was error for that court to decline to consider them on the ground that they had not been set out with sufficient detail or precision in the motion for a new trial in the trial court.

2. APPEAL AND ERROR—ADHERENCE TO THEORY PURSUED IN TRIAL COURT.

When the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, they will not be permitted to depart therefrom when the case is brought before an appellate court for review.

3. MASTER AND SERVANT—NEGLIGENCE—NONOCCURRENCE OF PRIOR ACCIDENT NO BAR TO LIABILITY.

In an action to recover for injuries produced by a hand car upon which the plaintiff was riding, which was alleged to have been negligently per-

mitted by the defendant to remain out of repair for a considerable time, by reason of which it jumped the track and produced the injuries in question, the fact that it had not jumped the track before, and that no other accident had happened to it, is not an answer to the charge of negligence or a bar to liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 216.]

4. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—INSTRUCTION.

In an action for personal injuries where there is a defensive plea of contributory negligence, an instruction that the defendant has the burden of proving the plea, and is required to establish it by a preponderance of the evidence, is unobjectionable when other portions of the charge make it plain that the truth of the plea is to be resolved according to the preponderance of the whole evidence, effect being given to every part of it, regardless of who produced it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 229-234.]

5. MASTER AND SERVANT—ASSUMPTION OF RISK IN RESPECT OF APPLIANCES PROVIDED BY MASTER.

Primarily, the servant has a right to assume that the master will exercise reasonable care in providing him with reasonably safe appliances with which to do his work, and he does not assume the risk of injury incident to the master's failure to discharge that duty; but this rule is subject to the exception that where an appliance provided by the master is defective and its condition is known to the servant, or is so patent as to be readily observable by him, he cannot then continue to use it without objection, without assuming the risk of injury incident thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 584-592.

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

6. SAME—DEFECTIVE APPLIANCE—SERVANT NOT REQUIRED TO EXERCISE CARE TO DISCOVER DEFECTS.

In determining whether a servant assumed the risk of injury incident to his use of a defective appliance negligently furnished by the master, the true test is not whether the servant exercised care to discover defects, but whether they were known to him, or were so patent as to be readily observable by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-592.]

7. SAME—INSTRUCTIONS MUST BE APPLICABLE TO EVIDENCE.

When, in an action by a servant to recover for injuries sustained by using a defective appliance negligently provided by the master, there is evidence persuasively tending to show that the defects were known to the servant, or were so patent as to be readily observable by him, and that, in these circumstances, he continued to use the appliance without objection, it is error to charge, without qualification, that the servant had a right to assume that the master had used reasonable care in providing a reasonably safe appliance, and that the servant had a right to use the appliance relying on its safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1175.]

(Syllabus by the Court.)

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 6 Ind. T. 534, 98 S. W. 341.

Clifford L. Jackson, for plaintiff in error.

W. H. Kornegay, for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

VAN DEVANTER, Circuit Judge. This was an action to recover for personal injuries sustained by the plaintiff, a sectionman in the defendant's service, who was thrown from a moving hand car which he and other sectionmen were using in the line of their employment. The complaint charged that the defendant furnished the car for the use of these sectionmen; that the flanges upon its wheels and its axles and boxing were badly worn, and one of its wheels was out of alignment; that in consequence it was inclined to jump the track; that these defects had existed for a considerable time and were known to the defendant, or at least would have been discovered by it if it had inspected the car with reasonable care; that on the occasion of the accident in question these defects caused the car to suddenly jump the track, and that the plaintiff was thereby violently thrown from the car to the ground and seriously injured. The answer denied that there had been any negligence on the part of the defendant, and alleged that the plaintiff's injuries were due to his own negligence. A trial resulted in a verdict and judgment for the plaintiff, and the judgment was thereafter affirmed by the Court of Appeals in the Indian Territory. 6 Ind. T. 534, 98 S. W. 341. A writ of error then brought the case here.

The Court of Appeals declined to consider some of the errors assigned in that court, because they had not been set out with sufficient detail or precision in the motion for a new trial in the trial court, notwithstanding the rules of the Court of Appeals in force when that motion was presented and ruled upon in the trial court, as also when the appeal to the Court of Appeals was perfected, declared that errors, assigned as these were, would be considered by that court "whether * * * set out especially in the motion for a new trial or not." Ind. T. Ann. St. 1899, p. 937, rule 3. In this the Court of Appeals erred, as we had occasion to hold in respect of a like ruling in the recent case of Missouri, K. & T. Ry. Co. v. Smith, 81 C. C. A. 598, 152 Fed. 608. At the conclusion of the evidence the defendant preferred a request for a directed verdict in its favor, which was refused, and error is assigned upon this ruling. We think it was right, because a careful examination of the record satisfies us that the evidence and the inferences reasonably to be drawn from it were such as to require that the case be submitted to the jury.

Error is assigned upon the refusal to give the following instruction:

"The jury is instructed in this case that if you find from the evidence that the hand car in question was used by the section crew on the section of the railway company where the accident in question occurred for some months prior to the time of the accident, and said hand car did not during that time jump the track, and during said time no other accident happened to said hand car, there can be no negligence attributed to the defendant in this case because of the condition of said hand car."

We think this ruling was also right. If, as matter of fact, the hand car had not jumped the track, and no other accident had happened to it, in the course of several months' use prior to the accident in question, that was a matter which might be addressed to the jury as an argument upon the questions whether the car had been out of repair for any considerable time, and, if so, whether that was the cause of its jumping the track, and whether such an accident could reasonably have been apprehended; but it was not, as matter of law, a complete answer to the charge of negligence against the defendant or a bar to its liability. *Fletcher v. Baltimore & Potomac R. R. Co.*, 168 U. S. 135, 141, 18 Sup. Ct. 35, 42 L. Ed. 411; 2 *Labatt, Master and Servant*, pp. 2272-2274. Referring to the defensive plea that the plaintiff had contributed to his injuries by his own negligence, the court charged the jury that the defendant had the burden of proving it, and was required to establish it by a preponderance of the evidence. Error is assigned upon this, and it is urged that it was calculated to make the jury believe that in passing upon the truth of the plea they could look only to the evidence produced by the defendant. The contention is neither tenable nor fair, because the court also said, in that connection, "It (meaning the defendant) may establish this (meaning the defensive plea) either by the evidence it introduces or by the plaintiff's evidence." Thus it was made as plain as it well could be that the issue of fact presented by the plea should be resolved according to the preponderance of the whole evidence, effect being given to every part of it, regardless of who produced it. That being so, this part of the charge is sustained by the highest authority. *Indianapolis, etc., Co. v. Horst*, 93 U. S. 291, 298, 23 L. Ed. 898; *Northern Pacific R. R. Co. v. Mares*, 123 U. S. 710, 721, 8 Sup. Ct. 321, 31 L. Ed. 296.

We come next to several assignments predicated upon instructions refused, and others given, bearing upon the question, whether the plaintiff had assumed the risk of injury incident to his continued use of the defective car. The Court of Appeals was of opinion that this defense was not available to the defendant because it was not affirmatively pleaded in the answer. But the question of pleading thus suggested was not raised upon the trial. On the contrary, as the record discloses, each of the parties, without objection from the other, introduced testimony addressed to the question of the plaintiff's assumption of the risk, both presented requests for instructions bearing thereon, and the court charged the jury upon that subject. We must, therefore, give effect to the settled rule, that when the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, they will not be permitted to depart therefrom when the case is brought before an appellate court for review. *Epperson v. Postal, etc., Co.*, 155 Mo. 346, 50 S. W. 795, 803, 55 S. W. 1050; *Central Vermont R. R. Co. v. Soper*, 8 C. C. A. 341, 351, 59 Fed. 879; *Lesser Cotton Co. v. St. Louis, etc., Co.*, 52 C. C. A. 95, 114 Fed. 133; *Baker v. Kaiser*, 61 C. C. A. 303, 126 Fed. 317; *Chicago, Milwaukee & St. Paul Ry. Co. v. Voelker*, 65 C. C. A. 226, 233, 129 Fed. 522, 529, 70 L. R. A. 264; *Cook v. Foley*, 81 C. C. A. 237, 248, 152 Fed. 41, 52; *New York, etc., Co. v. Estill*, 147 U. S. 591, 614, 13 Sup. Ct. 444, 37 L. Ed. 292; 2 *Cyc.* 670.

The evidence established that the plaintiff was 29 years old, that he had been in the defendant's service as a sectionman for about 17 months, and that he had been using the car in question almost daily for 4 months. There was also evidence tending persuasively to show that the defective condition of the car was known to him, and was so patent when the car was in use as to be readily observable by those who were using it; and that, in these circumstances, he continued to use it without objection up to the time of the accident. True, this evidence was contradicted, but a finding in accordance therewith would have been amply sustained. The rule of law to be applied in such a case, according to whatever may be the proper finding upon the evidence, is this: Primarily, the servant has a right to assume that the master will exercise reasonable care in providing him with reasonably safe appliances with which to do his work, and he does not assume the risk of injury incident to the master's failure to discharge that duty; but this rule is subject to the exception that where an appliance provided by the master is defective and its condition is known to the servant, or is so patent as to be readily observable by him, he cannot then continue to use it without objection, without assuming the risk of injury incident thereto. *Choctaw, Oklahoma & Gulf R. R. Co. v. McDade*, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96. It is in view of the evidence and the law as here stated that the assignments last mentioned must be considered.

The defendant preferred two requests for instructions, each of which declared, *inter alia*, that if, by the exercise of reasonable care, the plaintiff "could have discovered" the defective condition of the car, he should be held to have assumed the risk. Both were denied, and rightly so; for the true test in such cases is not whether the servant exercised care to discover defects, but whether they were known to him, or were so patent as to be readily observable by him. *Texas & Pacific Ry. Co. v. Archibald*, 170 U. S. 665, 671, 18 Sup. Ct. 777, 42 L. Ed. 1188; *Choctaw, Oklahoma & Gulf R. R. Co. v. McDade*, *supra*.

At the request of the plaintiff, and over the objection and exception of the defendant, the court, without any qualification thereof, incorporated the following in its charge:

"Plaintiff had a right to rest on the assumption that the hand car in question was free from defects discoverable by proper inspection;" and also: "He had a right to assume that the defendant had used reasonable care to furnish a safe hand car, and to deal with the hand car relying on the fact that it was safe."

This portion of the charge was properly subject to objection, for it so stated and repeated the primary rule before mentioned as to convey the impression that it was absolute, and not subject to any exception; and this in a case where there was evidence tending persuasively to show that it fell within the exception to the rule, and where the defendant in various ways indicated that it was relying upon the exception. In other words, it left out of view, and was well calculated to cause the jury to disregard, important evidence which it was their duty to consider in forming their verdict. *Smith v. Condry*, 1 How. 28, 35, 11 L. Ed. 35; *Rhett v. Poe*, 2 How. 457, 483, 11 L. Ed. 338; *Adams v. Roberts*, 2 How. 486, 496, 11 L. Ed. 349; *Ranney v. Barlow*, 113

U. S. 207, 215, 5 Sup. Ct. 104, 28 L. Ed. 662. And the objection was not merely that there was a failure to instruct upon a particular point, but that, in view of the evidence to be considered, there was a prejudicial misdirection. *Hickory v. United States*, 151 U. S. 303, 316, 317, 14 Sup. Ct. 334, 38 L. Ed. 170; *Ranney v. Barlow*, supra.

For the errors noticed herein, the judgments of both courts are reversed, with a direction to grant a new trial.

In re KINGSTON REALTY CO.

(Circuit Court of Appeals, Second Circuit. February 17, 1908.)

No. 209.

1. **BANKRUPTCY—CORPORATIONS—SUSCEPTIBILITY—NATURE OF BUSINESS.**

The susceptibility of a corporation to bankruptcy depends on the business it actually transacts, and not on the business it is empowered by charter to do.

[Ed. Note.—What persons are subject to bankruptcy law, see note to *Mattoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4.]

2. **SAME—"MANUFACTURING"—CONSTRUCTION OF HOUSES.**

A corporation engaged in constructing houses on its own land was not subject to adjudication as a bankrupt under Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), as amended by Act Feb. 5, 1903, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1025), authorizing an adjudication against a corporation engaged principally in "manufacturing," the term "manufacturing" being used in its ordinary meaning, viz., the making of articles of commerce ordinarily the subject of bargain and sale, which does not include building or construction.

3. **SAME—"TRADING"—"MERCANTILE PURSUITS."**

A corporation engaged in buying and selling improved and unimproved real estate is neither engaged in "trading," nor "mercantile pursuits," within Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1025), authorizing adjudication in bankruptcy against a corporation so engaged, the term "trading" being used to indicate the business of buying merchandise or goods or chattels to sell again for profit, and the words "mercantile pursuits" as having to do with trade or commerce of or pertaining to merchants or the traffic carried on by merchants in commercial transactions, the buying and selling of goods or merchandise or dealing in the purchase and sale of commodities habitually as a business, neither term being sufficient to include a dealer in land.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 8, p. 7053; vol. 5, pp. 4477, 4478.]

Appeal from the District Court of the United States for the Eastern District of New York.

For opinion below, see 157 Fed. 299.

W. H. Hamilton (Norman C. Conklin, of counsel), for appellant.

Beattys & Lamb (G. D. Beattys, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The only question presented upon this appeal is whether this corporation—the Kingston Realty Company—prior to the institution of these proceedings was engaged principally

in manufacturing, trading, and mercantile pursuits, and so is within the following provision of the bankrupt law:

"* * * any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over may be adjudicated an involuntary bankrupt." Section 4b, Act July 1, 1898, c. 541, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1025).

The certificate of incorporation of this company stated:

"The purposes for which it is formed are the purchasing, holding, improving by grading, paving, sewerage, and construction of houses and other buildings, and the selling and leasing of real estate."

It is true that "the susceptibility to bankruptcy of a corporation does not depend upon its charter." *Matter of Quimby* (D. C.) 121 Fed. 139, quoted with approval by this court in *Re Const. & Dry Dock Co.*, 130 Fed. 447, 64 C. C. A. 648. Whether it can be adjudged a bankrupt depends upon what it actually does, not what it is empowered to do.

The principal assets of the Kingston Realty Company are real estate, and it carried on a business amounting to \$10,000,000 in three years, the general nature of which was as follows: It acquired many parcels of real estate, and improved them by the erection of buildings and otherwise. When improved it sold them and purchased other parcels which it likewise improved. It held some of its property and leased it. Sometimes it sold the vacant lots which it acquired. It purchased large amounts of materials for its buildings. It operated window frame factories and stone crushing and concrete making plants, most of the products of which it used in its operations. Some of its products, however, were sold to outside parties, and it sometimes bought and sold building materials. It operated a city hotel which it owned, and had at one time operated a summer hotel. But it did not appear that these last dealings were of magnitude as compared with the real estate operations. The principal business of the corporation, therefore, was that stated in its certificate of incorporation, although it engaged in some incidental, and possibly ultra vires, transactions. Its president, who was called in the bankruptcy proceedings testified:

"Q. Wasn't its principal business set forth in its articles of incorporation?
A. Its principal business is set forth, and no doubt its principal business was that; but then it did lots of other business besides."

The corporation was a real estate company. Apparently it was not engaged in manufacturing or in trading or mercantile pursuits. One of these two propositions must then be established before the bankrupt law can possibly apply: (1) Building houses is manufacturing. (2) Dealing in real estate is trading or a mercantile pursuit. And even if one of these propositions be established, the basis for apportioning the business and determining what particular branch the corporation was principally engaged in is not obvious. But we need not consider that question unless and until it is reached.

Is the building of houses manufacturing? It strains the term to so use it. Goods, wares, and merchandise are manufactured; houses

are constructed. Houses are real estate. They are not articles of commerce, and the term "manufacturing" as used in the statute does not apply to their construction. "The distinction would seem to run along the line of those articles which are more or less fixed in place, and not ordinarily the subjects of bargain and sale as articles of commerce, as contradistinguished from those which are movable and ordinarily regarded as subjects of sale and manual transfer—articles of trade in the common course of mercantile business." *Columbia Iron Works v. National Lead Co.* (Court of Appeals, Sixth Circuit) 127 Fed. 99, 102, 62 C. C. A. 99, 102, 64 L. R. A. 645. If this corporation had been engaged in constructing houses upon other persons' land instead of upon its own, there might possibly be more ground for claiming that the statute applies. But it is held that construction companies are not engaged in manufacturing. Thus, in *Butt v. MacNichol Const. Co.*, 140 Fed. 840, 842, 72 C. C. A. 252, the Court of Appeals for the Fourth Circuit said:

"It is commonly understood that corporations engaged in erecting houses and other buildings which require the raw material to be sawed, planed, fitted, and put together are construction, and not manufacturing, companies."

And in *Re T. E. Hill Company*, 148 Fed. 832, 834, 78 C. C. A. 522, the Court of Appeals for the Eighth Circuit said:

"It (the corporation) was of the class commonly known as 'construction companies,' and not within the usual definition of a manufacturer—namely, one 'engaged in the manufacture for sale of articles of commerce.'"

The second inquiry is whether dealing in real estate—the buying and selling of improved and unimproved properties—is either trading or a mercantile pursuit within the meaning of the statute. The words "mercantile pursuits" have in general a slightly broader significance than the term "trading." Trading is a mercantile pursuit; but all mercantile pursuits may not involve trading. But with respect to the present case the terms have practically the same meaning. If the buying and selling of real estate does not constitute trading, it does not constitute a mercantile pursuit. The distinction between these terms and their meanings as used in the bankrupt law is clearly stated by Judge Brown, in this circuit, in *Re N. Y. & W. Water Co.* (D. C.) 98 Fed. 711, at page 713:

"In *Bouv. Law Dict.* a trader is defined as 'one who makes it his business to buy merchandise or goods or chattels, and to sell the same for the purpose of making a profit.' *Black, Law Dict.* says: 'One whose business is to buy and sell merchandise or any class of goods deriving a profit from his dealings'; and the weight of authority seems to be, that the proper description of the business of a trader includes both buying and selling, either goods or merchandise, or other goods ordinarily the subject of traffic. * * * The words 'mercantile pursuits' may have a little broader signification than 'trading.' 'Mercantile' is defined by the *Century Dictionary* as having to do with trade or commerce; of or pertaining to merchants, or the traffic carried on by merchants; trading; commercial. It signified for the most part, the same thing as the word 'trading'; and by 'mercantile pursuits' is meant the buying and selling of goods or merchandise, or dealing in the purchase and sale of commodities, and that too not occasionally or incidentally, but habitually as a business. * * * These terms are restricted also to dealings in merchandise, goods, or chattels, the ordinary subjects of commerce."

And in *Re United States Hotel Co.*, 134 Fed. 226, 67 C. C. A. 154, 68 L. R. A. 588, the Court of Appeals of the Sixth Circuit gives practically the same definitions:

"In the ordinary meaning of the term, 'a trader is one who makes it his business to buy merchandise or goods or chattels and to sell same for the purpose of making a profit.' 2 Bouv. Law Dict. 741. In Black's Law Dict. a trader is said to be 'one whose business is to buy and sell merchandise or any class of goods, deriving a profit from his dealings.' That one engaged principally in 'trading' is one whose chief business is to buy and sell for profit goods and chattels is well settled."

See, also, *In re Pacific Coast Warehouse Co.* (D. C.) 123 Fed. 749.

It will be observed that the same distinction between real and personal property involved in defining the term "manufacturing" arises in interpreting the terms "trading" and "mercantile pursuits." Dealing in articles of commerce—goods and merchandise—alone constitutes trading or a mercantile pursuit as those terms are used in the statute. A dealer in land is neither a trader nor a merchant.

For these reasons, we hold that this real estate corporation did not belong to the classes of corporations enumerated in the bankrupt law as subject to adjudication in bankruptcy.

The decision of the District Court is reversed, with costs.

ALTONWOOD PARK CO. OF NEW YORK v. GWYNNE

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

No. 175.

1. BANKRUPTCY—CORPORATIONS SUBJECT TO ACT—REAL ESTATE COMPANY.

A real estate company, the principal business of which is the holding of undeveloped real estate, is not one of the classes of corporations enumerated in Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), and is not subject to adjudication as a bankrupt.

[Ed. Note.—What persons are subject to bankruptcy law, see note to *Mattoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4.]

2. SAME—PETITION TO VACATE ADJUDICATION—STANDING OF CREDITOR TO FILE.

The fact that a creditor of a corporation which had been adjudicated a bankrupt in a petition to vacate such adjudication on the ground that the corporation was not subject to the act, in the erroneous belief that the question raised was jurisdictional, stated that he appeared specially without submitting himself to the jurisdiction of the court is immaterial, and affords no ground for the refusal of the court to consider his petition on the merits.

3. SAME—LACHES.

A creditor who filed a petition to vacate an adjudication in bankruptcy six weeks after he received notice of the adjudication was not chargeable with laches which would defeat his right to be heard where no intervening rights were prejudiced by the delay.

Petition to Review Order of the District Court of the United States for the Southern District of New York.

Morris H. Beal (E. J. Nathan, of counsel), for petitioner.

J. J. Adams, for respondent.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The Altonwood Park Company, a corporation organized under the laws of the state of New York, was adjudicated a bankrupt. The petitioner, a creditor, filed an application praying that the adjudication should be vacated because the corporation was not subject to be adjudicated a bankrupt. The District Court denied this petition, and the matter comes here for review.

The principal business of the corporation was the holding of undeveloped real estate. It was a real estate company and did not come within the provisions of the bankruptcy law. Matter of Kingstor. Realty Co. (decided by this court at the present session) 16C Fed. 445. But while the corporation was erroneously adjudicated a bankrupt it is urged that the adjudication should not be set aside because: (1) In his application for the vacation of the adjudication the petitioner stated that he appeared specially, and did not submit himself to the jurisdiction of the court. (2) The petitioner was guilty of laches.

The petitioner evidently thought that he was raising a jurisdictional question and endeavored to protect himself from acquiescing in the jurisdiction of the court. But the question was not one of jurisdiction at all. The District Court had jurisdiction of the parties and of the subject-matter. It was for it to determine whether the business of the corporation was such as to bring it within that class of corporations subject to adjudication in bankruptcy. Its judgment was erroneous, but it had power to make it. Still we think the limited appearance—made upon a mistaken conception of the law—no ground for failing to grant the relief prayed for. The petitioner expressly submitted the substantial matter—the validity of the adjudication—to the determination of the court. The decision upon this question in his favor would end the bankruptcy proceedings. If there are to be no further proceedings, it is immaterial that he be tried to keep out of them.

The second question is whether the petitioner was guilty of laches. While the adjudication was made March 28, 1907, it does not appear that the petitioner was notified of the proceedings until about June 14, 1907. The order to show cause upon the petitioner's application was entered August 2, 1907. It does not appear that there are any intervening rights, and we think the delay shown quite insufficient to constitute such laches as should debar a creditor from showing that the whole bankruptcy proceedings were invalid.

The order of the District Court is reversed with costs.

UNITED STATES v. DIECKERHOFF, RAFFLOER & CO.

(Circuit Court of Appeals, Second Circuit. January 7, 1908.)

No. 108 (4,152).

1. CUSTOMS DUTIES—CLASSIFICATION—ENTIRETIES—FURNISHED NEEDLE CASES—COVERINGS—"COVERINGS OF NEEDLES."

Paper articles, resembling pocketbooks in outward appearance, contained pockets filled with needles, and they were completed structures before the needles were added. *Held*, that they were not dutiable as coverings of the needles, under Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 (U. S. Comp. St. 1901, p. 1924), nor dutiable as entireties

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composed of paper and metal (needles), but that they and the needles they contained should be classified separately, as though imported independently.

2. APPEAL AND ERROR—ASSIGNMENT OF ERRORS—OMISSION.

On appeal from the Circuit Court it appeared that the appellee had been entitled to relief different from that decreed by that court. *Held* that, as the point had not been raised, the judgment of the Circuit Court must be affirmed, though incorrect.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the Circuit Court reversing a decision of the Board of General Appraisers (G. A. 6,220; T. D. 26,887), which sustained the action of the collector in assessing duty upon certain articles imported under the tariff act of 1897.

For decision below, see 151. Fed. 957.

J. Osgood Nichols, Asst. U. S. Atty.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importers.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The merchandise consists of books or cases made of paper, resembling card cases or pocketbooks in outward appearance. When opened, they disclose a succession of flat pockets, with flaps and with lettering and figures indicating in which particular pocket and in which part of each pocket needles of different class and size are to be placed. In each particular compartment, laid flat and neatly side by side, are placed the needles of the class and size which the lettering opposite that compartment calls for. The collector ascertained the value of both the case and the contents, and upon the total aggregate valuation assessed duty at the rate of 45 per cent. ad valorem, as "articles or wares not specially provided for in this act, composed wholly or in part of iron, steel * * * or other metal" under Act July 24, 1897, c. 11, § 1, Schedule C, par. 193, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645). Needles are on the free list: "Par. 620. Needles, hand sewing, and darning"—and the importers' protest claimed that the whole article, case and contents together, should be admitted free under that paragraph. It was also claimed, in the alternative, that they were dutiable under section 6, either as a nonenumerated unmanufactured article at 10 per cent. or as "article manufactured, in whole or in part, not provided for in the act," at 20 per cent. Of the claims raised before the General Appraisers that board said:

"The testimony is practically unanimous to the effect that the articles have been known in commerce and have been bought and sold for many years, and that they have always been handled as entireties and called by the name 'needle cases' or 'needle books.' The claim of the importers seems to be that, inasmuch as the cases or books are the usual covering for needles in such quantities, said books or cases are free of duty as the usual coverings of free goods. Some force is added to this contention by the fact, which we find, that the same number and assortment of needles which are contained in the cheaper varieties of these paper cases or books cost no more in said

cases than an equal number of needles packed in the familiar black paper packets, 25 to a packet, would cost. No question is raised as to black paper packets, which are admittedly free of duty as the usual covering of hand sewing needles."

The board sustained the collector on the ground that "the component material of chief value is metal," stating that they were concluded in respect to the question raised by the decisions of the Circuit Court of the Third Circuit in *Wanamaker v. Cooper* (C. C.) 69 Fed. 465, and of this court in *U. S. v. Mathews*, 78 Fed. 345, 24 C. C. A. 127. There seems to be some misapprehension of the scope of our decision in the case last cited. The only question before us was whether the cases were usual coverings of the needles, and therefore, under section 19 of the customs administrative act (Act June 10, 1890, c. 407, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924]), were free of duty. We held that:

"While the cases cover needles, and while the articles are extensively imported, the books are more than coverings, and are not designed to be used in the ordinary transportation of needles. They are ornamental articles, designed to be used and sold as such, and are properly described as furnished needle cases. A description of them as coverings for needles conveys an inadequate idea of the merchandise."

The propriety of considering case and contents as a unitary article composed in part of metal was not passed upon in that opinion, because it was not raised. It appears from inspection of the sample that the case was a fully completed structure before the needles were stowed in it. It was a case or book designed for and adapted to the holding of needles. After the user has worn out or lost the assortment of needles which it originally held, he can still use it as a receptacle for other needles. The case itself is composed of paper, and the suggestion that, when needles are stored in it, it becomes an article composed in part of metal, seems about as reasonable as would be the proposition that a square pasteboard box becomes an article composed in part of rubber when it is filled with rubber bands. It would seem that these cases are properly dutiable under paragraph 407 as manufactures of paper, not specially provided for (unless they are covered by some other clause in the paper schedule), while the needles which they hold are entitled to free entry; but we cannot direct such a disposition of the case at bar, because the importers did not raise this point in their protest and have not appealed from the decision of the Circuit Court. It is sufficient now to decide that the government is not entitled to a reversal on the theory that case and contents together constitute an "article composed in part of metal."

The decision of the Circuit Court is affirmed.

TEXAS & P. RY. CO. v. BOURMAN.

(Circuit Court of Appeals, Fifth Circuit. March 5, 1907.)

No. 1,562.

TRIAL—INSTRUCTIONS—REFUSAL OF REQUESTS.

The charge of the court in an action tried by stipulation on the evidence taken on a former trial held to have fully and correctly submitted the proper issues to the jury and to have justified the court in refusing requests made by the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Charles P. Cocke, for plaintiff in error.

A. E. Livaudais and Albert Voorhies, for defendant in error.

Before McCORMICK and SHELBY, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. This case was twice tried in the court below. On the first hearing, April 22, 1904, at the close of the testimony, a motion was made by the counsel for the defendant to have the court direct the jury to find a verdict for the defendant. The court thereupon heard argument from the counsel for both parties, and upon consideration thereof granted the motion of the defendant, and a verdict and judgment duly followed. The plaintiff duly moved for a new trial (April 23, 1904), on which an order was entered that the defendant do show cause on the 30th of April, 1904, why a new trial should not be granted, and that the matter be continued for hearing at the following term, at the same time filing with the record an opinion, which is, in its material parts, as follows:

"This matter being before me on motion for a new trial, I have carefully read the evidence, and again considered the law applicable to the case. It appears from the evidence that the plaintiff and other employes of the defendant, being under the control of a foreman, boarded the 'Cannon Ball' train at Davis, in order to return to Waggaman; that the conductor intended to stop the train at Waggaman to put off the men, but that this intention was not conveyed to plaintiff or his fellow laborers; that the plaintiff believed the train would only 'slow up' at Waggaman, and that he was then to jump off; that on former occasions plaintiff and others had jumped off at that place under the same circumstances, and knew that that particular train never stopped there, but only 'slowed up' to take the mail; that, while the foreman did not specifically order the plaintiff to jump off, he did tell him and the other man, 'Throw off your tools and let us get off;' and that under the circumstances plaintiff, not having been told that the train was going to stop, may well have understood, as he says he did, that the train would only 'slow up,' and that he was to jump off. After the train had slackened, he jumped off and was injured. The motion to direct a verdict for defendant was virtually based on two propositions: (1) That the injury was caused by the plaintiff's own negligent act, or by a risk incident to the employment and assumed by him; (2) That in any event the injury was due to, or caused by, the negligence of the plaintiff's fellow servants, meaning the foreman, the conductor, or engineer, or all of them."

Here the trial judge cites authorities, and thereafter proceeds:

"The question, therefore, is whether in the instant case the plaintiff is debarred by the doctrine of 'fellow servants,' and whether the matters of contributory negligence and assumption of risk should not have been left to the jury. The court desires reargument on those points, and the case will be restored to the trial docket for such purpose."

On June 22, 1904, this minute appears:

"This cause having been heretofore argued and submitted to the court upon the motion of plaintiff for a new trial, it is now ordered, for the reasons assigned in the written opinion filed this day, that the case be restored to the trial docket for reargument."

The record further shows that on February 6, 1905, the following minute entry was made:

"This cause came on to be heard at a former day upon the rule of plaintiff for a new trial herein, and after hearing further arguments from counsel for the respective parties the court took the same under advisement. On consideration thereof it is ordered that a new trial be granted herein, and that the verdict heretofore rendered in this cause be set aside."

The record shows that on February 23, 1905, it was stipulated by counsel for the respective parties that the new trial granted should be had upon the testimony taken stenographically on the former trial. On March 13, 1906, the cause being the second time on trial, the court refused the charges requested by the defendant, giving as the reasons that the general charge is sufficient for all the purposes of the case. It is unnecessary to recite the general charge. We have examined it with care, and we have examined all the testimony with diligence, and we concur in the opinion of the trial judge that the general charge fully and correctly submitted the proper issues to the jury.

It follows that the judgment should be affirmed; and it is so ordered.

THE HERCULES.

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

No. 192.

TOWAGE—SINKING OF TOW BY ICE—LIABILITY OF TUG.

A tug *held* liable for the loss of a barge in tow which sank from injury by ice, on the ground that, when the tug dropped the barge to break the way through an ice field extending out from the dock where she was to be berthed, she was left with such way on as to carry her against the ice field with such force as to break a hole through her planking.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, §§ 11-23.]

Appeal from the District Court of the United States for the Southern District of New York.

On appeal from a decree in favor of the libelant entered June 15, 1907, awarding \$1,335 against the claimant, as owner of the tug *Hercules*, for negligently towing the libelant's boat *Darwin* into the ice at Bay Ridge, South Brooklyn.

Amos Van Etten, for appellant.

Martin A. Ryan, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The testimony warrants the following conclusions:

First. The Darwin was in a seaworthy condition when taken in tow by the Hercules at the Hoboken coal docks.

Second. She was not injured on the journey to South Brooklyn, a distance of six or seven miles. There was floating ice in the North River but there is no evidence that it struck the Darwin. From the Battery to Bay Ridge there was clear water.

Third. The contention that the injury which caused the Darwin to sink was received on the journey down is based wholly upon inference and is inconsistent with the undisputed fact that no leak was discovered during the two hours and a half that she was being towed.

Fourth. At Sixty-Fifth street, which was the destination of the boat, there was a field of solid ice extending 150 yards from the shore through which it was necessary for the tug to break a passage before she could dock the Darwin.

Fifth. While the tug was engaged in this occupation the Darwin was left alone in clear water from 60 to 300 feet from the edge of the ice field. That she actually struck the ice field is conceded on all sides, and very soon thereafter—within two minutes the captain says—the leak was discovered and the signal for assistance was given.

Sixth. The Darwin was heavily loaded, she had a freeboard of only 18 inches and there was very little wind. It would seem highly improbable, if the tug had brought the Darwin to a standstill, that she could have drifted 60 feet, or 300 feet, with sufficient force to break a hole 10 by 12 inches in size through her planking.

Seventh. The inference seems clear that when the tug left the Darwin in an absolutely helpless position, the latter had on sufficient way to carry her into the ice with force enough to cause the injury. The District Judge so found and there seems to be no other plausible solution of the problem.

If the Darwin had received a wound 10 by 12 inches on the way down to the Battery it is apparent that it would have manifested itself on the journey to Bay Ridge. The wound could not have been inflicted after leaving the Battery for the reason that no ice was encountered thereafter. We are unable to say from the testimony what was the thickness of the solid ice into which the Darwin sheered, or what was her size and construction, or what was the exact location of the wound—whether on the port side near the bow or on the port side of the bow. Positive proof on these questions would have aided the court materially in locating the blame for the injury.

On the record as presented we are unable to say that the finding of the District Judge, who saw and heard the witnesses, is against the weight of evidence.

The decree is affirmed, with interest and costs.

UNITED STATES v. LIQUID CARBONIC CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

No. 178 (4,245).

CUSTOMS DUTIES—CLASSIFICATION—"TUBES"—GAS CYLINDERS—"STEEL TUBES FINISHED."

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 152, 30 Stat. 163 (U. S. Comp. St. 1901, p. 1641), for "steel tubes, finished," includes bottle-shaped vessels of steel, which are used in the transportation of gas and are about four feet long and eight inches in diameter, with one end permanently closed and the other tapered to a neck.

Appeal from the Circuit Court of the United States for the Southern District of New York.

There was no opinion below. The Circuit Court affirmed a decision by the Board of United States General Appraisers (G. A. 6,345; T. D. 27,295), which had reversed the assessment of duty by the collector of customs at the port of New York. The facts of the case appear from the following extract from the opinion filed by the Board of General Appraisers:

"Flicher, General Appraiser. The merchandise involved in these two protests is described on the respective invoices as 'steel cylinders.' Duty was assessed thereon at the rate of 45 per cent. ad valorem under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 193, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645); and the importers now claim that the articles are 'tubes,' dutiable properly at 35 per cent. under paragraph 152 of said act (30 Stat. 163 [U. S. Comp. St. 1901, p. 1641]), which reads as follows: '152. Lap welded, butt welded, seamed or jointed iron or steel boiler tubes, pipes, flues or stays, not thinner than number sixteen wire gauge, two cents per pound; welded cylindrical furnaces, made from plate metal, two and one-half cents per pound; all other iron or steel tubes, finished, not specially provided for in this act, thirty-five per centum ad valorem.' * * * The importers of the goods covered by protest 179,518, in a letter dated November 1, 1905, which is a part of the record, expressly waived their right to put in testimony, and submitted their protest for consideration, referring to T. D. 22,716, in which the Treasury Department announced its acquiescence in the decision of the Circuit Court of Appeals in Downing's Case, 105 Fed. 1005, 44 C. C. A. 686, affirming without opinion Downing v. U. S. (C. C.) 99 Fed. 423, and to G. A. 4,898 (T. D. 22,932), a board decision following the judicial rulings above. As the government desired to introduce some testimony, the case was set for hearing on February 20, 1906, and a number of witnesses were examined.

"The goods are bottle-shaped vessels of steel, about four feet in length and eight inches in diameter, with a steel cap fitted over and shrunk on one end, thus permanently closing it, and with the other end tapered to a neck. There is a thread cut on the outside of this neck for the purpose of screwing on a cap for the protection of the contents of the cylinder, and on the inside of the neck for the purpose of a valve connection. The articles are used for transporting carbonic acid gas, with which they are filled at a very high pressure. As has been said, no testimony was introduced by the importers; but the witnesses for the government, ten in number, were evidently well qualified, and their testimony as to the method of manufacturing the cylinders may be accepted as accurate. According to these witnesses there are two methods. In the first, a seamless tube of the required length is taken, and one end is drawn in and welded to a hemispherical shape; and the other end is 'necked down' to a bottle-neck shape, leaving an orifice for the insertion of a valve, as above referred to. In the other process a flat plate is sheared into a circular form, and then placed over a circular die, which is forced down upon the plate, causing it to assume a cup or bucket-like form. The cup is then placed in the end of a round mandril with a spherical end, and mandril

and cup are then forced through a series of circular dies, elongating the cap and reducing the thickness of the lateral walls, but preserving the original thickness of the material in the spherical end. The other end is then necked as described in the previous process. It would appear to one approaching this question de novo, and with only common understanding to guide him, that neither one of these processes produces tubes, but rather that the products of the process first described are articles made from tubes, while those made by the second process were stopped just short of the stage of manufacture where they would have become tubes. The witnesses were unanimous and emphatic in their declaration that these gas holders are not tubes within the understanding of anybody; and that this pronouncement is in accord with ordinary usage of words is signally corroborated by evidence from the importers themselves, as exhibited by the bills of lading, entries, and invoices, which all designate the goods as steel cylinders, and particularly by a copy of the protestants' own catalogue, that was admitted in evidence and which, throughout invariably refers to the articles as drums or cylinders, never as tubes.

"If the question raised by this protest 179,518 were before us for the first time, we have no hesitation in saying that we should reach a conclusion adverse to the contention set up by the importers. We feel, however, that we are concluded in the consideration of the question by the decision in the Downing Case, supra. The goods are practically alike, and while, in the present case, the government has introduced much and satisfactory testimony that the term 'tubes' does not include these gas cylinders, it is also true that there was testimony to the same effect in the case passed on by the court, although the five-line opinion of Wheeler, J., reversing G. A. 3,362 (T. D. 17,571), fails to disclose the character of the impression made on the judicial mind by the testimony presented by the record, which comprised over 100 printed pages. Protest 179,518 is therefore sustained, and the decision of the collector thereon reversed." * * *

D. Frank Lloyd, Asst. U. S. Atty.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importers.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The Board of General Appraisers has found that these importations are practically like those which were before this court in *U. S. v. Downing*, 105 Fed. 1005, 44 C. C. A. 686. The testimony in both cases is substantially the same, and we see no reason to modify our former ruling.

Decision of the Circuit Court is affirmed.

UNITED STATES v. DAVIES.

DAVIES v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. March 4, 1908.)

No. 1,898 (1,885).

CUSTOMS DUTIES — CLASSIFICATION — "WASTE" BAGGING — "COVERING" — "RAGS."

Selected pieces of second-hand jute bagging, intended for patching the covering of cotton bales, are not "bagging for cotton, gunny cloth, and similar fabrics, suitable for covering cotton," under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 344, 30 Stat. 181 (U. S. Comp. St. 1901, p. 1663), nor "rags," under section 2, Free List, par. 648, 30 Stat. 201

(U. S. Comp. St. 1901, p. 1687) but are dutiable as "waste" under section 1, Schedule N, par. 463, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1679).

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 5899; vol. 8, pp. 7408, 7777.]

Cross-Appeals from the Circuit Court of the United States for the Eastern District of Louisiana.

There was no opinion below. The Circuit Court reversed a decision by the Board of United States General Appraisers (G. A. 6,481; T. D. 27,586), which had affirmed the assessment of duty by the collector of customs at the port of New Orleans on importations by Frank Davies. The material in controversy was classified under the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 344, 30 Stat. 181 (U. S. Comp. St. 1901, p. 1663), for "bagging for cotton, gunny cloth, and similar fabrics, suitable for covering cotton," at the rate "per square yard" there provided for such merchandise. The importer contended for classification either under paragraph 463, relating to "waste, not specially provided for," or under paragraph 648, as "rags." These contentions having been overruled, the importer appealed to the Circuit Court, making the same contentions. That tribunal sustained the first contention—that the material was dutiable as waste under paragraph 463. From this decision both sides appealed, the importer contending for free entry under paragraph 648 (rags), and the government for the correctness of the assessment made by the collector.

The merchandise is described as follows in the opinion of the board:

"DE VRIES, General Appraiser. In this case it satisfactorily appears from the record and the admissions of the importer himself that the importations consist in their entirety of selected pieces of bagging, all of high grade, of measurable dimensions, and every one serviceable for use in patching cotton bales. A close examination of each bale was made. Each piece was segregated and measured, the exact dimensions of the importations calculated, and each and every piece was found to be suitable for patching cotton bales as they went to the compressor; the smaller pieces being used to cover over the cuts in the original bales made by the sampler's knife, and the larger pieces used as 'headers,' which are pieces of cotton used, after the bales come from the gin and before they go to the compress, for the purpose of closing over the heads of the bales. It satisfactorily appears in the record that this merchandise is cullings or selections from waste cotton bagging, which are culled or selected abroad, and, after being so culled and selected, baled and sent to this country. It likewise satisfactorily appears that each and every piece is suitable for covering cotton bales, and that these selections constitute not more than 15 per cent. of the originals from which they were selected."

Considerable further evidence was introduced in the Circuit Court—it being testified, in refutation of the board's findings that none of the pieces were sufficiently large to be used as "headers," that not every piece was suitable for use in patching bales, but from 5 to 40 per cent. of every importation was too small for such use and had to be thrown away, that 90 per cent. of the pieces had ragged edges and many had holes in them, and that the material was both bought and sold by the ton, while the fabric ordinarily used for covering cotton is dealt in by the yard.

R. E. Foster, Asst. U. S. Atty., and William Wirt Howe, U. S. Atty. Clegg & Quintero (John Clegg, of counsel), for the importer.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. From a careful examination of the evidence in this case, including the samples sent to this court with the record, we are of the opinion that the decree of the Circuit Court is right, and

that none of the assignments of error, either on the appeal or the cross-appeal, is well taken.

The decree is affirmed.

FENN v. LOUISELL.

(Circuit Court of Appeals, Fifth Circuit. March 10, 1908. On Rehearing, April 8, 1908.)

No. 1,706.

1. **EJECTMENT—COMMON SOURCE—PRIOR TITLE.**

Where both parties deraigned title from a common source, the validity of a prior tax title was immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 59-62.]

2. **SAME—OUTSTANDING TITLE IN ANOTHER.**

Where defendant neither connected himself with an alleged outstanding title in a third person nor traced it to any person at a time subsequent to the conveyance to the common source title, the validity of such outstanding title was immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, § 108.]

3. **SAME—LANDLORD AND TENANT—TITLE—ADVERSE POSSESSION.**

In a suit to recover certain land, plaintiff was not called on to prove, as against defendant as tenant, that plaintiff had adverse possession within the prescriptive statute.

In Error to the Circuit Court of the United States for the Northern District of Florida.

W. A. Blount and A. C. Blount, Jr., for plaintiff in error.

Fred T. Myers, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. As both parties deraigned title from a common source, the validity of a prior tax title was immaterial.

As the defendant below neither connected himself with the alleged outstanding title, nor traced it to any person at a time subsequent to the conveyance to the common-source title, the questions arising in relation to outstanding title in another were also immaterial. See *Rice v. St. Louis, etc., Ry.*, 87 Tex. 90, 93, 26 S. W. 1047, 47 Am. St. Rep. 72, and cases there cited.

As against the defendant as tenant, the plaintiff was not called upon to show title or adverse possession within the prescriptive statute. The vital issue in the case was tenancy vel non, and on that the instructions to the jury were full, and, if erroneous at all, the error was in favor of the defendant.

The judgment of the Circuit Court seems to be in accordance with the justice of the case, and it is affirmed.

On Rehearing.

PER CURIAM. The petition for rehearing is denied.

SWENSON v. SNARE & TRIEST CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

No. 183.

1. SHIPPING—CHARTERS—LOSS OF VESSEL—NEGLIGENCE—BURDEN OF PROOF.

Where a pile driver was chartered by respondent from libelant, and was lost while in respondent's exclusive possession as it was being towed up the North river, the burden was on respondent as a bailee to show that the loss was caused without any negligence on its part.

2. APPEAL AND ERROR—FINDINGS—REVIEW.

Where, on appeal from a decree in favor of libelant in a proceeding to recover for the loss of a pile driver from the charterer, the trial judge found that the charterer had failed to show that it was free from negligence, and the appellate court is unable under the evidence to hold that the charterer has sustained the burden of proof on such issue, the decree will be affirmed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3955-3969.]

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 145 Fed. 727.

H. M. Hitchings, for appellant.

Hyland & Zabriskie (Nelson Zabriskie, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. This was a libel in personam to recover damages for the loss of a pile driver which occurred in the East river in July, 1905. It is admitted that the pile driver was chartered by the respondent from the libelant and that while in the exclusive possession of the respondent it sank and was lost. As such an occurrence is not in the ordinary course of things, the burden was thrown on the respondent as a bailee to show how the loss took place and that it was not caused by its negligence.

The respondent has sought to sustain this burden by presenting testimony that, while the pile driver was being towed by the respondent's tug from Flushing to pier 15 at about midnight of said day, she appeared to list near the Brooklyn Bridge, and, being top-heavy, almost immediately capsized and sank; that this occurred while the pile driver was being towed with due care, and before any attempt had been made to turn into the pier of destination. The respondent's contention is that the cause of the accident was the unseaworthiness of the pile driver, and it has offered evidence tending to show that it was in fact old and unseaworthy. The libelant, on the other hand, has offered testimony tending to show that the pile driver was seaworthy, and he contends that the cause of the capsizing was negligent towage; that the tug turned in towards pier 15 and brought the driver around too sharply for that kind of a vessel. The libelant has called one witness, who testified that on the occasion in question he saw a tug with a pile driver in tow turning toward the New York shore, and that the pile driver listed and finally capsized. He has also presented

other testimony supporting his contention in a less degree. He further calls attention to the circumstance that the driver sank at just about the place where the tug should have turned into pier 15.

All the questions presented are pure questions of fact. If the testimony of the respondent's witness is credited, there was no negligence on its part. If what they said was true, the driver undoubtedly filled and capsized because it was unseaworthy. But if what they said was not true—if the testimony of libellant's witnesses is to be credited—then the respondent has failed to show that they were free from negligence. The District Judge heard the witnesses. He had an opportunity to note their appearance and behavior upon the stand. He has found that the evidence showed negligence upon the part of the respondent. We need not go so far. It is sufficient for us to say that we have carefully examined the whole record, and in view of the findings of the trial court are unable to hold that the respondent has sustained the burden of proof imposed upon it by law.

The decree of the District Court is affirmed, with interest and costs.

NATIONAL REGULATOR CO. v. POWERS REGULATOR CO.

(Circuit Court of Appeals, Seventh Circuit. February 7, 1908. Rehearing Denied May 8, 1908.)

No. 1,386.

1. **PATENTS—INVENTION.**

The coupling, without modification, of a motor that will run any kind of a machine to a machine that will run with any kind of a motor, is not patentable invention.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 27-29.]

2. **SAME—HEATING AND VENTILATING APPARATUS.**

The Powers patent, No. 558,610, for a heating and ventilating system wherein double dampers controlling separate ducts for hot and cold air are held in mixing position by a gradually acting thermostatically controlled motor, the purpose being to automatically regulate the temperature of the air discharged into a room through a single pipe, while for a new and useful combination, is void for lack of patentable invention, in view of the prior art, which disclosed the same motor and the same gradually acting damper, but not in combination.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

For opinion below, see 152 Fed. 984.

Appellant was adjudged to be an infringer of certain claims of patent No. 558,610, granted to Powers on April 21, 1896.

The specification thus describes the general nature of the invention:

"This invention relates to a heating and ventilating system for heating and ventilating apartments wherein the heating medium is warm air and the necessary amount of fresh air for ventilation is secured by mixing the appropriate quantity of air at normal temperature with the heated or warm air.

"The invention relates more particularly to the automatic control of the respective volumes of hot and cool air, so as to secure at all times the delivery of a uniform quantity of air into the apartment or apartments to

be heated and ventilated, while the proportions of the heated to the cool air are automatically regulated according to the temperature of the room itself.

"In carrying out my invention I make use of a gradually-acting pressure-thermostat which controls through a suitable valve or damper the hot and cold air passages. When two dampers are used, they are interconnected, and the movement of one by the action of the thermostat effects the movement of the other, so that while the relative proportions of the two currents of air may be varied the aggregate quantity delivered remains the same.

"My invention therefore consists, broadly, in a system of heating and ventilating by means of two currents of air at different temperatures automatically mixed, so as to maintain a uniform temperature in the apartment into which they are delivered, this delivery of the mixed air being made through a single pipe."

Claims 1, 2 and 3 are involved:

"1. In an air-heating and ventilating system, separate ducts for currents of air at different temperatures, in combination with means for controlling the flow of the air-currents and a gradually-acting thermostatically-governed motor for controlling said means and operating to vary the position of the controlling means according to changes of temperature, substantially as described.

"2. In an air-heating and ventilating system, separate ducts for currents of air at different temperatures, in combination with means for forcing the air, means for heating the current of air passing through one of the ducts, means for controlling the flow of the air-currents, and a gradually-acting thermostatically-governed motor for controlling said means, the construction of said duct-controlling means being such as to close one of the ducts in proportion to the extent to which the other is opened, whereby the air is directed proportionally through each of said ducts according to the variations of temperature in the apartment to be controlled, substantially as described.

"3. In an air-heating and ventilating system, separate ducts for currents of air at different temperatures in combination with valves or dampers for controlling the ducts, a pneumatically-operated pressure device for controlling the valves or dampers and operating against a gradually-increasing resistance and a thermostat for maintaining the air-pressure proportionally to the temperature of the apartment to be controlled, substantially as described."

W. Clyde Jones, for appellant.

Charles C. Linthicum, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). Reference patents prove that every element of the claims in suit was old. But in combining those elements Powers did something that was new and useful. The inquiry respects invention.

Without any aid from Powers a system of supplying heat and fresh air to school and other assembly rooms had been developed. Cold air from outside was conducted into the basement, and was forced along by a blower. One portion of the air passed over steam coils, and was highly heated. After the chill was taken from the remainder, the two currents in separate ducts were brought together in a trunk at the base of a single delivery pipe. A double damper was placed where the separate ducts united at the base of the single pipe. By means of a chain extending to the room to be heated by the single pipe the double damper could be manipulated. To the extent that one duct was closed the other was opened. This apparatus, minus the chain, is what is indicated in one of the two subcombinations of each of the claims in suit. Claim 1:

"In an air-heating and ventilating system, separate ducts for currents of air at different temperatures in combination with means for controlling the flow of the air currents."

Claim 2:

"Separate ducts (as in claim 1) in combination with means for forcing the air, means for heating the current of air passing through one of the ducts and means for controlling the flow of the air currents."

Claim 3:

"Separate ducts (as in claim 1) in combination with valves or dampers for controlling the ducts."

The other subcombination of each claim relates to an apparatus that obviates the chain and automatically moves the double damper in response to variations of temperature in the room. Claims 1 and 2:

"A gradually-acting thermostatically-governed motor."

Claim 3:

"A pneumatically-operated pressure device operating against a gradually-increasing resistance, and a thermostat."

Long before the patent in suit was applied for, electric regulators were used in residences. The thermostat's movement in response to variations of temperature in the room to be heated would close a circuit that operated an electric motor located in the basement. The motor was connected with the draft and check dampers of the furnace. The action was rapid, and completely closed one damper while it opened the other.

In 1889 (patent No. 416,947) Powers devised a pneumatic regulator. Commercially he employed it to control the draft and check dampers of residence furnaces. The thermostat's movement compressed a column of air within a pipe that led to the basement. The compressed air operated a motor that was connected with the draft and check dampers. The motor encountered an increasing resistance, such as is offered by a spring. The result was that the dampers were not rapidly and completely opened and closed, but were held in a balanced relation, gradually responsive to variations of temperature. This Powers regulator was "a gradually-acting thermostatically-governed motor," "a pneumatically-operated pressure device operating against a gradually-increasing resistance, and a thermostat."

To the prior art also belongs the application of the electric regulator to the double damper of the above-mentioned apparatus for heating schoolrooms. Of course the regulator operated in accordance with the law of its being. It rapidly and completely opened and closed the hot and cold air dampers just as it had the draft and check dampers. By its automatism it was better than the old manual control, but it was worse in that it gave alternate blasts of hot and cold air.

In putting his pneumatic regulator in the place of the electric regulator, Powers did a new thing. He was the first to make the connection. He also did a useful thing. His combination, while retaining the benefits of automatism, restored the advantage of manual control, namely, the mixing of the two currents of air as they reached the single delivery pipe.

Mindful of the fact that simplicity is often the highest mark of genius, of our duty to view the question as of the time preceding the disclosure of the patent, and of our grave responsibility in overturning a grant that presumptively is valid, we have been unable to escape the conclusion that the claims in suit are void. The work, and all the work, that Powers did in making the adaptation was to increase the size, in order to increase the power, of the thermostat that he had been using in residences, and to devise a form of double damper that would work more easily than the double damper that was then being operated by the electric regulator. This work may have required the exercise of the inventive faculty. We do not inquire, because appellant moves the old double damper by a kind of gradually-acting thermostatically-governed pneumatic motor that gets its power, not from the thermostat, but from an independent source, and further, because the claims in suit clearly assert a monopoly in the combination of any sort of double damper with any sort of gradually-acting thermostatically-governed motor. So the case, in our judgment, comes to this: Can a monopoly be properly granted for coupling without modification a motor that will run any kind of machine, to a machine that will run with any kind of motor? The answer to the question thus stated is found in *Blake v. San Francisco*, 113 U. S. 682, 5 Sup. Ct. 692, 28 L. Ed. 1070; *Royer v. Roth*, 132 U. S. 201, 10 Sup. Ct. 58, 33 L. Ed. 322, and numerous other cases.

The result was a distinct step in advance. But it was the inevitable result of attaching to each other the unchanged appliances. To have obtained a different result would have required a reorganization that might have taxed the genius of the inventor.

We cannot put the claims in the so-called "happy thought" class. If in truth a burst of inspiration points to the running of A.'s machine with B.'s engine, nevertheless a monopoly cannot be based merely on bringing the two together.

Lapse of time before gradually-acting thermostats were applied to the control of double dampers in hot and cold air pipes is claimed to be evidence of invention. In *McMillin's Case*, 112 U. S. 244, 5 Sup. Ct. 218, 28 L. Ed. 702, he was the first to apply the then century old steam engine to the exceedingly ancient capstan.

The decree is reversed, with the direction to dismiss the bill for want of equity.

HARDER et al. v. UNITED STATES PILING CO.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1908.)

No. 1,360.

1. PATENTS—VALIDITY—FEATURES NOT CLAIMED.

A patent is not granted nor to be sustained by what the patentee may have done in fact, but only for what he particularly points out and distinctly claims.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 88, Patents, § 241.]

2. SAME—INFRINGEMENT—SHEET PILING.

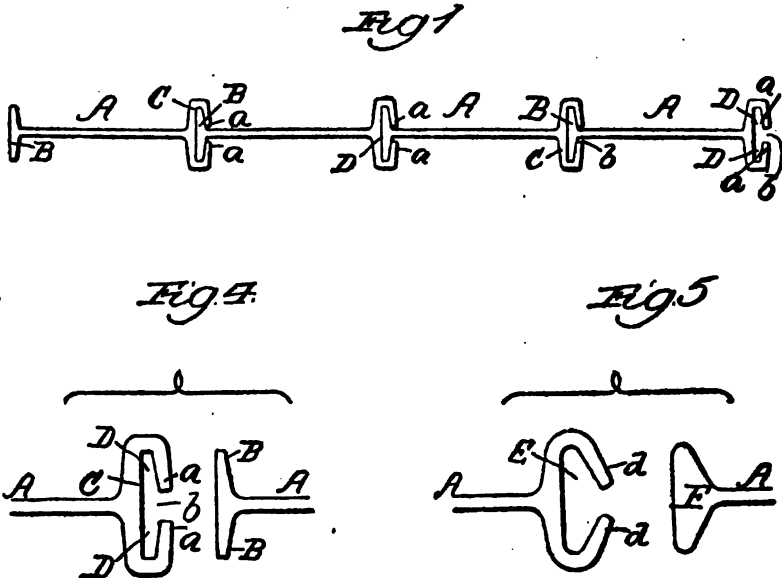
The Harder patent, No. 771,426, for a sectional sheet piling, construed, and in view of its limitations by the prior art *held* not infringed.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

For opinion below, see 149 Fed. 434.

Appellants' bill on account of alleged infringement of patent No. 771,428, issued to Harder on October 4, 1904, for metal sheet-piling was dismissed for want of equity.

The claims of the patent, with explanatory parts of the drawings and specifications, are as follows:



"This invention relates to improvements in metal sheet-piling for use in the construction of sea-walls, levees, docks, coffer-dams, caissons, bridge-pier foundations, sheeting for mine-shafts, and all similar work whether of a permanent or temporary character.

"This invention has for its object to provide beam-piling sections in which the interlocking features necessary in holding the sections loosely together when assembled in a wall structure is made an integral part of the piling-sections, which are duplicates of each other, and dispenses with the use of a separate locking means mechanically secured to the beams."

"One edge of each beam-section is formed with a straight cross-flange, B, like that of the ordinary I-beam flanges. The other edge is provided with a similar cross-flange, C, having an intumed angle-hook extension, a, from what would be the terminal edges of the cross-flange part and forming an integral interlocking beam edge of a contour corresponding to the letter C. The respective hook edges, a, stop short of each other and leave a longitudinal opening, b, for the reception of the adjacent web part of the joining beam-sections. In assembling the sections the cross-flange B of next joining beam-section telescopes endwise into engagement with the longitudinal groove or recess, D, formed in the C edge, the hook edges, a, overlapping the inner side of the flange B, and locks the parts together, as shown in Fig. 1. The groove, D, and the engaging flange will be of a corresponding shape, so as to comparatively form a tight joint and at the same time permit of the parts being assembled or separated with facility. By means of this integral locking arrangement much valuable time, material, and expense is saved, as the use of all separate parts, such as angle and Z irons, are entirely dispensed with.

"The contour of the interlocking engaging parts may be varied or changed, as shown in the modification Fig. 5, and without materially departing from the characteristic features of the improvement set forth.

"In the modification referred to the groove or recess, E, in the C part presents a greater area, the hook edges, d, being more widely extended, the engaging flange, F, being correspondingly large, with a greater slope to the bearing sides overlapped by the clamping-hook edges of the engaging section.

"Having thus described my invention, what I claim, and desire to secure by letters patent, is:

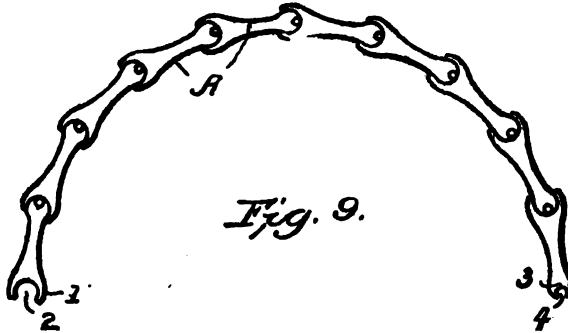
"1. In sheet-piling, a beam section, provided on one of its edges with an integral cross-flange and having a flanged recess in the other edge corresponding to the contour of said cross-flange.

"2. A beam piling-section, comprising in its integral structure, a web part, a cross-flange on one edge thereof, and a cross-flanged recess in the opposite edge.

"3. A beam piling-section, having a straight cross-flange on one of its edges and a C-shaped flange on the other edge.

"4. In sheet-piling, a beam-section provided with a C-shaped flanged edge and a companion beam provided on its joining edge with a cross-flange engaging the recessed C edge."

Appellee owns the Behrend patent, No. 639,884, December 20, 1899, and insists that the piling made by it is in accordance with the teachings of that patent. The exact form of appellee's piling, of which complaint is made, is not shown in any of the drawings, but comes nearest to Fig. 9:



A "packing-groove," which is an essential element of the Behrend patent, is thus described in the specification: "Edge, 1, of each pile is made large enough so that its groove, 2, will embrace and form a sliding connection with the smaller or opposite edge, 3, of the next adjacent pile. * * * Packing groove, 4, is made in one of the edges of each pile, preferably the smaller edge, 3, although it may be formed in either edge or partly in both." Stating that it was evident that changes might be made in the form and arrangement of the several parts described without departing from the spirit and scope of his invention, Behrend claimed "a pair of piles having a tongue-and-grooved connection, with a packing-groove formed between them." In practice, appellee's packing-groove is the space between groove, 2, of Fig. 9, and edge, 3, flattened as if cut across at the bottom of groove, 4. This structure, appellants say, is not protected by the Behrend, but is an infringement of claims 3 and 4 of the Harder patent. In the Dodge patent, No. 103,023, May 17, 1870, the inner interlocking member has a straight edge at a right angle with the web.

John G. Elliott, for appellant.

Thomas F. Sheridan and Clarence Byrnes, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). In Harder's statement the only inventive idea was to provide a locking means that should be an integral part of the beams instead of a locking means that was mechanically secured to the beams. He carried out the idea by making the "inturned angle-hook extension" that had theretofore been mechanically secured to one of the flanges of the ordinary I-beam, integral with the flange. He prescribed that the engaging flange and the flanged recess should be of corresponding shape so as to form a comparatively tight joint, and also be loose enough to permit the assemblage and separation of the parts with facility. On this disclosure of idea and of means, he claimed a monopoly, first, of all integral locking arrangements of a tongue and groove nature, and then of certain specific forms of the generic invention. He was soon apprised of his mistake by the examiner's references to Dodge and Behrend, and nothing remained but the possibility of securing claims that might be distinguished from the integral locking arrangements of the prior art. And in this light must the questions of scope of invention and of infringement be considered.

As Dodge and Behrend had disclosed the general idea of providing piling sections with integral interlocking means, there was no invention in Harder's making an old specific form of interlocking means an integral part of an old specific form of I-beam, unless the adaptation resulted in some material advantage beyond that of having in one piece what had before existed in two.

A solution of a vexatious problem, a new result, a benefit to mankind that justified the grant of the patent, is claimed, not on anything that Harder stated with reference to the nature and scope of the alleged invention, but on a theory of appellants' experts: If the Behrend or other metal piling of the older art were cast, it would be too brittle to withstand the blows of the pile driver. If wrought from steel otherwise than by the roller process, it would be too expensive for common use. The old forms could not be successfully rolled. To overcome these objections was the problem. Harder solved it by showing the forms that are covered by the claims of his patent.

If in truth Harder understood the now stated objections, and was the first to conceive and embody a way of overcoming them, he carefully refrained from saying so. Now a patent is to be sustained, not for what an inventor may have done in fact, but only for what he "particularly points out and distinctly claims" in his open letter. *Fastener Co. v. Kraetzer*, 150 U. S. 116, 14 Sup. Ct. 48, 37 L. Ed. 1019; *Indiana Mfg. Co. v. Crocker Chair Co.*, 103 Fed. 496, 43 C. C. A. 287; *Avery & Son v. J. I. Case Plow Works*, 148 Fed. 214, 78 C. C. A. 110.

According to appellants' experts' theory of invention the important feature was the flat end of the inner interlocking member. The corresponding element of the older structures could not be rolled in connection with the embracing member without warping the beam. Though Harder said nothing about this, or whether his form of piling beam should be cast or rolled, it is contended that the invention as now explained was pointed out in the patent with sufficient particularity and claimed with sufficient distinctness because the skilled

mechanic already knew that wrought metal was superior to cast metal for piling, that the only wrought metal of the requisite cheapness was rolled steel, and that in rolling steel beams with headed or flanged edges the lateral pressure on one edge must be balanced by a similar pressure on the other edge. This contention leads further, we think, than appellants intended. In modifying the Behrend piling as pictured in Fig. 9, no invention, but only the skill of appellants' aforesaid mechanic, was required in opposing the lateral pressure necessary in forming the larger head with a lateral pressure that had the natural effect of flattening the smaller head. So no construction can properly be given to the Harder patent which would cover appellee's present practice under the Behrend patent.

The decree is affirmed.

HOTEL SECURITY CHECKING CO. v. LORRAINE CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

No. 164.

1. PATENTS—SUBJECTS OF PATENTS—"ART."

A system of transacting business, disconnected from the means for carrying out the system is not, within the most liberal interpretation of the term, an "art," and, unless the means used are novel and disclose invention, such system is not patentable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 6.

For other definitions, see Words and Phrases, vol. 1, pp. 510, 511.]

2. SAME—INVENTION—METHOD AND MEANS OF ACCOUNT CHECKING.

The Hicks patent, No. 500,071, for a method of and means for cash registering and account checking, designed to prevent fraud and collusion by waiters and cashiers in hotels and restaurants, is void for lack of patentable novelty and invention.

Appeal from the Circuit Court of the United States for the Southern District of New York.

On appeal from a decree dismissing the bill in an action on letters patent No. 500,071, for an improvement in the art of cash-registering and account-checking, granted to John Tyler Hicks, June 20, 1893.

The opinion of the Circuit Court is reported in 155 Fed. 298.

Albert Francis Hager (Robert N. Kenyon and Richard Eyre, of counsel), for appellant.

Beattys & Lamb (George D. Beattys, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The Hicks patent describes and claims a "method of and means for cash-registering and account-checking" designed to prevent frauds and speculation by waiters and cashiers in hotels and restaurants. The object of the alleged invention is accurately to check the account of the cashier and of each waiter. In carrying out the system, each waiter is provided with slips of paper, so marked as to distinguish them from those used by the other waiters in the same establishment. The person in charge of each department,

which fills an order given by waiters, is provided with a sheet of paper ruled lengthwise in parallel columns, each waiter having a particular column exclusively appropriated to him. Each waiter is numbered or otherwise marked. If numbered, and this is the simplest method of designation, the number on the slips given him will correspond with his own number and his orders will be entered in the sheet column bearing a similar number. For instance, waiter No. 6 is given a badge showing that number, which he is required to wear conspicuously; he is also given slips bearing that number and his orders are entered under column No. 6 by the person in charge of the department filling the orders. The large sheet on which the orders of the different waiters are entered is simply a sheet of plain paper with parallel lines ruled thereon, the columns being numbered at the top; a sheet of legal cap could easily be utilized for this purpose. Each waiter is given a number of slips about $3\frac{1}{2}$ by $5\frac{1}{2}$ inches in size, which are blank except that the waiter's number is marked thereon. If, for instance, waiter No. 6 receives an order for food, he goes to the kitchen department and when the order is filled he exhibits his tray to the checker, who enters the price of each article on the waiter's slip and also on his own sheet under the column No. 6. The slip is returned to the waiter, who presents it at the proper time to the customer. Either the waiter or the customer pays the amount to the cashier who retains the slip. It is usually sufficient in practice to enter the total of any one order and not each item separately. If subsequent orders are given either from the kitchen, the bar or the cigar stand, the same process is repeated and the amounts entered upon the same slip. At the close of business the sum of the slips of waiter No. 6 in the hands of the cashier, can easily be compared with the sum of the items charged to him by the departments collectively and the same is, of course, true of all the other waiters. The amount charged to all the waiters can be compared with the total of all the items of all the slips in the hands of the cashier and with the cash reported by the latter. If there has been no carelessness or dishonesty, the amounts will agree and if there has been, it is easy to discover where the fault lies.

The specification enumerates ten separate results, which it is alleged are accomplished by the use of the patented system, all having in view the protection of the employer from peculation by his servants either individually or in combination with each other.

The claims are as follows:

"1. The herein-described improved means for securing hotel or restaurant proprietors or others from losses by the peculations of waiters, cashiers or other employes, which consists of a sheet provided with separate spaces, having suitable headings, substantially as described, said headings being designatory of the several waiters to whom the several spaces on the sheet are individually appropriated, in conjunction with separate slips, each so marked as to indicate the waiter using it, whereby the selling price of all the articles sold may be entered in duplicate, once upon the slip of the waiter making the sale, and once upon his allotted space upon the main sheet, substantially as and for the purpose specified.

"2. The herein-described improvement in the art of securing hotel or restaurant proprietors and others from losses by the peculations of waiters, cashiers or other employes, which consists in providing separate slips for the waiters, each so marked as to indicate the waiter using it, and in entering upon the

slip belonging to each waiter the amount of each sale that he makes, and also in providing a main sheet having separate spaces for the different waiters and suitably marked to correspond with the numbers of the waiters and of their slips, and in entering upon said main sheet all the amounts marked upon the waiters' slips so that there may thus be a duplication of the entries, substantially in the manner and for the purpose specified."

The principal defense is lack of novelty and invention. Section 4886 of the Revised Statutes (U. S. Comp. St. 1901, p. 3382) provides, under certain conditions, that "any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter" may obtain a patent therefor. It is manifest that the subject-matter of the claims is not a machine, manufacture or composition of matter. If within the language of the statute at all, it must be as a "new and useful art." One of the definitions given by Webster of the word "art" is as follows: "The employment of means to accomplish some desired end; the adaptation of things in the natural world to the uses of life; the application of knowledge or power to practical purposes." In the sense of the patent law, an art is not a mere abstraction. A system of transacting business disconnected from the means for carrying out the system is not, within the most liberal interpretation of the term, an art. Advice is not patentable. As this court said in *Fowler v. City of New York*, 121 Fed. 747, 58 C. C. A. 113:

"No mere abstraction, no idea, however brilliant, can be the subject of a patent irrespective of the means designed to give it effect."

It cannot be maintained that the physical means described by Hicks,—the sheet and the slips,—apart from the manner of their use, present any new and useful feature. A blank sheet of paper ruled vertically and numbered at the top cannot be the subject of a patent, and, if used in carrying out a method, it can impart no more novelty thereto, than the pen and ink which are also used. In other words, if the "art" described in the specification be old, the claims cannot be upheld because of novelty in the appliances used in carrying it out,—for the reason that there is no novelty.

The patent seems to us to cover simply a system of bookkeeping made applicable to the conditions existing in hotels and restaurants. The fundamental principle of the system is as old as the art of bookkeeping, i. e., charging the goods of the employer to the agent who takes them. Suppose the case of a firm selling goods by agents direct to the public. Before starting out the agent goes to each department and secures the goods needed by him, let us say, 5 dozen pairs of gloves, 3 dozen shirts, 100 neckties, 2 dozen pairs of shoes, etc. As a matter of course, the bookkeeper charges these items to the agent on the books of the firm and gives him a bill, or list, with the items and prices entered thereon. The agent knows from an examination of the list exactly what price he is to charge to the customer. When he makes remittances to the firm with statements showing the goods sold by him and the names of the buyers, the firm knows by an examination of its books what goods he has sold, how his sales compare with those of other agents and what amount, if any, he still owes. This, in essentials, is the scheme of the patent and it is as old as the laws of trade.

The patentee has modified and adapted it to fit the ephemeral character of the business in hand, but it required no exercise of the inventive faculties to do this. In a transaction which is to be concluded within an hour, a ponderous system of bookkeeping is unnecessary; but the substitution of a blank sheet laid on the desk for a blank sheet bound in a book, and a series of slips of uniform size for the ordinary bill heads, may require ingenuity and be more convenient, but it adds nothing of substance to the art.

The patentee is evidently an observant man, and, with large experience in the business, has written a treatise on restaurant account keeping, containing many valuable suggestions for preventing dishonesty by waiters, which may be epitomized as follows:—employ a competent and observant head waiter, have at least one honest man in charge, give each waiter a number and slips with a corresponding number, stamp the price of the articles ordered by him on the slip, and charge the amounts to him on a sheet of paper under his number, printed or written at the top of the sheet. Although the record does not show that this identical system was used prior to the patent, it does show that the underlying idea of keeping a duplicate record of the items taken by the waiter from the kitchen or bar, so that the cashier may know whether the proper amount of cash has been paid or not, had long been known. The essential features were old, the changes, elaborations and improvements of the patent belong to the evolution of the business of restaurant and hotel keeping, and would, we think, occur to any clever and ingenious person familiar with the needs of that business. The truth of this proposition will be made apparent by a brief survey of the prior art.

We agree with the judge of the Circuit Court in thinking that the patent to Smith for "a service and cash check," while not a direct anticipation, describes a system which in the main corresponds to that of the patent in suit. Smith says:

"The invention has for its object to assure returns to the proprietor to the full value of the food served by preventing collusion of employes and patrons without offense, and also to economize time of patrons and employes and assure more satisfactory service."

Smith provides each waiter with a package of checks requiring the waiter to write his name on the body and coupon of each check. As the waiter passes the checker on his way to the guest with the food ordered by him, the checker punches from the check the value of the food on the waiter's tray. When the order has been fully served, the cashier adds up the sums opposite the punch marks and writes the sum total in ink next the dollar mark on the check and coupon. The cashier has at hand a series of numbered spindles, one for each waiter, and on the proper one he places the coupon torn from the check. When a check is paid to the cashier, the coupon is returned to the waiter as a voucher and at the close of the day's business the cash in hand must correspond with the amount punched on the checks and also with the amounts written in ink on the coupons which are delivered up by the waiters when they have finished work for the day. The

Smith claim is not for a system, method or means, but is for "a service of cash check provided," etc.

Admitting, arguendo, that a system such as Hicks describes is patentable, if absolutely novel, we are of the opinion that the improvements of Hicks over the system disclosed in the Smith patent are such as would occur to anyone conversant with the business. The testimony also shows that several years prior to the Hicks application, there was in vogue in Harvey's restaurant in Washington, a system similar in all essential details to that of Hicks'. Although we are not prepared to say that the two systems are identical in detail, we are unable to discover any patentable improvements in the latter system over the former. We have no reason to discredit the statement of defendant's witnesses that Harvey used a checker's sheet ruled in parallel columns on which the prices of the articles ordered by the waiters, respectively, were entered, being also entered on the waiter's slip.

The brass check system which was in use prior to the patent is thus described in the complainant's brief:

"In this system the waiter received from the checker a brass check having thereon the total amount of the food, etc., served to the guest. If the guest gave a second order the waiter gave back the check to the checker and received a larger one in exchange. In some cases a record was made of the total paid by each guest, but this record was not like or comparable with the Hicks main sheet and could not achieve its results. There was no division of the sheet into spaces for the different waiters and there was no duplication of entries. The inadequacy of this system is obvious."

This statement is adopted because of its conciseness and, although it omits some features of the system, it will close debate upon the facts if it be accepted as correct. The principal differences between this system and the Hicks system are the substitution of paper for brass, recording each item separately instead of the total and using a recording sheet which is ruled instead of one that was not ruled.

Regarding the entry of the total amount upon the brass, or paper, check and upon the sheet, it will be remembered, as before stated, that the patentee says:

"Each item of the order may be entered separately on the slip and on the sheet if so desired, but, in practice, I have found it more convenient and usually sufficient for the purposes of my invention to enter the whole of any one order as a total."

This language is too plain to admit of doubt. It is a clear declaration on the part of the patentee that if the total be entered on the slip and sheet it will infringe the claims. This being so, if a system, similar in other respects, be found in the prior art where totals are so entered, it will anticipate the claims. The complainant has endeavored to explain away this statement but we are not in the least impressed by his efforts in that direction.

The alleged prior use by McKenna, we dismiss without comment for the reason that the testimony in its support is too uncertain to satisfy the requirements of the rule that prior use must be proved beyond a reasonable doubt.

If at the time of Hicks' application, there had been no system of bookkeeping of any kind in restaurants, we would be confronted with the question whether a new and useful system of cash-registering and account-checking is such an art as is patentable under the statute. This question seems never to have been decided by a controlling authority and its decision is not necessary now unless we find that Hicks has made a contribution to the art which is new and useful. We are decidedly of the opinion that he has not, the overwhelming weight of authority being that claims granted for such improvements as he has made are invalid for lack of patentability.

The case at bar is not distinguishable in principle, from the case of Hocke v. N. Y. Central & H. R. R. Co., 122 Fed. 467, 58 C. C. A. 627, in which this court, after describing the improvements "for securing against loss of freight" covered by the claims, said, "All this evidences good judgment upon the part of one who is experienced in the particular business, but it does not rise to the level of invention."

In the case of U. S. Credit System Co. v. American Credit Indem. Co., 59 Fed. 139, 8 C. C. A. 49, this court had before it a patent for "means for securing merchants and others from excessive losses by bad debts, which consist of a sheet provided with separate spaces and suitable headings," etc. The court says:

"There is nothing peculiar or novel in preparing a sheet of paper with headings generally appropriate to classes of facts to be recorded, and whatever peculiarity there may be about the headings in this case is a peculiarity resulting from the transactions themselves. * * * Given a series of transactions, there is no patentable novelty in recording them where, as in this case, such record consists simply in setting down some of their details in an order or sequence common to each record."

It is unnecessary to multiply authorities as we are convinced that there is no patentable novelty either in the physical means employed or in the method described and claimed in the Hicks patent.

The decree is affirmed, with costs.

SCOTT v. LAZELL et al.

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

No. 151.

PATENTS—INFRINGEMENT—BUSTLE AND HIP-FORM.

The Scott patent, No. 702,158, for a combined bustle and hip-form, discloses invention, and is valid. Also held infringed as to claim 2.

Appeal from the Circuit Court of the United States for the Southern District of New York.

On appeal from a decree entered May 21, 1907, dismissing the bill of complaint and holding invalid letters patent No. 702,158, granted to complainant June 10, 1902, for a "combined bustle and hip-form."

John K. Macdonald and Eugene S. Macdonald, for appellant.
Clarence Ladd-Davis and William McCloskey, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The Scott patent in suit relates to "new and useful improvements in invisible, reversible, and combined bustles and hip-forms," used for improving the contour of the human form at and below the waist line. The principal objects of the invention are to provide a combined bustle and hip-form which is simple, inexpensive, strong, durable, sanitary, reversible and comfortable and of such a construction that when in place on the body of the wearer, it will improve and fill out the form, so as to present a symmetrical figure without in any way betraying its presence to the eye of the beholder.

The bustle is crescent-shaped, padded and tufted and is fastened around the waist so as to cover the hips and rear portion of the body for about nine inches below the waist. The thickest portion of the bustle is at the center near the top, which is designed to round out the flat space at the rear, which is frequently found in persons having prominent hips. From the thick central portion, the bustle tapers down gradually to its edges, which are comparatively very thin. By the process of tufting the under portion, as shown in the drawings, is slightly contracted, moistened and passed over the rounded end of an ironing board, thus giving to the structure a concavo-convex form which will fit the body to perfection and show no abrupt enlargements through the outer garments. To produce greater rotundity, the bustle is reversed, in which position the edges, instead of clinging to the body of the wearer, stand out therefrom. The claims are as follows:

"1. As an improved article of manufacture, a bustle and hip-form comprising a covering substantially semi-circular in shape and filling therein, the said filling being tapered to a feather edge at all of its edges, the cover and filling being tufted so that one side of the cover will be contracted, whereby the devices may be reversed and two different sized and shaped concavo-convex forms produced, substantially as described.

"2. As an improved article of manufacture, a bustle and hip-form comprising a covering composed of two pieces connected together at their edges, each of said pieces having in its upper portion a circular recess and in its lower portion a series of slits connected together at their edges, filling having all of its edges tapered and located between said pieces, and the whole formed so that it may be reversed and two different sized and shaped concavo-convex forms produced, substantially as described."

The principal difference between the two claims is that the first claim requires the cover and filling to be tufted so that one side of the cover will be contracted, producing a different sized and shaped form when the bustle is reversed. The second claim makes no mention of tufting.

The defenses are lack of novelty and invention, noninfringement and that the defendant Cronin, and not the complainant, was the discoverer of the improvements described in the Scott patent.

There is but one prior patent in evidence and it was introduced by the complainant. This is the patent to C. M. Strong, dated October 9, 1883, for a combined bustle and hip pad. Several other patents and drawings for breast pads, shoulder pads and bustles are attached to the defendants' brief. They were not presented to the circuit court and no explanation of them is given; of course they cannot be considered on this appeal. The Strong bustle was designed to conform to the fashions of a quarter of a century ago and contains many of the defects which the Scott device is intended to remedy. The skirt of the

pad, instead of being worn at the sides and rear, is secured to a waist band and reaches nearly around the person. As the sides of the skirt of the pad come within a few inches of uniting in front, it is plain that the "straight front" effect, so popular at the present time, could not be produced by the Strong device. It is designed to be worn over and not under the corset, is not reversible and has no tapering or feather edges. Being of uniform thickness, it is incapable of rounding out the undesirable depressions in the human form as shown in the Scott patent. The Strong patent was cited by the Examiner on Scott's application and his claims were, thereafter, amended, but that the claims as allowed are in any way affected by the Strong patent, we are unable to perceive.

The exhibits "DeBahlul Pad," "Arm Scye Unfinished" and "Bust Form Unfinished" relate to alleged prior uses not pleaded in the answer, but, even were they properly before the court, they would be manifestly unavailing as they show none of the distinguishing features of the Scott device. They are crude and unfinished reproductions of devices intended to accomplish different results from those produced by the Scott bustle, and would be utterly useless if substituted therefor. There is before us but one prior patent and no sufficient evidence of prior use; and the art is one where the field of judicial knowledge is necessarily limited. We are, therefore, left with substantially nothing in the prior art to overcome the presumption of validity arising from the grant of the patent. The invention is one of minor importance and is not far from the line which separates invention from mechanical skill, but it is such an obvious improvement over the few prior structures with which we are at liberty to compare it, that we have little hesitation in answering the question of patentability in favor of the patent.

Are the claims infringed? On April 24, 1906, the complainant introduced "Complainant's Exhibit Scott Bustle," the counsel for the respective parties having previously agreed "that the same is a fair specimen of the device of the patent in suit."

On page 383 of the record the expert for the defendants says:

"I agree with the complainant's expert Phillips Abbott in so far as he testifies that the construction and operation of Complainant's Exhibit Defendants' Bustle No. 1 and Complainant's Exhibit Scott Bustle are substantially identical."

This is, in effect, an admission that the bustle purchased of defendants is substantially identical with the one made under the patent, or, in other words, it is an admission of infringement. However, as counsel for the defendants insist that the stipulation of April 24th was made inadvertently and under a misapprehension of the facts, we think the defendants should not be foreclosed thereby.

The elements of the second claim are, in a bustle and hip-form: (1) A covering composed of two pieces connected together at their edges. (2) Each of said pieces having in its upper portion a circular recess. (3) And in its lower portion a series of slits connected together at their edges. (4) Filling, having all its edges tapered and located between

said pieces. (5) The whole formed so that it may be reversed. (6) And two different sized and shaped concavo-convex forms produced

That the defendants have all of these elements except the sixth, is too plain for controversy. But it is contended that neither complainant nor defendants produce a bustle having two different sized and shaped forms.

Although we are of the opinion that the advantages alleged to flow from the reversal of the bustle are, to a certain extent, imaginary and greatly exaggerated, nevertheless, we think the reversible feature a valuable one and that, when the bustle is worn in the reversed position, there is a slight difference in contour and better opportunity for ventilation. It is not easy to see how the bustle in its reversed position can have any perceptible effect upon the contour of the wearer's gown, for the reason that the lower portion, which is farthest from the body, as shown in figure 3 and as illustrated in figure 4 of the later patent to Scott, cannot come in contact with the outer garment. However, the specification only requires that the under covering be "slightly contracted" and such contraction is found in both complainant's and defendants' structures. The defendants do not escape infringement by adding the lineal stitching at the lower circular edge of the bustle.

The first claim is limited by the following language,—“the cover and filling being tufted so that one side of the cover will be contracted.” In other words, contraction must be produced by tufting. We are unable to find this feature in the defendants' device. Tufting as ordinarily understood, would not produce contraction in the lower side of a bustle any more than in a quilt. It is said that if the stitches were put through diagonally it might produce contraction, but the specification does not so say and the stitches are substantially straight in the defendants' bustle. It is also suggested that the contraction might be produced by pinching the material and running the needle through it twice, but this is not “tufting” and would be more appropriately described as “puckering.” We are convinced that the defendants do not produce the contraction of the under piece by tufting, and therefore that they do not infringe the first claim. The defense, based upon the alleged invention of the bustle of the patent by the defendant Cronin, has not been established.

It follows that the decree of the Circuit Court must be reversed without costs in this court and the cause is remanded to the Circuit Court with instructions to enter the usual decree for the complainant based upon the second claim of the Scott patent but, as the defendants have succeeded upon the first claim, without costs.

DUNSMORE et al. v. KELSEY HEATING CO.**GRAFF FURNACE CO. v. SAME.**

(Circuit Court of Appeals, Third Circuit. February 28, 1908.)

Nos. 73, 74.

PATENTS—INVENTION—HOT-AIR FURNACE.

The Kelsey patent, No. 476,230, for a hot-air furnace, is void for lack of patentable invention.

Appeal from the Circuit Court of the United States for the Middle District of Pennsylvania.

Archibald Cox, for appellant.

H. P. Denison, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

PER CURIAM. In each of the above cases preliminary injunctions were granted by the court below, and from the decrees therefor these appeals have been taken. Since the granting of these injunctions and the entry of these decrees this court has handed down its decision in the case of James Spear Stove & Heating Company v. Kelsey Heating Company, 158 Fed. 622, argued at the last term of this court, in which the appellee and plaintiff below was the same as in these cases.

As the patent in suit was also the same, and has in the case referred to been adjudged invalid, the decrees granting injunctions in the cases now before us must be reversed, with costs; and it is so ordered.

SAFETY CAR HEATING & LIGHTING CO. v. CONSOLIDATED CAR HEATING CO.

(Circuit Court, N. D. New York. March 26, 1908.)

No. 6,986.

1. PATENTS—INVENTION—CAR HEATING APPARATUS.

The Searle patent, No. 707,361, for a railway car heating apparatus, the essential feature of which embodied in the third claim is "in combination a water circulating system having a radiating portion in the descending pipe or upon one side thereof, and a second heater located below the first-named heater and at substantially the lowest point of the circuit," is void for lack of invention in view of the prior art, the location of a heater at the lowest point of the circuit being old, and the use of two heaters at different points being a mere aggregation of old parts which act independently and simultaneously without having any effect on each other or producing a new result.

2. SAME—CONSTRUCTION OF CLAIMS—INFRINGEMENT.

Where an applicant for a patent contesting with others, and after repeated rejections in order to obtain a patent at all bases his claim thereon on a "peculiar organization" of parts, and specifies and specifically names and locates those several parts, he is held to the peculiar organization so particularized, specified, and claimed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 253.]

3. SAME—CAR HEATING APPARATUS.

The Dixon patent, No. 457,706, for a car heating apparatus, as limited by the prior art and the proceedings in the Patent Office, *held* not infringed.

4. SAME—SUIT FOR INFRINGEMENT—LACHES.

A suit for infringement of a patent is barred by laches where the defendant, a rival manufacturer, commenced making, advertising, and selling substantially the same device as that alleged to infringe more than 10 years before the suit was brought and before the patent was issued, and continued the same up to the time of suit.

[Ed. Note.—Laches as a defense in suits for infringement, see notes to *Taylor v. Sawyer Spindle Co.*, 22 C. C. A. 211; *Richardson v. D. M. Osborne & Co.*, 36 C. C. A. 618.]

In Equity. Suit to restrain alleged infringement of United States letters patent to complainant, as assignee of R. M. Dixon, for car heating apparatus, No. 457,706, dated August 11, 1891, applied for November 26, 1888, and United States letters patent to John Q. C. Searle, Julia E. Searle, executrix, etc., for railway car heating apparatus, No. 707,361, dated August 19, 1902, and applied for March 23, 1888, renewed August 26, 1898, and for an accounting.

Betts, Sheffield & Betts (Edmund Wetmore, Samuel R. Betts, Randolph Parmly, and John W. Peters, of counsel), for complainant.

Richardson, Herrick & Neave (W. K. Richardson, Charles Neave, and J. Lewis Stackpole, of counsel), for defendant.

RAY, District Judge. This suit originally alleged infringement of the patent to William C. Baker, No. 411,915, as well as those to Dixon, assignor to complainant, No. 457,706, and to Julia E. Searle, executrix of John Q. C. Searle, No. 707,361, but during the taking of complainant's rebuttal testimony the Baker patent was withdrawn from the controversy and will not be considered, except perhaps as a part of the art to which the patents now in suit relate. Both of these patents were applied for some years before they were issued; the Dixon patent November 26, 1888, and the Searle patent March 23, 1888. The Dixon patent issued August 11, 1891, and the Searle patent August 19, 1902, some fourteen years after application filed. Both patents relate to apparatus for heating railway cars, hot water circulating systems, and all the claims are in issue here. The record is voluminous, especially in exhibits and drawings. These patents show and describe the use of steam taken from a source of supply for the purpose of heating the hot water circulating system. The Searle patent is not confined to steam heaters, but as the defendant's device, alleged to be an infringement, involves the use of steam heaters, the Searle patent may be referred to as though confined to steam heaters for heating its circulating system.

The defendant corporation was organized in 1889, as a consolidation of the McElroy Car Heating Company and the Sewall Safety Car Heating Company. The defendant says that it commenced the manufacture and sale of the alleged infringing apparatus, or similar apparatus, in 1890, and has continued so to do undisturbed by complainant down to the time suit was brought in 1903, a period of some

12 years as to the Dixon patent. It was also making and selling substantially the same system now complained of during nearly all the time the Searle application was pending in the Patent Office. The defendant denies infringement, and pleads laches as to the Dixon patent, and alleges that the Searle patent is invalid, disclosing no patentable invention in view of the prior art. The William C. Baker patent, No. 411,915, applied for December 10, 1888, was issued October 1, 1889, and is for heating apparatus for railway cars. Also, No. 473,721, dated April 26, 1892, applied for June 24, 1887.

Hot water circulating systems for heating cars were not new in the art when the patents in suit were applied for—thus, Pike, No. 124,973, dated March 26, 1872; Weibel, No. 144,425, dated November 11, 1873, applied for August 23, 1873; Baker, No. 75,345, dated March 10, 1868; Duffield, No. 194,418, dated August 21, 1877, application filed February 5, 1877; but many patents were applied for at near the same time—thus, Towne, No. 397,152, dated February 5, 1889, applied for June 13, 1887; Dolan, No. 506,984, dated October 17, 1893, applied for October 5, 1887; Shinn, No. 484,343, dated October 11, 1892, applied for September 2, 1887; Gold, No. 388,772, dated August 28, 1888, applied for August 25, 1887; Towne, No. 512,239, dated January 2, 1894, applied for February 4, 1887; Magee, No. 584,288, dated June 8, 1897, applied for December 15, 1887; Baker, No. 590,470, dated September 21, 1897, applied for April 11, 1887. Others might be mentioned. This heating of the prior art was not confined to heaters in the car itself, but included steam taken from the engine. In letters patent to Charles F. Pike of Providence, R. I., dated March 26, 1872, No. 124,973, for "Improvement in Railroad-Car Heaters," he says that he has invented, and then goes on to describe, his new and useful "apparatus for heating cars." He says:

"And it consists in passing the exhaust steam from the locomotive-engine through suitable pipes, first through the feed-water in the tender and then successively to heaters under the cars from whence the heat is distributed to pipes and registers in the cars," etc.

He carries the steam in pipes through the feed water in the tank of the tender and heats it, thence through pipes to the heaters under each car. The heaters are inclosed in a nonconducting case and contain a number of small tubes through which the steam passes heating the oil or other noncongealable fluid in the heaters, or these tubes may be filled with oil and the steam pass around them. Pipes run under the upper floor of the car, there being a double floor provided. A branch pipe from each heater leads the heated fluid into these pipes which are connected. He says:

"The heated liquid passing up one side and returning passes through the pipes into the bottom of the heater to be there again heated, and so on automatically, keeping up a constant circulation."

He also provides registers. He says:

"In the bottom of the heaters are arranged small cocks for letting out the condensed water. The pipes are all connected by flexible, universal, or slip-joints of the usual kind. The great advantages of my invention are, first, perfect safety, there being but one fire on a train, viz., in the furnace of the

locomotive, and of course no accidents can occur from upsetting of stoves, and thereby the liability of being burnt to death is avoided. An equal temperature can be maintained in the whole car, and not, as now, with stoves, the passengers near the stove obtaining all the benefit therefrom and those in the center none; second, saving of fuel in the stoves."

His apparatus and circulating system was not confined to the use of exhaust steam, for he says:

"When it is desired to heat the cars before starting the virgin steam may be run through the pipes and heaters until the train is in motion, when the exhaust steam may be used," which, etc.

He then claims his arrangement of pipes, heaters, etc., as shown, and also:

"2. The method herein described for warming and ventilating railroad cars, consisting in passing steam (waste or virgin) through pipes in contact with a system of coils or pipes inclosed in air-flues, boxes, or chambers so that the steam heats the liquid in said coils or pipes, and the liquid by automatic circulation heats the air, so as to warm and ventilate the cars, substantially as set forth."

His heaters are arranged and located at the lowest point in the system, and it is perfectly apparent from his patent that he fully appreciated the benefits flowing from such an arrangement. This system of Pike suggested plainly and emphatically every advantage of a hot water circulating system in railroad cars, and long in advance of the fire horrors of 1887 on railroad trains he suggested the necessity of it, with steam heaters under each car supplied with steam from the engine of the train. He left nothing for succeeding inventors in this field except the perfecting of the circulating system. Now, in 1868, Baker had given to the world his patent for "Improvement in Railroad-Car Heaters," No. 75,345, in which he had a circulating hot water apparatus, the heater being a fuel-fed stove standing on the floor of the car. He points out the necessity of having the heater lower down than the circulating pipes—that is, of putting it at the lowest point in the system—but as he could not so locate a stove on a railroad car he provides a remedy so far as he can. He says:

"My invention relates to a circulating hot-water apparatus, especially adapted to railroad cars and other vehicles, in which the radiating or heating pipes are necessarily placed near the level of or below the fire. In hot-water warming apparatus, the heating-pipes have usually been elevated above the fire, so as to obtain an upward and distant circulation, and a downward return to the heater. Such apparatus has not been adapted to heating railroad cars, because the heat would not be sufficiently near the floor. The nature of my said invention consists in a circulating water apparatus, in which the heat is applied to a tube that extends upward to a water and expansion vessel, and from this water-vessel the circulation is downward, and through the radiating or heating tubes, and returns to the heater. * * * The pipes of my coil can therefore be led in any desired direction within the car or vehicle, and the stove or heater may be located wherever convenient. The ascending hot-water pipe can be carried up sufficiently high to insure the proper circulation through all the pipes connected with it, without depending upon the relative position of the heater to the coil for effecting the circulation, as heretofore."

The idea of auxiliary heaters and steam-generators—that is, more than one—along a line of piping to aid the circulation and keep up

heat was not new, and is fully described in patent to Baker, No. 247,529, dated September 27, 1881. When in 1887 and 1888 there came a general demand for the adoption and use of a system for heating railroad cars which should exclude stoves and heaters burning combustibles from the cars, and dozens of applications for patents for various suggested devices were filed in the Patent Office, it was not a new or novel thought or conception that stoves and heaters burning combustibles might be done away with in railroad cars, and that the necessary heat might be supplied from the engine of the train in the form of live steam and applied to the heating of water, oil, or other fluid, at the car, which in turn should circulate through pipes and radiators suitably located in the car as in hot water circulating systems elsewhere. There was no great difficulty in bringing live steam from the engine to the cars; there was no particular difficulty in heating water in a coil of pipe by means of this hot steam; there was no great difficulty in circulating the water when made hot through lines and coils of pipe and radiators. It was old in the art to do all this. The questions were what is the best method, the least expensive. Those who remember anything at all on the subject recollect that the cry of the railroad was, not that it could not be done, but that it was a too expensive thing to do. Little effort had been made to improve or perfect the Pike idea, for the Baker idea had been regarded as the best thing the railroads ought to be called upon to put in practical operation. The record in the case shows what many remember—that within a very short time successful and quite satisfactory results in hot water heaters were obtained—and the legislation of the state of New York abolished the use of stoves in railroad cars.

The combination of the Dixon patent is of (1) a system of circulating pipes; (2) an expansion reservoir connected with the pipes; (3) a main source of heating supply in operative connection with said system of pipes at different points by means of; (4) a series of transfer drums, one placed above and the other below the main body of said pipes; (5) branch steam pipes leading from the main steam pipe through the upper transfer drum and into the lower transfer drum; (6) a cock for controlling the admission of steam into the drums, and a cock in the lower drum for discharging the water of condensation.

The Searle patent, in claim 1 has in combination (1) a circulatory system which includes (2) a heat radiating portion (3) having an ascending pipe on one side thereof, and (4) a descending pipe on the other side thereof, (5) a heater in the ascending pipe, or upon one side thereof, and a second heater located below the first-named heater, and at substantially the lowest point of the circuit. Claim 2 is like claim 1, but adds an "expansion chamber" located above the ascending and descending pipes, substitutes "emergency heater having a combustion chamber" for "heater" in the ascending pipe, "primary heater" for "heater" at the lowest point of the circuit, and adds "means for transferring heat derived from the main source of heat supply into operative contact with the circulating liquid in this primary heater. Claim 3 places the "heat radiating portion" in the descending pipe or on one side thereof, a heater in the ascending pipe, or upon the other side thereof, and a second heater below the first-named heater, and at

substantially the lowest point of this circuit. The claims of these patents are not lengthy, and will be inserted:

Dixon Claim.

"In a heating apparatus, the combination of a system of circulating-pipes connected with an expansion reservoir, a main source of heat-supply in operative connection with said system at different points by means of a series of transfer-drums, one placed above and another below the main body of the circulating-pipes, branch steam-pipes, H and H', leading from the main steam-pipe, B, through the transfer-drum, G, and into the transfer-drum, F, a cock, f, for controlling the admission of the steam into the drums, and a cock, h, in the drum, F, for discharging the water of condensation, substantially as set forth."

Searle Claim.

"1. The combination, of a circulatory system that includes a heat-radiating portion and has an ascending pipe on one side thereof and a descending pipe on the other side thereof, a heater in the ascending pipe or upon one side thereof, and a second heater located below the first-named heater, and at substantially the lowest point of the circuit.

"2. The combination, of a circulatory system that includes a heat-radiating portion and has an ascending pipe on one side thereof, a descending pipe on the other side thereof, and an expansion-chamber located above said pipes and having communication therewith, an emergency heater having a combustion-chamber inclosing a portion of the ascending pipe of said system, a primary heater located at substantially the lowest point of the circuit, and means for transferring heat derived from a main source of heat-supply into operative contact with the circulating liquid in said last-named heater.

"3. In combination, a water-circulating system having a radiating portion in the descending pipe or upon one side thereof, a heater in the ascending pipe or upon the other side thereof, and a second heater located below the first-named heater, and at substantially the lowest point of the circuit."

An "expansion tank," in this connection, is a vessel to maintain a reserve supply of water in constant communication with both branches of the circulating system, and it should have a safety valve and means for filling the system with water. "Transfer heaters" are mere jackets surrounding a portion of the piping carrying the water and these are supplied with steam sufficiently hot to heat the water in the pipes contained therein. This steam may come from the boiler of the engine or any other suitable source. Of course it is understood that water in a jacket or cylinder could be heated by the steam contained in coils of pipe passing through it, and then be carried into the water pipes of the circulating system. In this case the heat of the steam in the jacket is transferred to the water in the pipe of the ascending branch, and, in accordance with the operation of very old and well-known laws, this heated water then rises and the colder and consequently the heavier water in the descending branch takes its place and in its turn is heated and hence a constant circulation is maintained so long as the heat is applied. This is conceded by the complainant's expert Morse. It has been well known for centuries that the tendency of hot water in a pipe is to rise while the cold will sink, and this fact was recognized in the prior art by Baker in 1868, when in his patent, No. 75,345, he applied a hot water circulating system to the heating of cars. It was obvious that as hot water rises it would tend to push what was above it, and, as the tendency of the colder water was to sink and take its place, that the nearer the bottom of the circulating system the

heater was located the better. It was also recognized that while both an up and a down current might be maintained in a single pipe still an adequate and operative system required two branches or lines of pipe from the heater, the one leading from it and called the ascending branch and the other, connected of course, called the descending branch, leading back to the heater, so as to allow the colder water in the circuit to renew its heat. It was also perfectly obvious that this water in the system traveling long distances through its turnings would give off and lose its heat rapidly, it being sent through the circuit for that very purpose, and that, in traveling a long road through a car, where the water pipes were mainly on a horizontal line, it would be advisable and even necessary to do something to accelerate the circulation and renew the heat at some point in the circuit. All this was old, as we have seen, and it was especially true where in a long train of cars the common and primary source of heat for all the cars was the boiler of the engine. As we have seen, in 1868 and in 1872, this was recognized. It was also recognized that, in such a system, where two heaters were used, the one should be placed above and the other below the main circulating pipes but both in the ascending pipe. It would have been idiotic to place a second heater in the descending pipe as that would have retarded circulation; that is, the two would have opposed each other so far as circulation was concerned. There was nothing new or novel in the idea of placing one of these heaters at substantially the lowest point of the circuit and the file wrapper of the Searle patent in suit demonstrates that Searle had no thought that there was any novelty in the idea or patentable novelty in an apparatus for hot water heating in railway cars which located one heater, when two were used in the system, at substantially the lowest point of the circuit.

The file wrapper of the Searle patent in suit shows that his application filed March 23, 1888, contained 17 claims and extensive specifications, all of which disappeared. They contained no reference to a heater "at substantially the lowest point of the circuit." In the specifications we find:

"The water heating chamber, 6, Figs. 1, 2, and 3, or, heating chamber, 6', Figs. 2, 3, and 7, located below the car, may form part of a single flow system, and may be arranged so the water before passing to the pipes that heat the car, may be heated by means of steam brought in contact with the circulating water in either of the ways heretofore described. * * * As shown in Figs. 2 and 3, a detachable and removable water heating chamber, 6', may be located beneath the car, and contain a steam coil, 5, which has been described with reference to other figures of the drawings."

In the claims we find:

"3. In a hot water warming apparatus for railway cars, the combination of a heater, water dividing chamber or fitting located above the heater, circulating pipes that heat the car and discharge into a combined water uniting, and water heating chamber below the car and connected to the heater substantially as described.

"4. In a hot water warming apparatus for railway cars, the combination of a water heating and circulating passage connected to a water dividing and expansion chamber above it, in which the water is divided, into two separate flows and relieved of the bubbles of steam and air, and a water uniting

chamber or fitting below the heating pipes to collect the separate flows and return them to the heater substantially as described. * * *

"7. In combination with the stove, I, a water heating and circulating chamber, 6', located below the car floor communicating with the lower leg of coil 8, and with the pipes that heat the car, said chamber enclosing a steam coil connected to a main steam supply, and arranged so the water can be heated with fire in the stove, or, by steam forced through the coil in contact with the circulating water, or, by both at the same time substantially as described. * * *

"10. In a hot water warming apparatus for railway cars, the combination of a heater, hot water circulating pipes, a detachable and removable water circulating passage or chamber located below the pipes that heat the car, inclosing a steam coil and communicating with a water passage or chamber above the heater through which the hot water must pass to heat the car, substantially as described."

May 15, 1888, Benton J. Hall, Commissioner of Patents, in a communication to Searle inclosed a summary of the claims, and there is no suggestion of a claim for a heater in the system so located. June 2, 1888, the Commissioner communicated to Searle a statement of the subject-matter of an interference, and said:

"The subject-matter involved in the interference is (1) the combination with a car, of a system of circulating pipes within said car and two heaters both in operative contact with said circulating system or with branches thereof and adapted to be operated simultaneously or separately for imparting heat thereto; (2) in a car heating system the combination with a system of water circulating pipes within the car of a suitable radiator in contact with said circulating system, or a branch thereof, mechanism for supplying said radiator with steam as a primary means of heating said circulating system, and a secondary heater also in operative contact with said circulating system and adapted to heat the same."

October 28, 1890, C. E. Mitchell, then Commissioner of Patents, communicated to Searle a further interference in which he said:

"In combination, a water circulating system having a radiating portion in the descending pipe or upon one side thereof, a heater in the ascending pipe or upon the other side thereof, and a second heater located below the first-named heater, and at substantially the lowest point of the circuit."

This was the language of Steward, examiner, not of the patent, and related to the location of the lowest heater.

April 22, 1892, about 4 years after the first application was filed and about 18 months after receiving this suggestive communication from the Commissioner, Mr. Norris, then attorney for Searle, wrote:

"Add to the above-entitled application the following additional claims to those already in the application. * * * In combination, a water circulating system having a radiating portion in the descending pipe or upon one side thereof, a heater in the ascending pipe, or upon the other side thereof, and a second heater located below the first-named heater, and at substantially the lowest point of the circuit."

As between Benjamin and Searle it was decided that two heaters in the ascending pipe of the system, one above and one below as mentioned in the claims first filed, was the invention of Searle, but there is nothing to show that Benjamin ever claimed the lower heater as located at substantially the lowest point of the system. It is evident that idea was the suggestion of the Patent Office and not a conception of Searle.

July 6, 1892, W. E. Simonds then Commissioner of Patents directed a revision and restriction of the claims. May 19, 1894, another interference was declared, and as a result, it seems, June 17, 1895, Searle canceled his claims and specifications and substituted others, increasing his claims to 27, and filing affidavits to carry the date of Searle's reduction to practice of his invention back to April, 1887. He also filed new specifications and drawings. All of these claims were rejected August 13, 1895. In the new specifications, Searle said:

"It will therefore be seen that my invention contemplates the use of at least two heaters arranged at different elevations in the system and which may be of any suitable construction or character, deriving their heat from any suitable source, or else a heater located below the line of the circulating system and at substantially the lowest point of the circuit."

It is evident that he did not know, even then, in view of the attitude of the Patent Office, whether to claim two heaters "arranged at different elevations" or one located "below the line of the circulating system." He was willing to accept either, and was waiting to ascertain which might be deemed patentable. Among these 27 new claims we find the following:

"1. In a heating system for railway cars, the combination of a liquid-circulating system for the liquid to be heated, having a radiating portion and a heater for heating said system arranged below it at the lowest point of the circuit, substantially as set forth. * * *

"3. In combination, a water circulating system having a radiating portion in the descending pipe or upon one side thereof, a heater in the ascending pipe or upon the other side thereof, and a second heater located below the first named heater and at substantially the lowest point of the circuit, substantially as set forth."

In "Remarks," appended to these new claims, he says, "Claims 12 to 26, both inclusive, are verbatim copies of original claims," etc. Reference to the original claims demonstrates they are not. All of these new claims were rejected August 13, 1895; new claim 1 on Pike No. 124,973, and new claim 3 on patents to Towne, No. 512,239, taken with Pike, and the examiner said:

"Claim 1 is rejected on the patent to Pike, 124,973, March 26, 1872, 'Train Water Heating Systems, Steam.'

"Claims 2, 3, 4, and 5 are rejected in view of the patent to Towne, 512,239, Jan. 2, 1894, 'Train Water Heating Systems, Steam,' when taken with the patent to Pike, above cited. Towne shows all the elements set forth in these claims, and Pike shows it to be old to locate a steam heater at the lowest part of a water circulatory system. To locate Towne's steam heater at the lowest part of his circulatory system, in view of Pike, would not involve invention. * * *

"Claim 8 is rejected on the patents to Towne, Pike, and Searle, noted, the patents to Towne and Pike showing the arrangement of the parts claimed, and Searle showing it to be ordinary to duplicate steam heaters in operative contact with water circulatory system."

October 25, 1895, Searle, by his attorney, submitted numerous amendments and a long argument and complaint in which he said, amongst other things:

"The soul of this invention which the examiner designated in the interference as patentable consists in the particular arrangement of one heater with reference to the other. * * * The two patents of Towne and Pike

are irrelevant, especially in view of the fact that they are lacking in the very feature which constitutes the soul of the invention or combination, to wit, the arrangement of one heater below the other, and at substantially the lowest point of the circuit. * * * There is no advantage in using two heaters in the same system unless one of the heaters is located at a different elevation than the other and is so connected with such other that the force resulting from the ascendancy of the water in the first heater will create a circulation through the upper heater, or, which is the reverse of this, the ascendancy of the water in the upper heater will draw the current through the lower one."

Now it so happens that this very idea had been expressed and fully illustrated in British patent to Oswald Rose, No. 2,567 of May 31, 1882 (see Fig. 16), where we have the primary and lower heater and two auxiliary heaters in the line of circulation one above the other. The patentee says:

"Figure 16 shows an arrangement by which large spaces can be heated by one circulating pipe and the water therein maintained at a high temperature notwithstanding the length of piping it has to pass through. X is the main heater, and X' X2 are other heaters placed round the pipe at suitable intervals after the manner shown in Figure 8 to assist in maintaining the heat in and promoting the circulation of the water or other fluid contained in the endless pipe."

His system is applied to railway carriages. Rose used electricity instead of steam for communicating heat to the water in the circulating systems of pipes.

The Towne patent of 1894 covered a system of circulating pipes, two heaters in operative contact therewith, and operated separately or simultaneously, one designed to be the main source of heat and the other for emergencies or use when the other did not sufficiently heat the car, both heaters being in the circulating system, so that the one supplemented the one or aided the other in heating the water in the pipes. This stove or heater was also so constructed that, if by insufficiency of steam from the engine, or want of it when the car was detached from the train, it was desirable to add other heat to that of the steam, or heat solely by other means, the water in the pipes and entire system could be heated by a gas flame, etc. Towne said nothing of having the one heater higher up than the other. He describes, in part, his system as follows:

"A transfer-chamber in each car adapted to be connected with the prime heater and to receive heat therefrom through pipes and flexible couplings between the cars, and to transfer the heat thus received to the local circulating medium of the car; third, a local circulatory system of pipes in each car connected with the transfer chamber and adapted to have the water contained in said pipes heated by it; fourth, a local supplementary heater in each car connected with the transfer chamber and adapted to heat the local circulating medium by direct combustion of fuel. * * * Instead of having the local heater embody in one structure the steam heated transfer chamber and the combustion chamber, as just described, these two chambers may be either duplicated or divided."

It seems clear to me that it was a self-evident proposition that if one steam heater would heat the water at one point and cause it to rise that another in the same ascending pipe would add heat to the ascending column of water, or restore heat at a distance from the starting point, and, in either event, keep up or accelerate the circulation

as the case might be or necessity demand. All this was pointed out and illustrated in the prior art as we have seen. As heater after heater in this art had been placed at the lowest point in the circulating system as common sense and experience dictated it should be, for the reason that the effect of heat on the water in the pipe when the proper temperature was reached was to cause the heated water to rise and move onward, it seems to me that in 1887 the idea of placing one heater at substantially the lowest point in the system was no longer new or novel, and that the location of a heater at that point presented no patentable invention. To my mind it was no more patentable to place the primary heater at the base of the column of water than it would have been to locate the fire at the lowest end of the chimney, base of the column of air, if it had been desired to establish circulation throughout its entire length. The history of the art does not suggest that any one ever thought of patenting such an arrangement until it was suggested, not by Searle, but by the remark of the Examiner that such was the arrangement illustrated in the drawings of Searle. Out of the 17 original claims of Searle, neither of which suggested those finally allowed, and out of the 27 new claims, including those formulated and presented in 1892, three were finally allowed, 10 years later, after rejection, amendment, and changes, as the result of mere persistence, the 3 claims in suit. And it is conceded they present no possible element of novelty unless it be in the placing of one of the heaters "at substantially the lowest point of the circuit." And to make a possible patentable combination this must be done in connection with another heater at another point on the ascending column of water—that is, on the ascending pipe. To place one heater at the lowest point had been done before, several times; that it should be placed there for convenience to secure the best results were obvious and hence it became the old story of putting one stove by the side of another, but at a distance from it, to better heat the building. It has been known for generations that the best way to heat the rooms on the first floor is to put your heater there, or in the basement, and not in the attic, as heat rises—the same as hot water—and that, if you would add to the heat of the air that passes to the chambers above and becomes cooler, you should place another heater there. I do not think such an arrangement of heaters in 1887 would have presented patentable novelty.

Ordinarily the work of the one heater in the circulating system of Searle would be as complete and effective and produce as good a result as the work of the two. The second heater in the system (I am not referring to the emergency heater), the more elevated one, made hot by steam brought to it from the common source of supply, and transferring the heat to the water in the pipes, works precisely the same and produces precisely the same result it would were the other not in the system. Its function and its sole function is to heat the water in the pipe at that point, taking it as it finds it when it arrives. It neither aids nor retards the operation of the one below, the so-called primary heater. That heater's sole function is to heat the water at that point taking it as it finds it. When heated to a certain point the water rises in obedience to a natural law. This heater must

heat the water to a certain degree before it will expand and rise. This water once made hot rises of its own accord and passes on, and the heater busies itself with a fresh supply. Its power to heat the water is derived solely from the steam brought from the locomotive or other source of supply and depends thereon. The second heater aids it in no way in transferring heat from the steam to the water. It does not draw the water through it or to it or aid it to transfer more heat to the water that comes to it than it otherwise would, or impart heat to it more easily. The first heater does cause hot or warm water to reach the second heater but this water being hot or warm in any degree does not aid the second heater to transfer to it more heat than it otherwise would, or to do its work of transferring the heat from the steam to the water more easily or expeditiously. You can heat warm water to the boiling point, or any desired point more quickly than you can cold water for the reason it requires the transfer of less heat, but the work of transferring the heat that is transferred, which is the function of the heat itself, remains precisely the same. Hence the placing of two heaters in the same ascending pipe is a mere aggregation.

This is not a patent or a claim for an improved heater or an improved transfer heater, but merely for a combination of old elements constituting a structure for heating cars, etc. It is not a new or improved process for heating water in a circulating system or for transferring heat from a steam pipe or pipes or receptacle to water in such a system. The process of reasoning by which the conclusion was reached that these claims disclose patentable invention was (and I quote from Steward, Examiner):

"As regards the merits of the invention, it is noted that in the declaration of interference No. 14,804, the issue in said interference was believed to be patentable over the issue in interference No. 12,961, only in the precise arrangement of the heaters, relative to the liquid circuit, the prime function of the heater in the ascending pipe being, in the opinion of the examiner, to give direction to the heat conveying medium, while the prime function of the 'second heater' was to heat said medium, the object of locating said 'second heater' at substantially the lowest point of the circuit being to cause the circulating medium to be in a heated state on entering the ascending pipe, thus avoiding the extra work of lifting said medium while in its cold-dense-state, which would result were the said second heater situated at any other point of the circuit. Considered in this light, there is an interdependence in action between the two heaters, hence, the assemblage is something more than a mere duplication of parts or a mere aggregation."

It should be remembered that the water in this circulating system when the heat is first applied is all of the same temperature. The steam from the locomotive reaches each heater by independent means at practically the same instant of time, and each heater commences its work of transferring heat from the steam to the water at substantially the same instant of time. The action of the heat on and in the water is to separate the particles, and as it expands and rises the heated particles fly off and upward from the others, or colder particles. They do not attract the colder particles or draw them after themselves or do any work whatever in that regard. The tendency is to repel. Sayr Tyndal:

"The motion of these atoms is communicated to the boiler, thence to the water, whose particles are shaken asunder, and fly from each other with a

repellent energy commensurate with the heat communicated. * * * Therefore we may reasonably conclude that this motion or vibration is heat, or the repulsive power. Heat, then, or that power which prevents the actual contact of the corpuscles of bodies, and which is the cause of our peculiar sensations of heat and cold, may be defined a peculiar motion, probably a vibration of the corpuscles of bodies, tending to separate them. It may with propriety be called the repulsive motion."

The rising of the heated particles tending to push the water above has a tendency to create a vacuum into which the colder water below, if below, or to one side, immediately rushes. As precisely the same operation is going on at each heater they act independently. The pipe bringing the steam into the heater or drum has nothing to do with giving direction to the heated water, nor does the steam of itself or its application to the pipe containing the water. Brought into contact with such pipe a portion of the heat in the steam is immediately transferred to the water through the metal side of the pipe, and that water when sufficiently heated moves immediately upward, and if there be a pipe leading generally upward from that point it will follow it. If the pipe be horizontal with an opening somewhere the heated water will follow on the upper side of the pipe moving towards the opening. I assume that by "heat conveying medium" in the above quotation is meant the heated water, inasmuch as it conveys the heat transferred to it to the different points of radiation which are or may be all along the water pipes. As before stated neither heater does anything to "give direction to the heat conveying medium." Natural laws do that if the water conducting pipes are so constructed as to allow them to operate. If there be a single pipe only and room for expansion—an expansion chamber—these natural laws will start a circulation in that single pipe, the up current hot or warm, the down current by its side colder, and the colder water will be constantly sinking, seeking the lowest level and hence returning to the heater.

It is not sufficient to avoid the statement that these two heaters are mere aggregations to show that both contribute to the effective heating of the car—the final result sought, the final object to be attained. To avoid the charge of aggregation "each element of the combination must qualify every other." *Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749. "The combination to be patentable must produce a different force, or effect, or result in the combined force or processes from that given by their separate parts. There must be a new result produced by their union. If not so, it is only an aggregation of separate elements." *Reckendorfer v. Faber*, 92 U. S. 347, 357, 23 L. Ed. 719. "A combination of well-known separate elements, each of which, when combined, operate separately and in its old way, and in which no result is produced which cannot be assigned to the independent action of one or the other of the separate elements, is not patentable." *Thatcher Heating Company v. Burtis*, 121 U. S. 286, 290, 291, 292, 294, 295, 7 Sup. Ct. 1034, 1038, 30 L. Ed. 942. All that Searle did was to add a second heater in a hot water circulating system. But it is said that he located one of them more advantageously than before; that is, at substantially the lowest point of the circuit. But as this had been done before, and repeatedly, I do not think he can claim that

idea. But assume that he can, inasmuch as the circulating system was old and the heater was old when in any circulating system, what Searle accomplished was simply the advantageous location of this second heater within the circulating system. To do this was not patentable invention. *Thatcher Co. v. Burtis*, page 290 of 121 U. S., page 1036 of 7 Sup. Ct. (30 L. Ed. 942). He has not mentioned or claimed any new or improved means for bringing the two heaters or either of them into the system or for adjusting them or either of them when there. Each is placed in the system in the old way and adjusted in the old way and by the old means. One, it is asserted but not shown, is in a new location in the system. Admit, if we will, for the argument, that this is true, and that this is a better system than any of the prior ones, that fact does not make the combination patentable. *Thatcher Heating Co. v. Burtis*, pages 290, 294 of 121 U. S., pages 1036, 1038 of 7 Sup. Ct. (30 L. Ed. 942). I cannot distinguish this case in principle from the *Thatcher Case* just referred to. In that case what Thatcher did was to combine in one structure, for the better heating of rooms or a building, by securing a uniform and steady heat that could be regulated by the occupants of the upper rooms and by means of a heater that did not require frequent attention (see page 291 of 121 U. S., page 1036 of 7 Sup. Ct. [30 L. Ed. 942])—all of which he accomplished—a cylinder or body of the heater projecting out from the frame or mantel; a feeder or fuel magazine within the cylinder, and an opening through which the magazine was fed from above. He thus increased the capacity of the magazine and extended the feeder or magazine to the feed hole so as to allow an uninterrupted passage of coal from above instead of through the front or side doors. Each element was old, but they had not been used in combination. Judge Wallace in the Circuit Court said (12 Fed. 569):

"Inasmuch as the heater was old, and the fuel receptacle with the described opening was old when located within an ordinary coal stove, what Thatcher accomplished was merely the advantageous location of the fuel receptacle within the fireplace heater. * * * It must be conceded that it was not obvious that such a fuel magazine could be advantageously employed in such a heater. Attempts had been made by others to do the same thing without satisfactory results, but Thatcher's organization was a success, and immediately commended itself to the public. But Thatcher's broad claims cannot be sustained. There may have been patentable novelty in the means he employed to adjust the parts in the new organization but there was none in merely bringing those parts together. They did not perform any new function in the new arrangement. The fuel magazine does just the same work in the new structure it did in the ordinary coal stove. * * * The parts do not cooperate to produce a new result. By their aggregation the new structure contains all the advantages which resided before separately in several structures. The new heater is, therefore, a better heater than any which preceded it, but it does not present a patentable combination, irrespective of the means employed to adjust the several parts into efficient relations to each other."

The Supreme Court of the United States quoting and approving all this said:

"It is admitted that what Thatcher did, and all that he did, was to transfer this well-known fuel magazine from its use in an out-standing base-burning stove to a fireplace heater, equally well known and in common use as to its arrangement, construction, position, and mode of operation. When this fuel magazine was thus transferred from one kind of stove to another, in its

new situation it performed precisely the same function, with respect to the fuel and the fire, as it had always been accustomed to perform in its old place, and the fireplace heater into which it was thus newly placed, so far as the generation and transmission of heat and heated air are concerned, operated precisely as it had habitually done before. It is true that such a fireplace heater, by reason of the fuel magazine, was a better heater than before, just as the outstanding stove with its similar fuel magazine was a better heater than a similar stove without such a fuel magazine. But the improvement in the fireplace heater was the result merely of the single change produced by the introduction of the fuel magazine, but one element in the combination. The new and improved result in the utility of a fireplace heater cannot be said to be due to anything in the combination of the elements which compose it, in any other sense than that it arises from bringing together old and well-known separate elements, which, when thus brought together, operate separately, each in its own way. There is no specific quality of the result which cannot be definitely assigned to the independent action of a single element. There is, therefore, no patentable novelty in the aggregation of the several elements, considered in itself. If, however, to adapt these several elements to each other, so that they can act together in one organization, required the use of means not within the range of mere mechanical skill, then it would be true that the invention of such means for effecting a mutual arrangement of the parts would be patentable. If, in the present case, owing to the necessary form, size, structure, and situation of a fireplace heater as ordinarily made and used, there were ascertained difficulties in uniting such a fuel magazine as Thatcher adopted from its known use in out-standing base-burning stoves, and those difficulties were overcome by something more than mere mechanical ingenuity, he might have been entitled to a patent, not for the combination, however made, of the fuel magazine and the fireplace heater, but for the means which he had invented for effecting it. Nothing of that, however, appears in this case. The invention described is not of any such device for effecting the combination; no claim is made of that character. The claim made is for the combination, no matter how or by what means it is or may be effected."

So here, the improvement in the circulating system is the result of the single change produced by the introduction of this second heater and "there is no specific quality of the result which cannot be definitely assigned to the independent action of a single element." No new function whatever is evolved from this combination and hence it is not patentable, all the elements being old. *Specialty Mfg. Co. v. Fenton Mfg. Co.*, 174 U. S. 492, 498, 19 Sup. Ct. 641, 643 (43 L. Ed. 1058) where it is held:

"Putting the Hoffman patent in its most favorable light, it is very little, if anything, more than an aggregation of prior well-known devices, each constituent of which aggregation performs its own appropriate function in the old way. Where a combination of old devices produces a new result such combination is doubtless patentable, but where the combination is not only of old elements, but of old results, and no new function is evolved from such combination, it falls within the rulings of this court in *Halles v. Van Wormer*, 20 Wall. (U. S.) 353, 368, 22 L. Ed. 241; *Reckendorfer v. Faber*, 92 U. S. 347, 356, 23 L. Ed. 719; *Phillips v. Detroit*, 111 U. S. 604, 4 Sup. Ct. 580, 28 L. Ed. 532; *Brinkerhoff v. Aloe*, 146 U. S. 515, 517, 13 Sup. Ct. 221, 36 L. Ed. 1068; *Palmer v. Corning*, 156 U. S. 342, 345, 15 Sup. Ct. 881, 39 L. Ed. 445; *Richards v. Chase Elevator Co.*, 158 U. S. 209, 15 Sup. Ct. 831, 39 L. Ed. 991. Hoffman may have succeeded in producing a shelf more convenient and more salable than any which preceded it, but he has done it principally, if not wholly, by the exercise of mechanical skill."

And, if adding this second heater in the circulating system at substantially the lowest point does add to the efficiency of the system, aids the circulation, and increases the heat carried thereby and radi-

ated into the car, as it is done in obedience to the same law and in the same way and by the same means and only by an increase of the heat, power employed and applied, a mere duplication, it is "a mere difference in degree, a carrying forward of an old idea, a result, perhaps somewhat more perfect, but not rising to the dignity of invention." *Wright v. Yuenghing*, 155 U. S. 47, 53, 54, 15 Sup. Ct. 1, 39 L. Ed. 64, and cases there cited. The court said, pages 53 and 54 of 155 U. S., page 4 of 15 Sup. Ct. (39 L. Ed. 64):

"Wright's only invention, then, was in the combination of the cylindrical guide with the trough shown in the Farrar patent. Did this accomplish a new and valuable result it is quite possible that a patent therefor might have been sustained, but we do not find this to be the case. The cylindrical guide performs the same functions as in the prior patents; the trough, in which the connecting rod works in the Farrar patent, is practically the same as in the Wright patent, and the combination is a mere aggregation of their respective functions. If the combination of the trough and cylindrical guide of the Wright patent gives greater lightness and strength to the frame than the combination of the trough and the flat guides of the Farrar patent, it is a mere difference in degree, a carrying forward of an old idea, a result perhaps, somewhat more perfect than had hitherto been attained, but not rising to the dignity of invention. We have repeatedly held patents of this description to be invalid. *Stimpson v. Woodman*, 10 Wall. (U. S.) 117, 19 L. Ed. 866; *Smith v. Nichols*, 21 Wall. (U. S.) 112, 22 L. Ed. 566; *Guidet v. Brooklyn*, 105 U. S. 550, 26 L. Ed. 1106; *Hall v. Macneale*, 107 U. S. 90, 2 Sup. Ct. 73, 27 L. Ed. 367."

See, also, *Brinkerhoff v. Aloe*, 146 U. S. 515, 516, 13 Sup. Ct. 221, 224 (36 L. Ed. 1068) where it is said:

"To sustain a patent on a combination of old devices it is well settled that a new result must be obtained which is due to the joint and co-operating action of all the old elements. Either this must be accomplished, or a new machine of distinct character and function must be constructed. *Pickering v. McCullough*, 104 U. S. 310, 26 L. Ed. 749; *Hailes v. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241; *Tack Co. v. Manufacturing Co. (C. C.)* 3 Fed. 26, 9 Biss. 258; *Wringing Machine Co. v. Young*, 14 Blatchf. 46, Fed. Cas. No. 9,508. If several old devices are so put together as to produce even a better machine or instrument than was formerly in use, but each of the old devices does what it had formerly done in the instrument or machine from which it was borrowed and in the old way, without uniting with other old devices to perform any joint function, it seems that the combination is not patentable."

In *Am. C. M. Co. v. Helmstetter*, 142 Fed. 978, the Circuit Court of Appeals, Second Circuit, said (page 980, 74 C. C. A. 240, page 242):

"The fact that the two devices are not separately claimed, but only in combination, would indicate that the patentee regarded the elements individually considered as old. The distinction between a combination and an aggregation lies in the presence or absence of mutuality of action. To constitute a combination it is essential that there should be some joint operation performed by its elements, producing a result due to their joint and co-operating action, while in an aggregation there is a mere adding together of separate contributions, each operating independently of the other. *Hailes v. Van Wormer*, 20 Wall. 353, 25 L. Ed. 241; *Reckendorfer v. Faber*, 92 U. S. 347, 357, 23 L. Ed. 719; *Pickering v. McCullough*, 104 U. S. 310, 318, 26 L. Ed. 749."

Here, these heaters do not act jointly, but each separately, independently. They both operate at the same time on the water in the pipe but each transfers heat in its own way at its point of operation and the heat from the one is simply added to that of the other or goes

to supply a loss of heat by radiation. See, also, *Dodge Coal Storage Co. v. N. Y. C. & H. R. R. Co.*, 139 Fed. 976, affirmed by Circuit Court of Appeals, Second Circuit, 150 Fed. 738, 80 C. C. A. 404.

The Searle patent in suit is void for want of patentable invention in view of the prior art; and the introduction of the second heater at substantially the lowest point of the circuit was a mere aggregation of old, well-known devices; and this location of one heater at that point was not the idea of Searle, but of the Examiner at the Patent Office, suggested to him by the prior art which he cited, and then adopted by Searle and formulated into a claim about four years after his application was filed, and after such location and duplication of heaters in such a system had gone into general use, and after his original claims had been rejected. But more than this, in view of the art as it existed in 1887-1888, ordinary mechanical and engineering skill was fully competent to do all that Searle did or claims to have done. The defendant company was making and selling a circulating system with more than one transfer heater in its ascending pipes two years or more before Searle formulated such a claim. Complainant's Exhibit No. 26, said to show defendant's construction, presents two "lower transfer heaters" beneath the car floor and two "transfer heaters" above it, and also a third, or emergency heater. Defendant has an improved system of its own, and has a separate circuit for each side of the car. It has placed two of its transfer heaters where Pike placed his in 1872, where Weibel placed his in 1873, and where Duffield placed his in 1877 (see patents Nos. 124,973, 144,425, and 194,418), underneath the car and at, or even below, substantially the lowest point of the circuit.

I have carefully examined the testimony of complainant's witnesses Freeman and Carpenter and all the evidence of tests. I will not go into it as to my mind it fails to establish any joint action, co-operation, co-action of the two heaters in the sense of the patent law. Again, if we accept that theory, for it is, at best, but a mere speculative theory, defendant's system does not work in accordance with it. Defendant divides his circuit into two equal portions, and uses his heaters to renew the heat in the water at distant points, and not to enable the one to operate differently from what it would standing alone in the circuit. That is, he does not place them near together so as to enable the one to perform some different function than it otherwise would by having hot water to operate on, or in having hot water operate on it.

Dixon Patent.

As to the Dixon patent I think the defense of laches is clearly established; also that of noninfringement. An essential element of that patent which has but one claim is a cock located in the lower drum for discharging the water of condensation. This cock the defendant does not use with the steam heater. In short, it wholly omits an element of Dixon which he made essential by specifically inserting and claiming it in his combination located at a certain point. The Dixon patent followed the Searle patent in suit and several others. He filed broad claims which were rejected and canceled. Others were sub-

stituted only to be rejected and canceled. Then came the narrow claim in suit and of it he said, by his attorneys, "The claim is specific, and covers a peculiar organization of parts only shown by Dixon." He must be limited to this "peculiar organization." He was in no sense a pioneer. He has submitted to limitations and restrictions imposed by the Patent Office, and has also expressly limited himself. I think it well said that the distinction between this specific claim and the rejected and canceled claim is that the claim in suit specifies the cock, f, near the expansion tank, and which cock controls the admission of steam to the drums, first, the upper drum, and thence through pipes or a pipe to the lower drum, and the cock, h, in the lower drum, under the car, for discharging the water of condensation. This is not defendant's construction or organization. Defendant for a specific purpose places its cock for discharging the water of condensation in the main steam pipe under the car, and at a point where it will not freeze when the drum is not heated. Of course the location of this cock is not fundamental in the claim. It has no new main or fundamental idea. It is apparent also that defendant has a peculiar organization of old elements which materially differs from that of the Dixon patent. However, when a claimant, contesting with a score of others in the same field and at the same time, after repeated rejections, in order to obtain a patent at all, adopts and specifies as his invention a "peculiar organization" of parts and specifies and specifically names and locates those several parts he is held to the peculiar organization so particularized, specified and claimed.

But after all, the laches of complainant, unexplained and not excused, should defeat this action so far as the Dixon patent is concerned. That patent applied for in 1888, as limited and changed, was finally granted in August 11, 1891, over 10 years prior to the commencement of this suit. In 1890, and the evidence is not disputed, the defendant, a competitor of the complainant, commenced making, advertising, and selling car-heating apparatus and devices like those now alleged to infringe. There is no question that those devices infringed the Dixon claim if the ones now complained of do. There can be no question that the complainant knew just what defendant was doing. There was no possible concealment or covering up. When those devices went into use they were plain to see, and open to inspection by all the world, and it is impossible to suppose that complainant did not keep its eye on what defendant was doing. I do not think the complainant ever expected to rely on the Dixon patent as a valid patent or as broad enough to cover the defendant's construction. The following cases are sufficiently in point and all are directly applicable: *Lane & Bodley Co. v. Locke*, 150 U. S. 193, 14 Sup. Ct. 78, 37 L. Ed. 1049; *Richardson v. D. M. Osborne & Co.*, 93 Fed. 828, 36 C. C. A. 610; *McLaughlin v. People's R. Co.* (C. C.) 21 Fed. 574; *Woodmanse & Hewitt Mfg. Co. v. Williams*, 68 Fed. 489, 15 C. C. A. 520; *Meyrowitz Mfg. Co. v. Eccleston* (C. C.) 98 Fed. 437; *Starrett v. Stevens Arms Co.* (C. C.) 96 Fed. 244—all patent cases. *Speidel v. Henrici*, 120 U. S. 377, 387, 7 Sup. Ct. 610, 30 L. Ed. 718; *Abraham v. Ordway*, 158 U. S. 416, 15 Sup. Ct. 894, 39 L. Ed. 1036; *Penn Mutual Life Ins. Co. v. Austin*, 168 U. S. 685, 697, 18 Sup. Ct. 223, 42 L.

Ed. 626; *Gildersleeve v. N. M. M. Co.*, 161 U. S. 573, 16 Sup. Ct. 663, 40 L. Ed. 812; *Gill v. U. S.*, 160 U. S. 426, 16 Sup. Ct. 322, 40 L. Ed. 480.

In my judgment it would be inequitable to permit an interference with defendant in its business on the ground of alleged infringement of this Dixon patent after a delay of over 10 years in bringing suit during all of which time without protest it was making and selling the devices now alleged to infringe, especially in view of the narrow character of the Dixon claim, its doubtful validity, and the great doubt that infringement has been committed. This delay would seem to be an admission either that the Dixon patent is invalid in view of the prior art or that defendant does not infringe.

There will be a decree dismissing the bill, with costs.

SMITH & HEMENWAY CO. v. E. C. STEARNS & CO.

(Circuit Court, N. D. New York. March 30, 1906.)

No. 7,127.

PATENTS—INFRINGEMENT—MITER-BOX.

The Seavey patent, No. 622,190, for a saw-guide for sawing material for forming miter-joints, if conceded validity is not in any sense a pioneer patent, but is merely for an improvement in details of construction of the miter-boxes of the prior art, and is limited by the action of the Patent Office to the precise combination shown and described, without any range of equivalents, and the patentee having expressly limited himself to a device with the "two-part slotted standard hinged to the bed outside of the line of the inner face of the bed" the patent is not infringed by the device of the Potter patent, No. 867,927, in which the hinge is located inside of the inner face of the bed, although in all other respects such device is a substantial copy of that of the patent.

In Equity. Suit to restrain alleged infringement of United States letters patent, No. 622,190, issued March 28, 1899, to Thompson and others, as assignee of Charles O. Seavey, for "saw-guide for sawing material for forming miter-joints."

Robinson, Martin & Jones, for complainant.

Alfred Wilkinson, for defendant.

RAY, District Judge. The patent in suit has but one claim, which reads as follows:

"In a saw-guide for sawing material to form miter-joints, the combination of a bed or frame adapted to fit the edge of the material to be sawed, a two-part slotted standard hinged to the bed outside of the line of the inner face of the bed, the parts of said standard being free above the lowest line of movement allowed to the saw and joined together below said line, each part being provided with a laterally-extending plate or frame, said plates being wholly separated from each other throughout, substantially as described."

The patentee says that his "invention has relation to devices for guiding or controlling the position or line of action of a hand saw in sawing up stock in order to fit the abutting ends to form neat close

miter-joints, such as are desirable if not essential in the inside finishing of houses. By my present invention I produce a device which can be applied to the stock to be sawed by merely placing it thereon, and which may be readily adjusted so as to secure an exact cut at any predeterminate angle. My device is, moreover, durable and can be compactly folded, so as to occupy but little room in a carpenter's tool chest or other place where it may be kept." He then says in the specifications, "to the foregoing ends my invention consists of (1) a saw-guide for aiding in cutting stock at any required angle embodying in its construction, a, an angular base or bed adapted to be placed upon the stock to be sawed, and, b, a guide proper for the saw, c, pivoted or hinged upon the end of the bed, d, the said guide being provided at one end with a segmental or curved arm, which, e, extends through a slot in a standard or projection connected with the bed, in which slot the arm is adapted, f, to be clamped so as to hold the saw-guide in fixed position at any angle to which it may be adjusted." This is an old combination of old elements, and produces no new result whatever, and no element performs any new function. It is in fact what is known as a "miter-box." In this claim the patentee says that the bed or frame is adapted to fit the edge of the material to be sawed. One part is turned over at a right angle with the other part so that the one part rests against the face and the other part on the top of the material to be sawed. The next element is a two-part slotted standard and it is hinged to this bed outside of the line of the inner face thereof. These two parts are free above the lowest line of movement allowed to the saw and joined together below said line. By this is meant that the slot between the two parts which receives the saw is open and free down as far as the saw is allowed to operate or is required to operate so that it cuts down through the lumber being sawed without coming in contact with the metal parts or any other obstruction. Each part of this two-part standard is provided with a laterally-extending plate or frame, and these are wholly separated from each other. These plates are side by side and embrace or hold the saw. We have three elements in this claim: (1) "Bed or frame"; (2) "two-part slotted standard"; (3) "laterally-extending plate or frame," one on each part of the standard. Aside from immaterial changes of form, which perhaps make a lighter and even better device, this combination does not differ from the prior art in construction, arrangement, operation, or result except in the single particular that the two-part slotted standard is "hinged to the bed outside of the line of the inner face of the bed."

The file wrapper is in evidence, and shows that the application as originally filed contained five claims, all of which were rejected on references as follows:

"Claim 1 is met in patents: No. 405,210, Goulding, June 11, 1889. No. 108,296, Rossecrans, Oct. 11, 1870. No. 418,177, Goulding, Dec. 31, 1889. No. 548,104, Westfall, Oct. 15, 1895. No. 295,920, Hipolito, April 1, 1884. No. 257,041, Meyers, April 25, 1882. No. 375,187, Nixon, Dec. 20, 1887. (All in mitering saw.) Claims 2 and 4 present nothing of invention over Hipolito, Meyers, and Rossecrans. Claim 3 presents nothing of invention over Hipolito, Meyers, and Goulding. Claim 5 is met in Rossecrans, Meyers, Goulding, and Westfall. The claims are therefore rejected."

Those five claims read as follows:

"1. A saw-guide for sawing material to form miter-joints consisting of an angular bed-plate, a standard hinged to one end of said bed-plate and provided with saw-guide plates extending therefrom, and means for clamping and holding the said guide-plates in any position to which they may be adjusted with reference to the bed-plate.

"2. A saw-guide for sawing material to form miter-joints consisting of a bed-plate adapted to be placed and maintained in position on the material to be operated upon, a standard hinged to one end of said bed-plate and provided with saw-guide plates extending therefrom, as described, a slotted projection on the bed-plate, a segmental arm pivoted at one end to one side of one of the saw-guide plates, its free portion extending through the said slot, and a set-screw for clamping the said segmental arm in position in the said slot.

"3. A saw-guide for sawing material to form miter-joints consisting of a bed-plate, a standard composed of two members clamped together at their lower ends and hinged to said bed-plate, saw-guide plates integrally connected with said members of the standard and extending therefrom, as described, and means for clamping the guide-plates and standard in any position to which they may be adjusted with reference to the bed.

"4. In a saw-guide, the combination, with an angle base or bed provided with a slotted stud or projection and a set-screw, of a slotted standard hinged to the base and having saw-guide plates projecting therefrom, and a graduated segmental arm connected at one end to the side of one of the saw-guide plates and projecting through the slot in said stud or projection of the bed-plate, whereby the saw-guide plates may be adjusted with precision at any desired angle with respect to the bed-plate and clamped in said adjusted position.

"5. In a saw-guide, the combination with a bed adapted to be placed on the stock, and adjustable saw-guide plates adapted to swing over the stock to be sawed, and to be held in any position to which they may be adjusted."

They embrace each and every element of the claim substituted and allowed and now in suit aside from "a two-part slotted standard hinged to the bed outside of the line of the inner face of the bed."

"Bed or frame adapted to fit the edge of the material to be sawed" is found in old claims 2 and 5. "A two-part standard" is found in old claim 3, and a "slotted standard" in old claim 4. The standard is hinged to the bed or frame in the first four old claims. In old claim 3 the two parts of the standard are only fastened together at their lower ends, and hence are free and open down to that point. The saw-guide plates extend from the standards in four of the claims. Reference to the patents cited in the Patent Office shows that Seavey limited himself to the slotted standard hinged to the bed outside of the line of the inner face of the bed in order to get his patent—in order to distinguish his claim from the prior art. The bed or frame of this device, the horizontal part thereof being at right angles with the upright part, may be of wood or metal, and it holds at one end the saw-guide proper, which is hinged or pivoted thereto so as to swing to the right and left. This two-part slotted standard which carries the said laterally extending frame for holding and guiding the saw is pivoted to the bed at one end just below the horizontal part and also lower down, but the lower hinge or pivot serves no purpose except to give strength; that is, hold the standard more truly and rigidly in position. The hinges or pivots are attached to one part of the standard only, and hence if the standard is pivoted to the bed at its right-hand end the other part of the standard is further to the

right than are the hinges or pivots which do not interfere with or obstruct the slot between the two parts of the standard. The two parts of this standard are clamped—fastened together—at their lower ends, and hence from that point there is a free opening upward for the saw blade. The laterally-extending plates or frames extend in the same direction at right angles to the standard over the horizontal part of the bed, one for each part, and fit closer together than the parts of the standard so as to maintain the saw blade in its perpendicular position, each pressing slightly against it but not interfering with its movement. We now have the swinging arms of the saw holder so pivoted as to swing within a limit at any desired angle to the bed, and hence the saw placed in the holder will swing at any desired angle to the piece to be cut or sawed. As these pivots or hinges are below the horizontal part of the bed, it is necessary, in order to have an operative device, to pivot or hinge the two-part slotted standard "outside the line of the inner face of the bed." Otherwise the hinges or pivots would come against the face of the timber to be cut and and no true cut at a desired angle could be made. When the angle of the cut is determined the holding blades are swung to the right or to the left to that angle, which is indicated on a gauge or segmental or curved arm extending through a slot in an upward projection of the bed, and which segmental arm may be clamped and held by means of a screw at the desired point. As the two parts of the standard extend lower down than the timber to be sawed, as a rule, although not necessarily so, a pin of wood is inserted in the lower end of the slot for the teeth of the saw to strike upon after cutting through that operated upon. This saw-guide is constructed for small timbers usually, but it could be enlarged and the standards extended downwardly indefinitely but this would serve no useful purpose as the standards are not saw-guides but supports for the saw-guides or laterally extending arms, and one of them is also utilized for the pivoted connection.

The defendant's device is, substantially, a Chinese copy of complainant's, except that one of its laterally extending plates or frames, forming a part of the two-part standard, has a horizontal flange and projection with a socket to receive a vertical pivot pin, forming a part of the bed at one end, and on this pin the saw-guide proper is pivoted to the bed. Defendant's device has but one hinge or pivot, and this is located not outside but inside the inner face of the bed, and as a result the defendant's two-part slotted standard is hinged to the bed inside the line of the inner face of the bed. The purpose, mode of operation, and result attained by the two devices are precisely the same. But each party has a patent for its device. Complainant proceeds under the said Seavey patent; the defendant under a patent to one William M. Potter, assignor to defendant company, dated October 8, 1907, application filed April 27, 1905, No. 867,927, for "miter-box." The claim of that patent reads as follows:

"In a folding miter-box, the combination with the base composed of a face-plate and integral top-plate arranged at a right angle to the face-plate, whereby the base fits a square edge of a round bearing pin on the upper surface of the top-plate near one end and arranged within the plane of the face-plate, a clamping sleeve fitted to said pin and adapted to turn thereon,

means to clamp said sleeve on the pin in fixed position, a downwardly depending inner shank and an inner jaw transversely arranged on the upper end of the shank, said jaw and shank being integral with the sleeve, a corresponding outer shank and jaw, said outer shank being secured to said inner shank at their lower ends, by two screws, and said shanks having correspondingly flaring outer ends and flat, vertically arranged faces arranged parallel and close together, an integral platform on the inner face of the sleeve arranged parallel to the top plate, a segmental plate on said platform having a notched inner edge and indicating numerals on its upper surface, a spring latch on the top plate to engage with said notches, a supporting plate of greater width, thickness, and length than the top-plate arranged parallel thereto on the inner face of the face-plate, means to secure said supporting plate to the inner face of the face-plate at adjustable distances from the top-plate, and a bench clamp secured on said supporting plate, substantially as described and shown."

It is seen that this device, or miter-box, has the "bed or frame" of Seavey, called "the base"; the "two-part slotted standard" of Seavey, called "a downwardly depending inner shank and an inner jaw transversely arranged on the upper end of the shank, * * * a corresponding outer shank and jaw, said outer shank being secured to said inner shank at their lower ends by two screws," etc., and also the "holding arms or plates" of Seavey, which in Potter are called "inner jaw" and "outer jaw," being the jaws aforesaid, the shanks—really the jaws of the shanks—having flat vertically arranged faces, arranged parallel and close together. These jaws hold and guide the saw. Different names are given by the respective patentees to the same thing performing the same office or function in the combinations. Potter has added in the language of the claim a description of some details, old in the art, which Seavey has, but does not mention in his claim, as, for instance, the "segmental arm 1, the free part of which passes through a slot, m, formed in an upper projection, n, from the base, a, and tapped into the upper end of the said projection is a set screw, o, adapted to be turned down on the segmental arm and hold it in any position to which it may be adjusted or moved in the slot, m," etc., is fully described by Seavey in his specifications and shown in his drawings, but is not mentioned in his claim; while Potter in his claim describes that part of his device as follows:

"A segmental plate on said platform having a notched inner edge and indicating numerals on its upper surface, a spring latch on the top-plate to engage with said notches, a supporting plate of greater width, thickness, and length than the top-plate arranged parallel thereto on the inner face of the face-plate," etc.

The "round bearing pin" of Potter's device is a pivot pin fixed and inserted in the end of the horizontal part of his base and is located within the plane of the face-plate. This pin enters the hole in the clamping sleeve, so called, which is a projection on the inner jaw, and transversely arranged on the upper end of the shank. In this way and by this means the shanks and jaws which carry and clamp the saw blade are pivoted to the bed. This clamping sleeve has a thumb screw, means for tightening it on the pivot pin. It is a different mode of pivoting the two members of this miter-box together. But both methods are old and well known. The swinging movement of the part that holds and guides the saw and determines the angle of the cut is precisely the same in both combinations. One member

of the pivots or hinges of the Seavey device is an integral part of the inner part of the two-part standard, while the other is an integral part of the perpendicular face of the bed; while in the Potter patent one member of the pivot or hinge is an integral part of the inner part of his two-part standard, and the other member is an integral part of both the perpendicular and horizontal parts of the bed. In both devices a third member, or pin, is the pivot on which the true saw holder turns. As before stated the only substantial difference in the two devices is the location of the pivot or hinge.

Turning to the prior art, we have the Goulding patent, No. 418,177, dated December 31, 1889, which has a bed or frame adapted to be placed upon the material to be cut with an elevated part at one end having a pivot pin or "round bearing pin," on which the saw-guide proper is pivoted to the bed or frame, said pin being located just inside the line of the inner face of the bed. The saw-guide proper consists of a frame extending upward from the pivot point on which it turns, and by means of a set screw binding against the pivot pin it may be set and held at any desired angle. The saw is inserted at the end or from below, and is held in position at the predeterminate angle while the sawing operation is going on by two two-part slotted standards forming a part of such frame, so constructed that each part presses slightly against the saw on opposite sides thereof, of course. One part has an extension containing the hole or "clamping sleeve" for the pivot or "round bearing pin." The defendant's device (Potter) is a copy of the Seavey and Goulding devices. Goulding does not have the segmental plate with numerals indicating the angle as does Seavey and Potter, but this was old in the art, and is shown in Meyers, No. 257,041, dated April 25, 1882, Rossecrans, No. 108,296, dated October 11, 1870, and Blissfield, No. 81,782, dated Sept. 1, 1868. He has, however, a substitute, as "the lug of the bed plate is provided with angle holes which register with a pin in the hub of the frame." While I fail, in view of the prior art, to find in either device any new element, or any new combination of old elements producing a new or different result or a better result, or a new mode of operation, or an improved mode of operation, and am of the opinion that neither Seavey nor Potter disclose patentable novelty, and that both patents are void, the case may be disposed of on the ground that Seavey was a mere improver, in no sense a pioneer, is limited by the action of the Patent Office to the precise combination shown and described by him, and has expressly limited himself to a device with the "two-part slotted standard hinged to the bed outside of the line of the inner face of the bed," and is not entitled to any range of equivalents. This combination defendant does not make, use, or sell. Therefore he does not infringe. He so differentiates his device in many respects that infringement is not made out. If I could find any conception amounting to patentable invention and means for carrying it into effect in the Seavey patent outside of the mere location of the pivots appropriated by the defendant I should sustain the patent, and hold that infringement is made out. The appropriation by defendant of the Seavey construction is plain and palpable. For lightness and convenience of handling and operation it is an improvement on the prior art, but

ordinary mechanical skill was and is competent to accomplish all that Seavey did and all that Potter does.

The complainant insists that the true reading and construction of the Seavey claim is that the two-part slotted standard is hinged to the bed so as to swing outside of the line of the inner face of such bed, and that the claim does not refer to the location of the hinges or pivots themselves, and that while Potter has located his hinge or pivot inside that line he thereby swings his two-part slotted standard outside the line of the inner face of the bed and has the equivalent of Seavey and the same mode of operation in that regard. If that construction can be given to Seavey's claim—and he discloses patentable invention—then the contention is true, and defendant infringes. But Seavey framed his claim and selected his words. His language is "a two-part slotted standard hinged to the bed outside of the line of the inner face of the bed," not a "two-part slotted standard hinged to the bed" so as to, or in such a manner as to swing or move "outside of the line of the inner face of the bed," nor, a two-part slotted standard outside the line of the inner face of the bed and hinged to said bed. These words which complainant would have read into the claim, in view of what transpired in the Patent Office and of the hinging or pivoting of the saw-guide of the Goulding patent whose standards swing outside the line of the inner face of the bed, are important, and to my mind would materially change the reading of the Seavey claim. The specifications throw little light on this subject, but the drawings show the location of a pivot at K, near the lowest point of the bed and outside the face thereof. The specifications say:

"The standard and connecting saw holding and guiding plates are hinged to the base 'a,' as at 'k,' so that the guide plates may be swung around at any angle with respect to the bed plate as indicated. * * * It will be noticed that the two-part slotted post, to which the laterally-extending plates or guides 'd' are secured, is located outside of the plane of the inner face of the angle plate or bed 'a,' which line coincides with the outer edge of the material to be sawed."

The rejected claims called for this two-part slotted standard or post pivoted or hinged to the post, and it was only when the language was changed to its present form—"hinged to the bed outside of the line of the inner face"—that the claim was allowed. I think the claim must be construed to mean that the standard is actually hinged outside the line of the inner face, and not that it is hinged to swing outside, or hinged in such a manner that the post or standard will hang or be outside. If this be not so then there is no difference between the hinging of Seavey's device and that of Goulding. Goulding was cited against the original claims presented, and we must assume the change of language as to hinging was made intentionally and understandingly. Reverse the saw holder of Goulding, take off one of his standards or move it back to the point of pivoting, elevate the standards slightly, and we have in effect and substance both Seavey and Potter. Especially would this be true if we add the segmental plate of Potter and the segmental arm of Seavey which ordinary mechanical skill is competent to do, and which had been successfully done in the prior art. In short, Seavey and Potter as stated are mere improvers, and they have added no new element in their structures which

performs any new function or modifies or changes the functions or results of the old combinations. They have changed the details of construction. They do just what the prior art did, viz., furnish an angle plate bed, a saw-guide pivoted thereto so it may be swung to any desired angle above the timber to be sawed and held in position during the sawing operation.

In *Loom Co. v. Higgins*, 105 U. S. 591, 26 L. Ed. 1177, it is laid down that to constitute invention a new combination of old elements must produce a new and a beneficial result, not attained before; that both novelty and utility must characterize the subject of a valid patent, but that "even these are not enough for we must have invention. The new or improved thing must be the product of some exercise of the mental faculties—the result of a mental conception." *Pearce v. Mulford*, 102 U. S. 112, 26 L. Ed. 93; *Atlantic Works v. Brady*, 107 U. S. 199, 2 Sup. Ct. 225, 27 L. Ed. 438; *Burt v. Ivory*, 133 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647.

In view of the file wrapper, the prior art, and the wording of the claim the court cannot rewrite the claim or insert words not found therein to make it conform to what we may suppose the patentee intended. Said the Circuit Court of Appeals, Second Circuit, in *Universal Brush Co. v. Sonn*, 154 Fed. 665, 668, 669, 83 C. C. A. 425:

"We are asked to reconstruct the claim by substituting the word 'face' for the word 'contracted' and adding to the claim the following: 'Said face aperture being sufficiently narrow or contracted to retain said composition.' Whether such a claim, if originally inserted in a patent describing a metal brush back, would disclose invention and an operative method of construction we are not called upon to decide; it is enough that the patentee did not so word the claim and it is beyond the province of the court to rewrite it. In *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344, Mr. Justice Bradley, at page 278 of 95 U. S., page 346 of 24 L. Ed., says: 'They (the patentees) cannot expect the courts to wade through the history of the art, and spell out what they might have claimed, but have not claimed. * * * But the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the Patent Office. * * * As patents are procured ex parte, the public is not bound by them, but the patentees are. And the latter cannot show that their invention is broader than the terms of their claim, or, if broader, they must be held to have surrendered the surplus to the public.' See, also, cases cited in *National Bunching Machine Co. v. Williams* (C. C.) 44 Fed. 190, 194, 12 L. R. A. 107."

That the complainant is not entitled to any range of equivalents, see *Computing Scale Co. v. Automatic Scale Co.*, 204 U. S. 609, 617, 621, 27 Sup. Ct. 307, 51 L. Ed. 645; *Cimiotti U. Co. v. American F. R. Co.*, 198 U. S. 399, 406, 410, 25 Sup. Ct. 697, 49 L. Ed. 1100; *U. B. Co. v. Sonn*, 154 Fed. 665, 83 C. C. A. 422.

There will be a decree dismissing the bill of complaint, with costs.

MILLER v. WHITNEY GLASS WORKS.

(Circuit Court. D. New Jersey. April 6, 1908.)

PATENTS—SUIT FOR INFRINGEMENT—ESTOPPEL.

Defendant purchased from complainant and his associates in business four machines, manufactured by them and designed by complainant. Before doing so it asked for a guaranty that the machines were not infringements of any patent, and in reply received a letter from the makers, writ-

ten by one of complainant's associates in the business, assuring it that they were constructed entirely on the principles covered by certain expired patents, and that there was no danger that they infringed other patents. After receiving the machines, defendant constructed and used another substantially like them. After the sale was made, and three of the machines had been delivered and installed, complainant applied for and subsequently obtained a patent thereon. *Held*, that complainant was not entitled to maintain a suit in equity for infringement on account of the use by defendant of the machine it constructed, at least before notice to defendant of the infringement, nor without proof that it was used after such notice.

In Equity. Suit for infringement of patent. On final hearing.

S. D. Oliphant, Jr., and George M. Finckel, for complainant.

Vroom, Dickinson & Scammell and Francis T. Chambers, for defendant.

CROSS, District Judge. The patent involved in this suit is No. 787,050, for a glass-molding machine, which was issued to the complainant April 11, 1905. The bill of complaint is in the usual form and calls for an answer without oath. Answer and replication were thereupon filed, and in due course the plaintiff took testimony in support of his bill. The defendant, however, submitted no proofs, and the cause is now before the court upon final hearing.

Upon the facts disclosed, I think that the complainant is not entitled to relief. In August, 1903, the defendant corresponded with the manufacturers of the machine, which was subsequently the subject of the patent in suit, in respect of the purchase of one or more of them, and in the course of that correspondence received of one R. J. Beatty a letter of which the following is a copy:

"Federal Glass Company, Columbus, Ohio.

"August 19th, /03.

"Whitney Glass Works, Glassboro, N. J.—Gentlemen: Replying to yours of 17th would say that there is no occasion for any guaranty in regard to the use of the Miller machines. They are constructed entirely on the principles covered by the Arbugast, Windmill and Rylands patents, which have all expired and do not in any way conflict with any other patents. The Atlas Glass Co. spent over \$40,000.00 in finding out that these patents were dead issues, and the courts have settled this issue; the case having gone through the Court of Appeals and then to the Supreme Court of the U. S., all three concurring. It seems to me that their decisions are all the guaranty that is needed. Miller has combined these three patents in the simplest and most durable type of a machine, which is, I feel certain, the best that has been gotten out. If you see the machine in operation you will like it.

"Yrs. &c.

[Signed] R. J. Beatty."

The complainant admits that Beatty, the writer of the above letter, was associated with him when he first began to manufacture machines like that disclosed in the patent. After the receipt of the letter, the complainant and his associates sold four machines to the defendant, and to the Gayner Glass Works of Salem, N. J., which corporations, according to the testimony, were one and the same. The complainant testifies that these machines were installed in the plants of said companies as follows: The first on January 2, 1904, at the Gayner Glass Works; the second on April 20, 1904, at the same place; the third January 2, 1905, at the same place; and the fourth at the works of

the defendant company at Glassboro, November 12, 1904. It appears, therefore, that four machines were sold to the defendant and its associate company prior to the issue of the patent in suit, and that of these three were sold prior to December 6, 1904, the date when the application for the patent was filed. Complainant testified that he did not authorize the writing of the above-mentioned letter, and did not know that it had been written; but, as above stated, he admitted that the person who signed it was associated with him in the manufacture of the machines, as he evidently was in their sale.

It is admitted that the defendant made and used in its plant one machine substantially like those which it had bought of the complainant and his associate manufacturers. That this machine was manufactured and used by the defendant, is, however, clearly attributable, in my judgment, to the misleading statements contained in the above letter. It would appear therefrom that the defendant thought the machines it was proposing to buy might be patented, and accordingly sought protection in their use, and in reply to its inquiry upon that point it was informed that the machines were constructed entirely upon the principles of expired patents and that therefore no guaranty was necessary. There is no evidence whatever to show that the defendant then knew, or was at any time informed, of any pending or intended application for a patent by the complainant; nor is it pretended that the machines sold were marked, either "Patent applied for" or otherwise, in such manner as to put the defendant upon inquiry. The defendant was completely lulled to sleep by the complainant, through his associate and agent, and the complainant had no cause of complaint, at least until after he had given actual notice to the defendant of his patent; and it is not pretended that any such notice was given until about the middle of August, 1905. When such notice was received by the defendant, it replied, admitting in effect that it had made and used a machine like the complainant's without knowing that it was patented, and asking what royalty the complainant demanded for the machine. The evidence discloses nothing of the relationship of the parties between the time of this reply and the commencement of this suit.

The complainant is in the position of having led the defendant to believe that the machines which it purchased were not only not subject to the claims of any live patents, but, on the contrary, that in their manufacture he had availed himself solely of principles disclosed in expired patents. The defendant relied upon these representations when it purchased the machines, and when subsequently for its own use it constructed a machine like them. Under the circumstances the complainant will not, as to this defendant, be permitted to stand upon the constructive notice which followed the issue of his patent. This defendant is entitled to more. If the information which the complainant gave had been true, the defendant was not only amply protected in the use of the machines it had purchased, but, in the absence of contract, had a right to copy them when and as often as it pleased. To base the decision of this case merely upon constructive notice by the defendant arising upon issue of the complainant's patent would work a great wrong. The defendant was placed in a position by the com-

plainant where it was at least entitled to actual notice of his patent before it could be justly treated as an infringer thereof, and, indeed, as to this machine, it is an open question whether the defendant ought to be enjoined from using it, even after actual notice of the complainant's patent, or, in other words, whether the complainant, by his own conduct, has not equitably estopped himself from asking to have the use of this machine enjoined. This question, however, need not now be decided, since there is no evidence in the case of use or threat to use the machine after actual notice to the defendant, and certainly its mere possession under the circumstances cannot be considered a threat to use.

The answer denies that the defendant since the receipt of said notice has "at all or in any way used the said alleged infringing machine, nor has it sold the same or made any disposition thereof, but that since the receipt of said notice it has held the machine in its possession without any use thereof, of any kind or in any manner"; and the complainant has shown nothing to the contrary. The burden of proof was clearly upon the complainant to show that the defendant had violated its rights after notice, and the mere fact that the machine, built under the circumstances it was, still remains in its possession, in the absence of clear proof of use or threat to use, does not warrant this court in awarding the relief prayed for in the bill of complaint.

The bill will be dismissed, with costs.

SUPERIOR DRILL CO. et al. v. LA CROSSE PLOW CO.

VAN BRUNT v. SAME.

(Circuit Court, W. D. Wisconsin. February 6, 1908.)

1. PATENTS—INFRINGEMENT—GRAIN DRILLS.

The Packham patent, No. 557,868, for an improvement in grain drills, held not anticipated, and to disclose patentable invention, but, as construed by the Circuit Court of Appeals in a prior suit, not infringed.

2. SAME.

The Van Brunt patent, No. 659,881, for an improvement in grain drills, discloses invention and is valid, but is for a highly specialized combination of old elements in a fully developed art, and is limited by the prior art to the specific combination shown. As so construed, it is not infringed by the machine of the Davis patents, Nos. 830,644 and 830,645.

In Equity. Suits for infringement of letters patent, No. 557,868, granted to F. R. Packham April 7, 1896, and No. 659,881, granted to W. A. Van Brunt October 16, 1900, both for improvements in grain drills. On final hearing.

Staley & Bowman, for plaintiffs.

Fred Gerlach, for defendants.

SANBORN, District Judge. Suits for infringement. For convenience they were heard together, and may be conveniently decided together. The patents in question relate to improvements in seeding

and planting machines, and the use of revolving disks to open furrows for the deposit of the seed, the keeping open of the furrow until the seed is effectively scattered and lodged in the furrow, and the effective covering of the seed. In other words, they relate to improvements in furrow openers, seed-delivery conduits, and furrow closers; and, incidentally, to scrapers, or appliances to prevent clogging, and modifications of the scrapers and conduits for use in heavy and sticky soils, especially in the Northwest where the seeding must be done as soon as the frost leaves the ground, and while it is wet and sticky, and covered with straw and trash. The art of seeding machines has reached a highly developed stage. Many machines involving separate patents are made and sold so nearly alike that a superficial observer would pronounce some of these machines identical. Defendant's machine appears to be quite similar to Van Brunt's, but both of them appear quite distinct, perhaps equally so, from a casual inspection, to the Superior Company's device, which is the Packham patent of 1896, No. 557,868. But when the Van Brunt and La Crosse devices are critically examined, by one having in mind the prior art, and the proceedings in the Patent Office attending the issue of the patents, many differences are discerned. The development of the art has become highly specialized. For many years little opportunity has existed for any broad exercise of the inventive faculty in furrow openers, but during this period very many important details of improvement have been discovered and applied, and secured by patents.

The Packham patent, owned by the Superior Company, was issued April 7, 1896, the Van Brunt patent October 16, 1900, No. 659,881, and defendant's patent was issued to Frank E. Davis September 11, 1906, Nos. 830,644 and 830,645. The Packham patent was sustained by the United States Court of Appeals of the Sixth Circuit in 1902. *Dowagiac Mfg. Co. v. Superior Drill Co.*, 115 Fed. 890, 53 C. C. A. 36. A quotation from that opinion will show the nature of the invention, the conditions existing in 1896, and the ground on which the patent was sustained. The court say:

"The general composition of grain drills and their mode of operation being well known, it will be necessary to particularly describe only those parts of a drill which are immediately involved in the operation of opening the furrow, dropping and scattering the seed in the furrow, and covering the seed with the soil. As might be expected from the universal use of these implements, which have become so indispensable in the production of grain crops, a great many inventions and a long list of patents had already developed and spread the knowledge of the art of their construction, and their use, at the time of Packham's invention. In one of the leading forms of these the furrow was opened by a device in the shape of a very narrow double-moldboard plow, which, penetrating the ground at an acute angle, opened and slightly raised the soil on either side, whereupon the seed was dropped through a tube behind and within the wings of the opener, while the soil was thus lifted, and immediately upon the passing forward of the opener out of the way the soil dropped back upon the seed. In another the furrow was made by a wedge-shaped device, called a 'shoe' and somewhat in the form of a sharp V, both in its horizontal and its vertical shape, the point dividing the soil which was pressed sidewise by the wings, and, the lower edge of the shoe being also an angle and the wings flaring outward, the earth was in consequence pressed downward while it was being pressed sidewise, thus leaving the furrow in a V shape. The seed was dropped in the furrow immediately behind the shoe,

and the sides of the furrow being impacted it was necessary to employ a covering device, as a short chain carrying rings dragging behind the shoe or blades which were set so as to scrape the earth back into the drill, or a press-wheel which would crush down upon the seed the upper part of the sides of the furrow. In another, instead of a shoe, the same work was done by using a roller in the form of two concave discs having their concave sides facing each other, and their edges united in one, the result being that, as the roller moved on its journal it formed and left the V-shaped furrow of the shoe-drill. Some covering apparatus was necessary as in the case of the shoe-drill and for the same reason.

"In recent years the disc-harrow has come into general use. As usually constructed the operative part consists of concave discs, located at equal distances upon a shaft having bearings. In use these discs, and, of course, the shafts were set at an angle to the line of the draft, and when the harrow was drawn forward the revolving discs would cut into the ground and scrape up on their concave sides, and partly turn the soil lying in their wake, leaving ridges larger or smaller depending somewhat upon the angle at which the discs were set. Thereupon, invention began of means and methods to utilize this form of harrow for the purposes of a seeding drill, and a considerable number of patents were taken out upon such inventions. The general object sought to be obtained was to devise some subsidiary apparatus, which co-operating with the discs of the harrow would open a furrow, drop the seed evenly upon the bottom thereof, and then properly cover it. Several of these inventions seem blind enough, but others made some approach toward the definite purpose."

The court next proceeds to describe a prior invention of Packham in 1894, in which the seed was dropped from a point opposite the center of the disk and that a difficulty with this construction was that when clods, stubble or trash were met with the seed fell on the land outside the furrow, and then continues:

"So it seemed a desideratum that a construction should be devised whereby the furrow should be kept clear of obstructions and the seed be prevented from spilling upon the land outside the furrow while it was being sown and covered. The purpose of the Packham invention, now in question, was to supply this requirement. It consisted in adding a shield to the former construction extending from the conduit and on the land side thereof, down into the furrow and having its forward edge bent a little inwardly and conformed to the convex surface of the disc, so as to prevent any obstruction from coming into the furrow or in the way of the falling seed. The shield was attached to the frame above in a constantly fixed relation to the disc, and so located along the rear and bottom segment of the disc, but at a little distance therefrom, as to follow in the wake of the disc and just within the furrow made thereby when the machine was in operation, the lower edge of the disc being also bent inwardly to conform to the convexity of the disc and consequently to the land side of the furrow. It is true that the purpose of deflecting the seed, which is dropped against the inside of the shield, is not mentioned in the specification; but in describing its form it is stated that it extends downwardly, 'following substantially the line of the furrow-opening disc,' and in the drawings (see figure 4 above) it is shown to conform to the convex face of the disc, curving inwardly at the bottom. It is seen that the obvious consequence of this is that the seed falling upon the inside of the shield would be deflected against the lower portion of the disc, and in use this is found to be the result. And in *Goshen Sweeper Co. v. Bissell Carpet Sweeper Co.*, 72 Fed. 67, 19 C. C. A. 13, it was held by this court that a patentee is entitled to all the advantages of his invention whether he knew of such advantages or not; and that proposition has been confirmed by our more recent decisions. *Frederick R. Stearns & Co. v. Russell*, 85 Fed. 218, 29 C. C. A. 121, and *Palmer Pneumatic Tire Co. v. Lozier*, 90 Fed. 732, 33 C. C. A. 255, 268. And see the learned opinion of Judge Sanborn in *National Hollow B. B. Co. v. Interchangeable B. B. Co.*, 106 Fed. 693, 709, 45 C. C. A. 544."

Having thus described the invention the court sustains it as producing a new and useful result, and proceeds as follows:

"The proceedings in the Patent Office on Packham's application for the patent in question were put in evidence, and it is claimed that they have the effect to restrict his claims. From the contents of the file wrapper it appears that upon the filing of the application the first three claims were objected to upon references which seem to import that it was understood that the shield had something to do with opening the furrow. Thereupon the first claim was withdrawn, and a new one substituted, the formation of the shield being explained by letter, the applicant saying therein: 'By this arrangement the shield has absolutely nothing to do with opening the furrow, while in the reference devices this is usually the chief function of the shield.' Thereupon, the Office made the further objection that the first three claims lacked patentable novelty, upon references. To this Packham responded by letter as follows: 'It will be understood that the shield forms no part of the furrow-opener, nor is it in fact a part of the conduit. The conduit ends where the shield commences, and as the shield stands within the angle of the furrow-opening disc, the soil remains in the condition left by the rotation of the disc while the seed is dropped from a point above the furrow, thus ensuring the most efficient planting.' And he amended the claims here involved to the form shown in the patent. Upon this explanation and amendment the patent was issued. The effect of the applicant's renunciations was to make it free from doubt as to whether his shield should assist in making the furrow and whether it should form a part of the conduit. It is not now claimed that it performs either of those functions. If it were so claimed the proceedings would constitute an estoppel. *Thomas v. Rocker Spring Co.*, 77 Fed. 420. 23 C. C. A. 211. On the contrary what is now claimed is in full accord with the applicant's disclaimer."

The prior art is examined by the court, and distinguished for the reason that it does not disclose the shield of the Packham device, designed to travel within the furrow and keep it clear from rubbish; and which also serves, on its opposite side, to deflect the seed against the disk, and keep it within the furrow so kept open to receive it by the shield. The court then says:

"The result is that the patent must be held valid. It was not a primary invention, but we think it brought the organization of disc furrow-opening and seed-dropping and covering devices to a much higher degree of perfection than had previously been attained. This was done by locating in the right place and in the right manner a shield or guard constructed in the right form to accomplish a better and more useful result. The invention constituted a distinct and valuable improvement, and was patentable for what the claims here involved fairly import, and the patentee (and his assigns) are entitled to claim as equivalent all such combinations of the same, or similar parts, organized in a similar manner and operating to perform a like mechanical result."

I am satisfied with the reasoning of this case, and conclude that the Packham patent is valid.

The precise form of the La Crosse patent is shown further on. It contains no shield to keep the furrow open or deflect the seed. Distinguished from the Packham invention, it contains a seed conduit or boot of the "closed delivery" type, while the Packham has an open delivery. In the former the seed is carried clear down into the furrow by a continuous conduit located just in the rear of the disk, and there deposited. In the Packham device, using his own words, "the shield forms no part of the furrow-opener, nor is it in fact a part of the conduit," but is designed to hold the soil in the position left by the

disk until the seed can be deposited. In the La Crosse device the only shield is the grain conduit itself. It is part of the conduit. There is no shield "conforming to the shape of the side of the disk, nor any shield standing wholly within the angle of the disk, so as to hold the soil in the position left by the disk. There is nothing, in short, in defendant's machine, which is found in the Packham claims, as construed by the Court of Appeals in the case cited.

I conclude that the Packham patent is not infringed, and that the bill of the Superior Company should be dismissed.

As before stated the Van Brunt and La Crosse devices are superficially quite similar, and I have made a careful study of the respective claims, and the art prior to Van Brunt's patent, so as to endeavor to find out just what Van Brunt invented, and how the Patent Office was able to distinguish an award of patent on the Davis or La Crosse device. At the time Van Brunt entered the field, both the "open delivery" and the "closed delivery" types of machines were old. It was also old to employ scrapers for cleaning the disk surfaces. Scraper blades had been attached to seed conduits and to drag-bars, to keep clean both sides, or one side only, of the disk. Seed conduits had also been supported or carried in various ways by the drag-bars, either by attaching the conduit directly to the drag-bar, or sustaining it by a supporting arm. With the prior art in this situation Van Brunt applied for an improvement in grain drills. From the center or journal of the disk, where it is attached to the drag-bar, he extends a curved arm upward and backward and near the concave side of the disk, and from the top of the arm he carries the closed seed conduit, made integral with the arm, down on the opposite or concave side of the disk, and close to it. To the toe of the conduit he attaches a narrow scraper, lying against the disk, and up to its center. Described in another way, he combines a boot, a projecting arm, a bearing for the disk at the end of the arm, a disk placed between boot and arm, and one scraper attached to the arm on one side and another attached to the toe of the boot on the other side. He successfully combines specific, well-known, and useful things into a particular relation to each other, by designing a yoke, composed of an arm and a boot, mounting the disk by a journal or bearing at one end of the yoke, and carrying a scraper from the other end up to the bearing on the opposite side; thus disposing the disk between the arm and boot, and adding a scraper on the convex side, sustained by the arm. It is a specific, highly particularized device for supporting the seed conduit entirely upon the bearing or journal of the disk. It is in one piece (aside from the scrapers), supported wholly by the disk bearing, and has no connection with the drag-bar. In one form of the invention the casting is supported by the bearing on both sides of the disk, and in the other on the arm-side only.

All the Van Brunt claims are for a combination. The first combines (1) a boot; (2) an arm (offset laterally from the boot); (3) a disk mounted at the end of the arm; (4) disposed between arm and boot. The second adds (5) a scraper attached to the arm. The third claims the same elements combined with a concave-convex disk and boot on its convex face, except the opposite scraper, attached to the toe of the

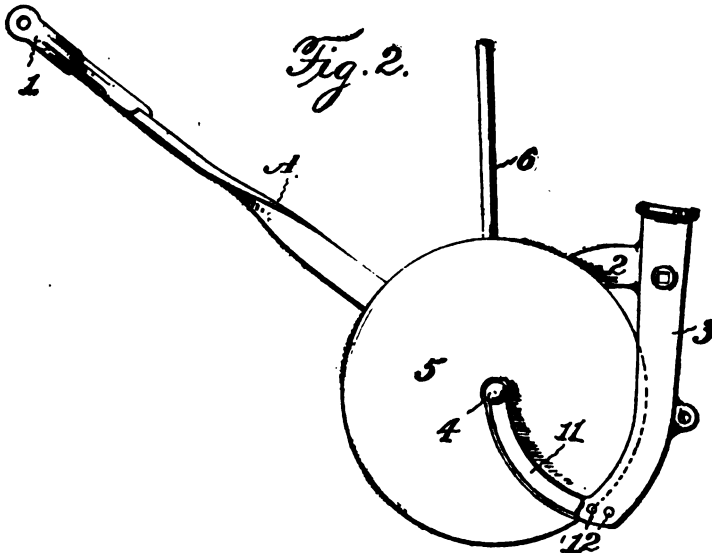
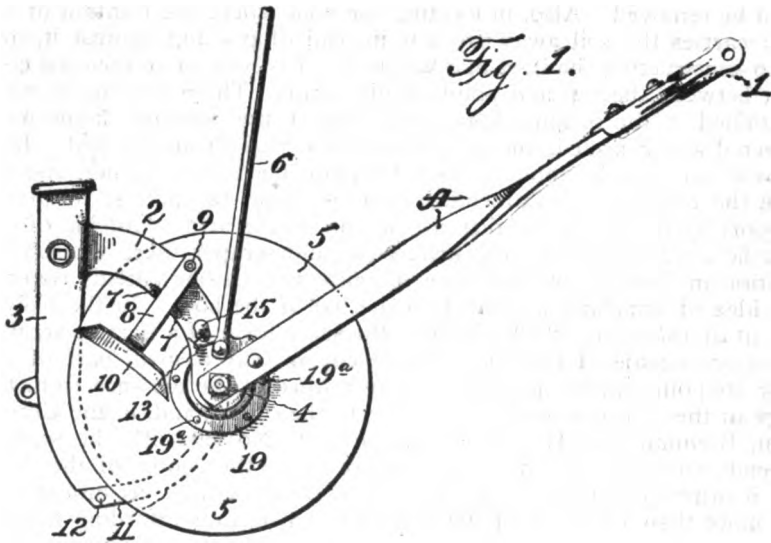
boot, on the convex side. The fourth claims a combination of boot, arm, disk, and bearing at the end of the arm, with the two scrapers. And the fifth claims a combination of boot and disk with the convex face scraper. Claims 6-8 relate to the bearing, and claim 9 was withdrawn. Claim 10 relates to a rear-presswheel, and a spring, to keep it down. The gist of the invention is specified to be in exposing a greater amount than before of the disk surface for agitating the soil, and so arranging the scraper that the boot may be extended to the bottom of the furrow, and all liability of trash gathering on it be removed. Also, in locating the boot where the rotation of the disk carries the soil away from it instead of packing against it, and in so constructing the boot that within itself is formed an inclosed conduit between the top and point of discharge. These statements were contained in the original application, before the original claims were rejected and canceled, and at a time when Van Brunt claimed a boot on one side of a disk and means for supporting it on the other, and before the language was amended so as to claim the precise means of support by mounting the disk at the end of the arm. Outside of the specific combination of disk, arm, boot, and scraper there was no invention in Van Brunt's machine, because two earlier patents covered the idea of attaching a scraper to the toe of the boot. In the Colver patent of 1855, No. 12,895, there is the same form of a narrow scraper hung on the toe of the boot; but it covers only a small part of the disk, its point extending upward only a third of the distance from the edge of the disk towards its center. On the other hand, in the Christman, Brennan, and Homire patent of 1898, No. 602,827, the scraper extends from the toe of the boot clear up to the center of the disk; but it differs considerably from the Van Brunt scraper because it covers more than a quarter of the face of the disk, thus affording a lodging place for soil and debris, which is avoided by Van Brunt by making the scraper narrow like a butcher's knife, leaving most of the disk surface free. But the whole conception of the Van Brunt device is found in these two earlier patents, thus depriving his invention of all real patentable novelty except such as is embodied in his specific combination.

Turning now to the La Crosse device: It has already been shown that it bears a great superficial resemblance to the Van Brunt patent. But when closely examined a sufficient difference appears to distinguish it from the latter. Both are highly specialized combinations in a fully developed art. The fact that a patent was issued upon the latter device is presumptive evidence of its validity, and that the skilled patent officers were able to distinguish it from the Van Brunt device. No interference was declared by the commissioner of patents, but the Van Brunt patent was cited as a reference.

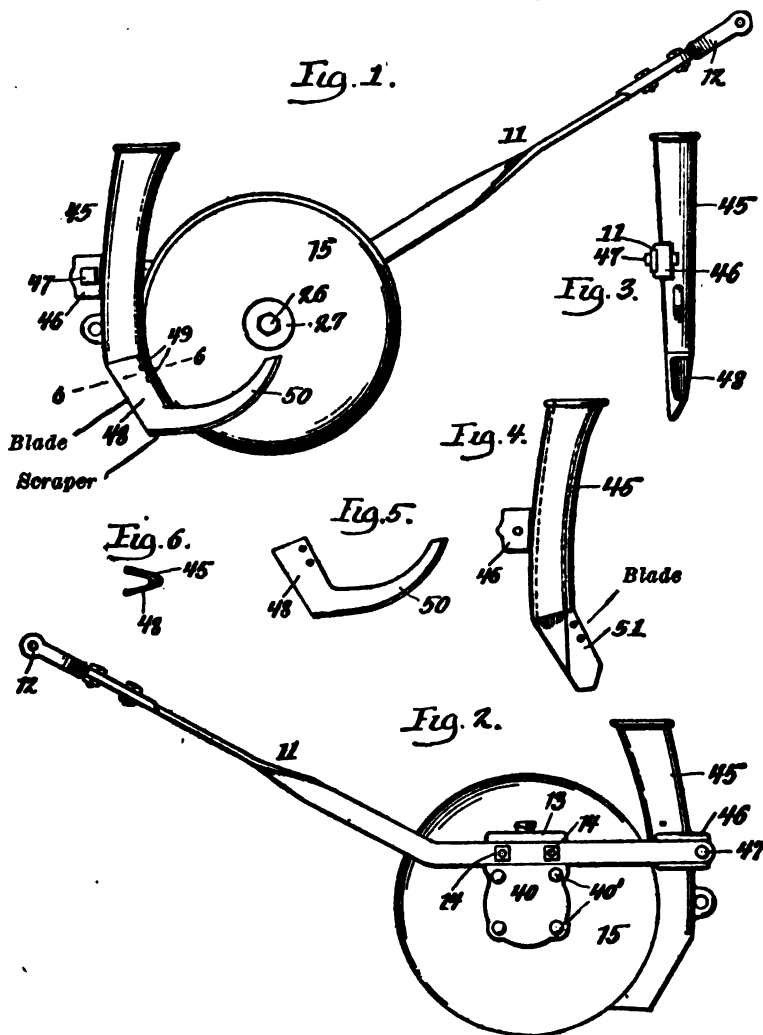
Some of the original claims made by Davis, in his application for the La Crosse patent, conflicted with the fourth claim of the Van Brunt patent. That claim is for a combination of boot, arm, disk, and bearing, with the scraper carried on the boot-toe. Davis at first, in his first four claims, described a combination of a drag-bar with a disk, a boot, and a scouring-blade secured to the boot, also a scouring-blade comprising a scraper. The scouring-blade is described in the specifica-

tions as an extension of the scraper, made of polished steel, easily passing through the furrow and soil, deflecting the soil away from the boot, and effectively preventing it from adhering to it. The Van Brunt scraper and the La Crosse scraper and scouring extension, are shown in the drawings as follows:

Van Brunt Scraper.



La Crosse Scraper and Scouring-Blade.



The scouring-blade also forms part of the outer wall of the boot, and the scraper removes the soil from the disk to be deflected by the scouring-blade away from the boot and the seed.

The examiner rejected these original claims for a combination of drag-bar with the disk, boot, scouring-blade, and scraper, but allowed them to be amended to claim the combination of a drag-bar, disk, boot, scouring-blade, and scraper, and in this form a patent was issued. The

original claims were rejected on the Packham, Van Brunt, Mast, and Hoyt patents.

The practical differences between Van Brunt and La Crosse are that Van Brunt puts the disk between the boot and arm, and La Crosse puts the boot behind the disk. Van Brunt's scraper cuts the soil, etc., off from the revolving disk and deflects it to the land side of the furrow, while La Crosse cuts it off and plows through it by means of the scouring-blade. In one device the soil is deflected wholly by the scraper, and in the other partly by the scraper and partly by that wall of the boot formed by the scouring-blade. Another difference, both in claims and construction, is that Van Brunt supports his arm, boot, and scraper upon the disk bearing, while the La Crosse device is supported wholly from the drag-bar. The distinctions referred to are indeed close, but in view of the state of the art they are sufficient to distinguish the two devices, and relieve the defendant from the charge of infringement. Van Brunt might lawfully follow the conceptions of Colver and Christman in specific combination with other elements, but in so doing he should be limited to the construction he adopted, leaving defendants free to adopt another specific construction embodying the same constructions in a different form.

Van Brunt is entitled to the credit of having designed a practical and efficient improvement, and his patent is valid and useful.

The La Crosse patent secures a similar beneficial result by a different combination and in a different way; and the patent is also valid, and does not infringe.

The bills in both cases should be dismissed.

CLARK v. GEORGE LAWRENCE CO.

(Circuit Court, D. Oregon. April 6, 1908.)

No. 2,788.

1. PATENTS—NOVELTY—BURDEN AND MEASURE OF PROOF.

A patent duly issued is presumptively valid, and one attacking it for want of novelty has the burden of proof; and, if oral evidence is relied on, the proof must be clear, satisfactory, and beyond a reasonable doubt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 35, 36, 40.]

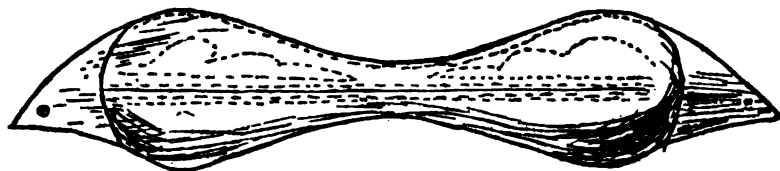
2. SAME—INFRINGEMENT—BUCKING ROLL FOR SADDLE.

The Clark patent, No. 674,757, for a bucking roll for attachment to a saddle, to prevent the rider from being thrown against the front part of the saddle, was not anticipated, and discloses novelty and invention; also held infringed.

In Equity. On final hearing.

The complainant, on May 21, 1901, was granted a patent for an invention described as "a certain new bucking roll to be used on stock or Mexican saddles." In further description the inventor specifies as follows: "My invention relates to bucking rolls attached on a stock or Mexican saddle, as used by stockmen on the range, 'cowboys,' 'rough riders,' and men of like occupation, for giving the rider a better hold and preventing him from be-

ing bumped against the fore part or fork of the saddle while rough riding or breaking wild horses." The roll is best represented by figure 5 of the drawing, thus:



It consists of a base of skirting or sole leather, upon which is sewed or stitched a quilted contrivance made of soft or flexible leather, such as cordovan, calfskin, or the like, forming, when so combined with the base, a receptacle for filling, such as hair or like suitable material, and, when filled or upholstered, completes the form of the roll. As will appear from the figure, it consists of the two protruding or enlarged knobs at either end, and the contrivance so reduced in the center as to require little, if any, upholstering to give it shape. The ends are secured to the saddle by leather strings passing through the first holes, or at the forward buttons of the saddletree, and tied; and the center is tied or laced down to the seat of the saddle. There is much more in detail of the invention, but this description will suffice to elucidate the present controversy.

The defendant has been manufacturing and selling in the market an attachable roll, consisting of two pieces, which is readily constructed by cutting the complainant's contrivance in two at the center and attaching a leather strap extension at the small end of each piece, then attaching each by its larger end on the outside of the saddletree, at the first button, one on one prong of the fork of the saddle, and one on the other, and wrapping the strap around beneath the fork, bringing it together at the same button. For the use and sale of this latter contrivance the complainant complains of an infringement upon his patent.

Coovert & Stapleton, for complainant.
Cake & Cake, for defendant.

WOLVERTON, District Judge (after stating the facts as above). It is not seriously contended that complainant's device is not the result of inventive genius. If it were, I think the contention could not be successfully maintained. True, there has been a process of development relative to the idea of a bucking roll such as the complainant lays claim to as the inventor, yet the idea is the result of inventive faculty, rather than mere mechanical skill. The suggestion of such a contrivance first came by the rider of an unruly or bucking horse laying a blanket, rolled in form, across the front of his saddle, and tying it fast, to assist him in maintaining his seat, and at the same time to protect him from being thrown forward upon the pommel of the saddle. A rude improvement upon this method is referred to in the testimony, where round knobs, in the shape of semispheres, between three and four inches in diameter, were fastened to each prong of the fork of the saddle. This was the idea of a Mexican by the name of H. Salazar, but, so far as the record shows, never came into general use. Another contrivance to which the name of bucking roll came to be attached consisted, in its first stage, of a band running across the front part of the seat of the saddle, being fastened by its ends to the second buttons, and sewed or stitched to the seat over the center. Frequently the seat

of the saddle was quilted, and this roll quilted to correspond. It served merely to make the seat more comfortable and for ornamentation—not to prevent the rider in any way from being thrown forward in the saddle. So, also, it was not uncommon for the roll to be enlarged—that is, increased in width and thickness—to suit the taste of the rider, but not for the especial purpose for which complainant's device was designed. It may be said, therefore, without further elaboration, that complainant's product of a new and improved bucking roll was the result of inventive skill and application.

The two serious questions involved by the controversy are: First, whether complainant's contrivance is void of novelty—that is, whether it has been anticipated by the work or invention of others; and, second, whether the defendant's device is an infringement upon that of complainant. It may be premised that the patent, having been issued to the complainant by the lawfully constituted authority of the general government, and presumably after examination and investigation, creates a presumption of novelty and utility, and, if nothing else were offered, no evidence of pertinency and force to countervail the recitations of the patent, the complainant would naturally be entitled to its full protection. *Haughey v. Meyer* (C. C.) 48 Fed. 679. Further than this, a patent throws the burden upon him who would overthrow or impeach the certified invention for want of novelty; and, whenever an attack is sought to be supported by oral testimony, the adjudications are to the effect that, before it can succeed, "the proof shall be clear, satisfactory, and beyond a reasonable doubt." *The Barbed Wire Patent*, 143 U. S. 275, 284, 12 Sup. Ct. 443, 36 L. Ed. 154. This case cites *Coffin v. Ogden*, 18 Wall. 120, 124, 21 L. Ed. 821, where the distinct doctrine is stated thus:

"The invention or discovery relied upon as a defense must have been complete, and capable of producing the result sought to be accomplished; and this must be shown by the defendant. The burden of proof rests upon him, and every reasonable doubt should be resolved against him. If the thing were embryotic or inchoate, if it rested in speculation or experiment, if the process pursued for its development had failed to reach the point of consummation, it cannot avail to defeat a patent founded upon a discovery or invention which was completed, while in the other case there was only progress, however near that progress may have approximated to the end in view. The law requires, not conjecture, but certainty."

See, also, *Deering v. Winona Harvester Works*, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153.

With these premises in view, we can understandingly advance to a consideration of the claims made by which it is sought to establish anticipation of complainant's patent. The Spencer patent is the first introduced. The invention consists of pieces of wood secured near the front end of each of the two parts of the saddletree. These are made a part of the tree, and are not detachable. The patent states that the pieces "serve to prevent the rider being thrown forward over the saddle and are designed to supersede the ordinary pommel of military saddles." The device never, so far as the record shows, came into practical use, although the patent was issued in 1862. The next to be introduced is the Woodruff patent, issued in 1861. It consists of an arrangement of stops, built in an angular position upon the side

of the saddle, in such a manner as to gather over the legs of the rider and aid him in keeping down upon his seat in resistance to either a lateral movement of the horse or an abrupt check of its speed, having the tendency to throw the rider forward. These stops are also designed for military saddles. Like the Spencer, this device has never come into practical use; nor is it detachable.

In each of these cases the invention was rather an improvement upon a saddletree, not a distinct contrivance within itself, adjustable or not to the tree, as the owner might desire. Both patents answered practically the same purpose, which was to gather over the legs of the rider, as specified in the latter patent, and operate as an aid to keeping the rider in place in the saddle. Both were clumsy affairs, and evidently not well suited for the purpose for which they were designed, or they would not have been discarded in use. Like the idea of the use of a blanket made into a roll and tied across the front part of the saddle, they were perhaps an advance in the state of the art, but were still lacking in the adaptability to make them of practical utility. The bucking roll in question is detachable, and answers to one function only, that of preventing the rider from being thrown forward from his seat in the saddle, and it is manifest that the patents relied upon are not anticipations of the complainant's invention.

A third patent, or that of George H. Meeker, is alluded to as having anticipated the complainant's invention; but I do not find it in the record, so am unable to determine as to its pertinency.

Other alleged anticipation is sought to be shown by oral testimony. Mr. Gerichten, in describing a quilted saddle and roll, testifies that there were some that covered just half of the seat, others went up to the fork, and others extended over the cantle and jockeys—"that is, the quilting, and then they had different style of rolls. Some had a little narrow roll across; others had a roll with big bumps on the side." Witness then testifies in substance that he made the rolls as far back as 1889; that they were detachable at that time, and not sewed into the seat of the saddle; that the base was a solid piece of leather, similar to the complainant's roll; that they had big protruding knobs on them, a good deal larger than those on complainant's roll—not the same shape exactly, not quite as wide; that the center was narrow, containing no filling at all; that they were attached to the saddle, sometimes at the first button, sometimes on the side and the center, or sometimes tied down, sometimes laced down; that he made a model of the roll and saddle, and had it on exposition at the Manufacturers' Fair in Portland in about 1897, perhaps 1898. On cross-examination he testifies that he made up a couple of dozen of the rolls designated by him, while in Prineville, Or., and a like number while in Colfax, Wash., and sold them out to different persons, but that he could not now give the names of any of them. A painting of the saddle on exhibit at the fair was produced and recognized by witness, and introduced in evidence, which shows that the alleged roll thereon is but an extension of the quilted seat, attached on the sides at the second buttons of the saddle, and presents but slight enlargement of the so-called roll where it is asserted the protruding knobs existed.

F. M. Koontz testifies that he made a saddle in May, 1906, at the

request of one Kanty, of Arlington, and a roll in accordance with a description given by him; that it looked something like defendant's roll when on the saddle; that it was not over half as wide, and the knobs at the ends were not so prominent—were about half as big as those on the Clark roll; that he made two of the rolls for Kanty.

T. S. Coffey testifies that while in business in Scio, Or., in 1899, being a saddler, he gave to Mr. Richardson, Clark's traveling salesman, an order for a roll, which was to be narrow in the center and wider at the ends, and very prominent, and was to fasten at the two front buttons of the saddle; that he came into this idea of a roll early in 1899, in talking to another person about it; that they two together figured out a roll something of that description, and that the rolls "that were used then on the saddles were not sufficient for what they were calculated to be." Witness further states that he cut out a pattern for Richardson, and that a couple of rolls were made from it, and forwarded to him by Clark, one of which is produced and offered in evidence. This roll, it may be said, does not comport with the roll of complainant's patent. It lacks height in the protruding knobs, and is made not nearly so small in the center, and, indeed, is only somewhat larger than the quilted ornamental roll hereinbefore described, and which has been in general use.

W. C. Rupert testifies that, while in business with Gabel, in The Dalles, some time in 1895, his firm made a roll, at the request of one Guthrie, which was at first nonadjustable, but was subsequently changed, at the instance of Guthrie, so that it was detachable, but was fastened at the second buttons of the saddle. A careful scrutiny of the description of this roll given by the witness impresses one that it was not in design of such similarity as to take the place of complainant's roll.

G. H. Farley testifies touching the same roll, and describes it in its first form as "just a plain, straight roll, bulged out some," and says that the reconstructed roll was "a good deal the same" as that of complainant. Witness then deposes that many rolls were thereafter made like the Guthrie roll.

Mr. Guthrie describes the roll as containing bulbs something similar in size to those on the Clark roll. He says that the first roll, when put on, was stitched on, but that after it was altered it was fastened to the second buttons of the saddle, without being laced down in the center.

L. A. Porter testifies in direct contradiction of Rupert, Farley, and Guthrie as to this saddle and the roll attending it. He was a liveryman, and remembers distinctly seeing the roll, having had the saddle in his barn for some time. He describes the roll as being an extension of the quilted seat, and says it was rather out of the ordinary, because it extended farther up on the front of the saddle; that it was sewed fast to the seat; that the change consisted in taking some of the padding out of the center; and that it was the same in general style and appearance as the old style of roll.

In all the testimony there is a manifest lack of that certainty and definiteness, as it pertains to the alleged earlier production of bucking rolls and their exact manner of construction, as to leave it in grave

doubt whether any roll had ever been made or used of substantially similar mold and usefulness prior to the invention of complainant of his style of bucking roll. This conclusion is well illustrated by the testimony of Gerichten, who, after stating with much positiveness that the roll he had constructed was of substantial similarity to complainant's patent, recognized a painting showing the pattern of the roll he attempted to describe, which clearly demonstrates that the recollection of the witness was faulty, and that, so far as his testimony is concerned, instead of showing anticipation, its effect was quite the contrary. So it may be said, of all the oral testimony adduced, there is not that definiteness and certainty about it that affords proof persuasive and convincing as it relates to the question of anticipation. At least, it is wholly insufficient to overcome the presumption of novelty which attends the issuance of complainant's patent. I hold, therefore, that there has not been anticipation of complainant's device.

The next inquiry is whether the roll being manufactured and sold by the defendant is an infringement of complainant's patent. There is but little question that the defendant endeavored, in the production of its roll, to avoid, if possible, any infringement upon complainant's patent. One of its witnesses says as much, and the defendant does not affirmatively controvert the proposition. The only alleged elements of distinction between the two rolls consist in the construction of defendant's roll in two pieces and the manner of attaching them to the saddle-tree. It will be borne in mind that complainant's roll is attached at the outer ends to the saddle-tree at the forward buttons, and tied or laced down to the seat in the center. The outer end of each piece of defendant's roll is attached to the tree at the forward button, the same as complainant's. The inner end is contrived with an extension, consisting of a leather strap, which is carried around the prong of the pommel underneath, and made fast, also, at the first or forward button, so that each piece, in its mechanical attachment, is simply tied around a prong of the pommel of the saddle-tree. Both rolls perform exactly the same function, and the sole question remaining is whether the difference in the manner of attachability attending the defendant's roll is such as will save it from the charge of infringement upon the complainant's patent. I am impressed that it is not; that the difference consists in a mere mechanical equivalent, and not in a patentable improvement in the art.

What would be the difference if the complainant's roll was simply cut in two in the middle, and the inner end of each part tied fast to the saddle seat? It is plain that there could be no elemental difference between a roll so constructed and the original. The difference would be mechanical only. Carrying the discussion further: Suppose the inner ends of the severed roll are made fast by means of a screw entering the prong of the pommel; the difference would manifestly still be mechanical. If this be so, how can it affect the contrivance differently to carry the end by an extension in the way of a strap around underneath the prong to the forward button? Indeed, I find, from an examination of defendant's model, "D," which was offered and received in evidence, that each separate piece of its roll is nailed to the

prong of the pommel on the inside, which being the case, it makes the strap a useless extension, rather than a useful, much less a novel, improvement.

In *Erie Rubber Co. v. American Dunlop Tire Co.*, 70 Fed. 58, 16 C. C. A. 632, relied upon so strongly as being parallel with the case at bar, it will be noted that there was a substantial and elemental difference between the two contrivances about which there was a contention. Not so here. The difference consists of a mechanical equivalent only, and cannot avail the defendant. It is well settled that a broader range of equivalents attends a primary or first invention than where the patent relates to a new combination of old elements, or an improvement. "Therefore, it is said, with reference to such elements in any combination as constitute its subordinate means, no other elements can be equivalent unless they are equivalent inventions; that is, unless they not merely perform the same functions, but perform them by applying the same force to the same object through the same mode of application." *Erie Rubber Co. v. American Dunlop Tire Co.*, *supra*.

In the case at bar, however, the difference claimed cannot be said to be elementary in character, but is merely mechanical. True it is, also, that if a patentee specifies any element as entering into a combination, he makes such element material thereto, and the courts will not declare it immaterial. *Fay v. Cordesman*, 109 U. S. 408, 421, 3 Sup. Ct. 236, 27 L. Ed. 979; *B. F. Avery & Sons v. J. I. Case Plow Works* (C. C.) 139 Fed. 878. But this principle does not change the rule relative to mechanical equivalents, and does not affect the present controversy.

The defendant should be enjoined from further infringing the complainant's patent, and such will be the decree of the court.

UNITED STATES v. SELLERS.

(Circuit Court, S. D. New York. March 2, 1908.)

No. 4,996.

CUSTOMS DUTIES—CLASSIFICATION—"STEEL PLATES"—"PLATES."

The provision for steel plates in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161 (U. S. Comp. St. 1901, p. 1638), while not covering all steel articles that are known as plates, includes so-called monogram dies and plates used in engraving, which, besides being called plates, are within the dictionary definitions of "plates."

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision of the Board of General Appraisers followed a previous decision reported as G. A. 6,472 (T. D. 27,684), and sustained protests of W. B. Sellers against the assessment of duty by the collector of customs at the port of New York.

J. Osgood Nichols, Asst. U. S. Atty.

Brooks & Brooks (Frederick W. Brooks, of counsel), for importer.

HOUGH, District Judge. The merchandise under consideration consists of steel plates intended to be engraved and used in the printing of steel engravings, and so-called monogram dies, which are small plates on which monograms are to be engraved. The collector assessed duty under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 193, 30 Stat. 167 (U. S. Comp. St. 1901, p. 1645). The Board of General Appraisers sustained the protest, holding the goods properly dutiable as steel plates under paragraph 135, with additional duty as polished steel plates under paragraph 141.

These plates are "sheets of metal of uniform thickness and even surface" (Century Dictionary); and they are also "pieces of metal extended or flattened to an even surface, with a uniform thickness" (Webster's Dictionary). I adhere to the interpretation of paragraph 135 contained in *United States v. Buehne Steel Wool Co.* (C. C.) 154 Fed. 93. It is, of course, true that calling a thing a plate does not make it one, as in the drawplate case. *U. S. v. Newman Wire Co.* (C. C.) 152 Fed. 488, affirmed T. D. 28,600. But these articles are called plates, and are really plates, and I think the decision of the Board of Appraisers plainly right.

Decision affirmed.

In re ATLANTA NEWS PUB. CO.

Intervention of GOSS PRINTING PRESS CO.

(District Court, N. D. Georgia. October 18, 1907.)

No. 1,846.

1. SALES—CONDITIONAL SALES—VALIDITY—STATUTES.

Code Ga. 1895, § 2776, provides that whenever personal property is sold on condition that the title shall remain in the vendor until paid for, such sale in order to be valid as against third parties shall be in writing and executed in the same manner as mortgages of personal property, but as between the parties the contract as made shall be valid whether written or not, and section 2777 declares that conditional bills of sale must be recorded within 30 days from date, and in other respects shall be governed by the laws relating to the registration of mortgages. *Held*, that, where there is a mere oral reservation of title and no writing, the title will be so fixed in the buyer that the rights of third persons obtaining judgments or liens antedating the sale may be enforced against the vendor's claim of title, but if the reservation of title is in writing, though not properly executed and recorded, the reservation is good as between the parties and as against general creditors and creditors with liens antedating the sale, and is only subject to such liens as are obtained or debts arising from credit given in good faith by reason of the buyer's apparent ownership of the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1366-1371.]

2. SAME—RESERVATION OF TITLE—VALIDITY—CONTRACT—CONSTRUCTION.

A bankrupt, having purchased a three-deck newspaper press under a written contract providing that the title should remain in the seller until the price was paid, subsequently telegraphed the seller's representative ordering a fourth deck for the press, "according to the original agreement," and on the same day wrote a letter confirming the telegram, containing the words "Your company retaining title to the fourth deck until the notes are paid." *Held*, that a sale of the fourth deck pur-

suant to such correspondence constituted a written contract of conditional sale, which though not executed or recorded as prescribed by Code Ga. 1895, §§ 2776, 2777, was valid as against the bankrupt, its general creditors, and those not having given credit to the bankrupt on the faith of the ownership of the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1353.]

8. BANKRUPTCY—DIVISION OF MACHINES—CONDITIONAL SALES—LIENS.

Where a printing press was subject to a mortgage on the plant of the bankrupt at the time the bankrupt purchased a fourth deck therefor under a valid conditional sale, the seller was entitled to recover such fourth deck from the bankrupt's trustee, the bankrupt having failed to pay the price before bankruptcy, provided such fourth deck was such a separate and distinct part of the press that it could be taken off and leave the remainder intact.

4. SAME—CONTRIBUTION TO SUBSEQUENT LIENS—PAYMENT.

Where intervener sold a bankrupt a fourth deck to a printing press under a conditional sale, and on nonpayment of the price before bankruptcy claimed the right to recover the proceeds of a sale of such fourth deck from the bankrupt's trustee, it could only do so after paying such proportion of the liens that attached to the property of the bankrupt after the fourth deck became part of the plant and before bankruptcy, as the amount realized from the sale of such fourth deck bore to the amount realized from the bankrupt's entire plant, and this though such liens had been paid off, the court of bankruptcy having jurisdiction to recharge such liens against the property to which they belonged, regardless of their prior payment.

John L. Hopkins & Sons, for petitioning creditors, receiver, and trustee.

A. H. Bancker, for bankrupt.

Westmoreland Bros., for intervener, Goss Printing Press Co.

NEWMAN, District Judge. On the 10th day of May, 1902, the bankrupt, the Atlanta News Publishing Company, purchased from the intervener, the Goss Printing Press Company, a newspaper printing and folding machine of the style known as a "Goss three-deck straight-line, with one color attachment machine." In this contract which was in writing signed by both parties, it was stipulated:

"It is further agreed that the title to all of the aforesaid property shall remain in the party of the first part [the Goss Company] until accepted and paid for by the party of the second part [the Atlanta News Company] in full as agreed upon hereafter."

The purchase price for which this machine was sold was \$16,000, of which \$5,000 was to be paid in cash, and for the balance notes were given payable monthly thereafter, and all of the notes were paid in full before the transaction in question here took place.

On May 4th, 1906, the bankrupt company desiring to purchase what is called a "fourth deck" for the machine named sent the following telegram to the representative of intervener:

"Please wire lowest cash payment, best rate of interest on deferred payments, longest time in which to pay for fourth deck for press. How soon could be shipped?"

To which the following reply was received on the same day:

"Cash payment one thousand, balance two years, payable quarterly, interest five per cent., ship eight weeks."

On May 8th the bankrupt company sent the following telegram:

"Ship soon as possible fourth deck for our press according to original agreement, forty-five hundred dollars delivered, and put on press, one thousand cash, balance two years, payable quarterly, interest five per cent. * * *"

On the same day, May 8th, the bankrupt company sent the representative of intervener the following letter:

"Confirming telegram this date as follows: 'Ship soon as possible fourth deck for our press according to original agreement, forty-five hundred dollars delivered, and put on press, one thousand cash, balance two years, payable quarterly, interest five per cent. * * *'. It is our understanding that upon the erection of the fourth deck on press we will be due you \$1,000.00 cash, and the balance, \$3,500.00, in quarterly notes, bearing five per cent., notes to be secured in accordance with original agreement, your company retaining title to fourth deck until notes are paid. We hope to be in a position to purchase another press in the near future, as our business gives good promise for the future, and I want you to be in a position to quote very lowest price on same."

This letter was signed by the manager of the News Company.

On the same day, May 8th, the intervener through its president and general manager wrote the following letter to the bankrupt company:

"We have your telegram asking us to ship as soon as possible fourth deck for your press, according to the original agreement and as per our telegram to you of May 4th, 1906. This will have our immediate attention, and we will rush the work all we can consistent with good workmanship. We expect it will take just about eight weeks to get it ready for shipment. * * *"

After some correspondence with reference to the shipment of the deck and putting same up, on July 28th, the bankrupt company through its general manager wrote to the Goss Company, stating that the fourth deck had been put on to their satisfaction, and explaining why check for the \$1,000 and notes were not sent on the day the letter was written, it being Saturday and inconvenient. On Monday thereafter the following letter was written by the general manager of the bankrupt company to the Goss Printing Press Company:

"I hand you herewith New York Exchange for \$1,000.00, being cash payment for extra deck which you have just added to our printing press. I also inclose you herewith the following notes in settlement of our account, in accordance with contract, namely, \$4,500.00; the terms as follows: \$1,000.00 cash, the balance in quarterly installments covering a period of two years, notes to draw 5% interest per annum. * * * Please acknowledge receipt of this cash payment, and of the notes, etc., and oblige."

Then follows a memorandum of the several notes, the amount, and when due.

A petition in involuntary bankruptcy was filed against the News Publishing Company on the 31st day of January, 1907, and, on the 18th day of February thereafter, it was adjudged an involuntary bankrupt. On the 23d day of February, 1907, the Goss Printing Press Company filed its intervention in the bankruptcy court, setting up that by the terms of the contract between it and the News Publishing Company the title to the fourth deck had been reserved by it, and asking to have the same turned over to it. Answer was filed by the trustee denying that there was a conditional sale, and an intervention and answer was filed in the same connection by the Maddox-Rucker Banking

Company, trustee under a mortgage or deed of trust executed by the News Company on February 1, 1905, to secure the payment of a certain issue of bonds for \$25,000, of which \$17,200 had been sold. The issue raised on this intervention of the Goss Printing Press Company was referred to the referee, and he has made his report finding against the intervener. To this report exceptions have been filed, which raise several questions of interest.

The statute of this state on the subject of conditional sales as embodied in section 2776 of the Code of Georgia of 1895 is as follows:

"Whenever personal property is sold and delivered with the condition affixed to the sale, that the title thereto is to remain in the vendor of such personal property until the purchase price thereof shall have been paid, every such conditional sale, in order for the reservation of title to be valid as against third parties, shall be evidenced in writing, and not otherwise. And the written contract of every such conditional sale shall be executed and attested in the same manner as mortgages on personal property; as between the parties themselves, the contract as made by them shall be valid and may be enforced whether evidenced in writing or not."

The next section (2777) is as follows:

"Conditional bills of sale must be recorded within thirty days from their date, and in other respects shall be governed by the laws relating to registration of mortgages."

The meaning of section 2776 as applicable to the facts in this case as construed by the Supreme Court of the state is this: (1) Where there is a mere oral reservation of title and no writing whatever on the subject, the title will be so fixed in the vendee that the rights of third parties obtaining judgments or liens antedating the sale may be enforced against the vendor's claim of title. (2) Where the contract reserving title in the vendor is in writing, although not properly executed and recorded as required by the statute, the reservation is good as between the parties, and as to general creditors, and also as to creditors with liens antedating the conditional sale; and is only subject to such liens as are obtained, or debts arising from credit given in good faith by reason of the property being in the possession of the vendee with apparent ownership and without any notice of title elsewhere.

The first question in this case is, was there a good reservation of title as between the Goss Printing Press Company and the Atlanta News Publishing Company? I think it must be held that there was, eliminating for the moment the question of whether previously existing liens on the property of the Atlanta News Publishing Company attached to this fourth deck, and as to the rights of subsequent creditors, and looking at the matter solely as to the rights of the two parties to the contract. The telegram of May 8th sent by the representative of the News Company directed that the fourth deck should be sent "according to the original agreement," and on the same day a letter sent by the representative of the News Company shows what is meant by the original agreement, as the letter states "your company retaining title to the fourth deck until the notes are paid"; and, in the letter written the same day (May 8th) by the president of the Goss Printing Press Company, it is shown that he understood the contract as did the

representative of the News Company, for he uses the language "according to the original agreement." It seems to me that, if there had been no claims of third parties whatever, there could be no doubt as to the right of the Goss Company to have retaken the fourth deck on default in payment on the part of the News Company, under this clear reservation of title. What resistance could the News Company have made, being in default, when a demand for the return of the fourth deck was made, in view of the language of their letter, "your company retaining title to the fourth deck until the notes are paid"? In my opinion, none whatever. So that I think it may be assumed as between the parties this was a conditional sale in conformity with the statute of Georgia on this subject.

While the matter is presented somewhat informally by the report of the referee and the condition of the pleadings now before the court, it appears that the serious objection to the return of this property to the Goss Printing Press Company was on the part of the trustee for the bondholders under a mortgage or trust deed in existence at the time of the transaction with reference to the fourth deck. This mortgage covered all the property of the Atlanta News Publishing Company, and if this had been an unconditional sale of the fourth deck, undoubtedly its lien would have attached, subject to the question as to whether it became such an integral part of the press as that it could not be taken from it without injury to the machine, which will be alluded to hereafter. So that the important question is whether the Goss Company can take back this fourth deck, claiming title under its contract with the News Company as against the lien of this mortgage.

In *Conder v. Holleman & Ballard*, 71 Ga. 93, in the opinion by Judge Blanford, after discussing the last section referred to with reference to registration of conditional sales, the opinion proceeds as follows:

"But the object of the registration of mortgages is to give notice to all persons having dealings with the mortgagor of the existence of the mortgage; and in this case it appears that the dealings had between the plaintiff in execution and the defendant had taken place long before the sale of the property levied on, and which was sold by the claimant to the defendant in execution, and the judgment in said case had been obtained long before said conditional sale. Then whether said conditional sale had been duly recorded or not, it would not in any manner affect the plaintiff, whose judgment had been obtained before the sale, and as to him it made no difference whether the sale was recorded or not. A judgment creditor of a mortgagor whose judgment was obtained before the making of a mortgage, would not be affected by the record of such mortgage in any way. So this judgment creditor is in nowise affected by the nonrecord of this conditional sale; no right has accrued to him between the making of the conditional sale and the record of the same; he is not hurt by its nonrecord; and as to him it is the same as if the sale had been duly recorded. The title to this property was in the claimant, he having reserved the same until it was paid for by the defendant in execution, and he did not lose the same nor render it liable or subject to the judgment and execution of plaintiff by reason of not having his conditional sale recorded within thirty days. The lien of this judgment never attached to the property levied on."

In *Mann v. Thompson*, 86 Ga. 347, 12 S. E. 746, in the opinion also by Judge Blanford, he distinguishes the case then before the court from the case of *Conder v. Holleman & Ballard*, supra, because in the

instant case there was only a parol reservation of title, and in the preceding case the contract was in writing, and holding that an antecedent judgment against the purchaser would attach notwithstanding the parol reservation of title, Judge Blanford says in the opinion:

"Had this contract between Thompson and Webb been reduced to writing, then the present case would run all fours with the case cited in 71 Ga., *supra*."

In *Cottrell v. Merchants' & Mechanics' Bank*, 89 Ga. 508, 15 S. E. 944, this is said in the opinion by Chief Justice Simmons, on page 515 of 89 Ga., on page 946 of 15 S. E.:

"It may be said that the object of record is to notify subsequent purchasers or creditors of the prior claim, and thus save them from being misled by the appearance of ownership resulting from possession; that the plaintiffs, by failing to record, put it in the power of the party in possession to effect a fraud, and therefore they ought to bear the loss."

The same rule is laid down in *Rhode Island Locomotive Works v. Empire Lumber Co.*, 91 Ga. 639, 17 S. E. 1012.

The only doubt I have had about the correctness of what has been said above, and the application of the authorities cited, arises from the language of the Chief Justice in the case of *Merchants' Bank v. Cottrell & Sons*, 96 Ga. 168, 23 S. E. 127. Some expressions in that opinion look as though the court intended to hold that a contract of conditional sale should be attested to make it good even against antecedent liens such as that contesting the rights of the seller here. The matter turns upon the sense in which the expression "third persons" is used in the opinion; and in order to reconcile that decision with the other decisions of the Supreme Court of the state it seems to me it would be necessary to consider the expression "third persons" as applying to those who obtained liens or became creditors upon the faith of the apparent ownership of the property in the buyer. There is, however, this language in the opinion:

"The main object of the statute was to prevent frauds and perjury which, in the absence of such a law, might be practiced by debtors and others in collusion with them to defeat creditors seeking to subject to their claims property apparently belonging to the debtor." Citing *Rhode Island Locomotive Works v. Empire Lumber Co.*, *supra*.

It may be further observed that the case of *Bank v. Cottrell*, *supra*, was before the Supreme Court in 89 Ga. 508, 15 S. E. 944, and from the report of the case there it appears that the printing press in question had been delivered to the Enquirer-Sun Company and placed in its office before the mortgage to the bank was given; so that the opinions in both cases dealt with that state of facts.

The whole trend of the decisions of the Supreme Court of the state is that where there has been a bona fide reservation of title by the seller of personal property, and the same reduced to writing, that such reservation is good between the parties, and as against all others who have not obtained rights or sustained loss on the faith of the apparent ownership of the property in the buyer. This view of the statute and of the effect of the decisions of the Supreme Court of the state is consistent with the view taken by this court, and by the Circuit Court of Appeals for this circuit in the case of *Trust Co. v. Railway Co.*, 48 Fed. 868, 1 C. C. A. 133. In that case it was held in substance that the lien of a

mortgage or trust deed securing bonds did not attach to rolling stock sold the Marietta & North Georgia Railroad, as against the rights of the intervener Groome who had made a conditional sale of the same, reserving title in himself. It is also in line with the decisions of the Supreme Court of the United States construing similar statutes, in the cases of *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339, *Meyer v. Car Co.*, 102 U. S. 1, 26 L. Ed. 59, and in the very recent case of *York Manufacturing Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. In the last-mentioned case it is said in the opinion that:

"There was no clause in the mortgage covering after-acquired property, and in any event the mortgage would not cover property so acquired, the title to which, as in this case, was reserved to the vendor."

I have given all the cases cited by counsel, and all I could find on this subject, a very careful examination, and the result of it is that I must hold, so far as this question is concerned, that the right of the Goss Printing Press Company to recover the fourth deck must be sustained.

There are two questions which remain unsettled, and it is impossible to settle them from the report of the referee or any evidence before the court: First, whether this fourth deck became an integral part of the entire press in such a way that it could not be separated without injuring the whole. So far as I can gather from the facts shown by the referee's report on this subject (in which are clearly typographical errors), there would not seem to be great difficulty about doing this. Unless this fourth deck could be removed after having been placed on the press without injury to the remainder of the press—that is, unless it was such a separate and distinct part of it that it could be taken off and leave the other part intact—it would seem to have become so much a part of the machine as that the lien of the mortgage would attach to it. And if this should be resolved in favor of the Goss Company, and it should be finally held that that company had a right to take back the fourth deck, it could only do so, in my judgment, after paying such proportion of the liens referred to by the referee in his report, as accrued against all the property of the News Company after the fourth deck became a part of the plant of the News Company, and before the bankruptcy. So far as I can see these liens consist of some laborers' liens and some taxes. Whether other liens arose and were paid I am not informed; but it is clear that the liens for taxes and the laborers' liens would attach to all the plant, and that under the most favorable view of the statute for the Goss Company, and considering also the fact that the liens were paid off out of the proceeds of the property generally, there would be no reason why there should not be deducted from the amount arising from the sale of the fourth deck, or standing in lieu of it, as I understand the agreement, the proportion which the amount realized from the fourth deck bears to the amount realized from the entire plant of the News Company.

It is suggested that these liens which attached to this fourth deck have been paid off. This would make no difference, as I understand the rule. A court of bankruptcy in a case like this would recharge,

and fix liens where they properly belong. These liens undoubtedly attached to the fourth deck even as against the Goss Company and its rights, and the fact that they were paid for the time being out of other funds should not prevent this fund from contributing its pro rata to their payment.

The matter is returned to the referee to give it final direction in accordance with the views herein expressed.

UNITED STATES v. OREGON SHORT LINE R. CO.

(Circuit Court, D. Idaho, C. D. March 19, 1908.)

1. CARRIERS—TRANSPORTATION OF LIVE STOCK—CONFINEMENT—ACTION FOR PENALTY—EXCEPTIONS.

Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), prohibits confinement of live stock in transit for more than 28 hours, unless unloading is prevented by storm or other accidental or unavoidable causes, which cannot be anticipated or avoided by the exercise of due diligence and foresight. The act also imposes penalties recoverable by a civil action in the name of the United States. *Held* that, though the exception is contained in the enacting clause of such act, the act created a general offense, and not one limited to particular conditions; and hence a complaint to recover penalties imposed was not defective for failure to negative the exception.

2. SAME.

Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), prohibits the confinement of live stock in transit for more than 28 hours, unless unloading is prevented by storm, accidental and unavoidable causes, and section 3 declares that every carrier who knowingly and willfully fails to comply with its provisions shall be liable to a penalty. *Held* that, if a complaint thereunder contains the necessary allegation that the carrier acted "willfully," such allegation in itself is sufficient to negative the exception.

3. SAME—BURDEN OF PROOF.

In an action against a carrier for confining stock in transit more than 28 hours, in violation of Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), the burden is not on the government to show that the carrier was not prevented by storm or other accidental or unavoidable cause, which it could not have anticipated by the exercise of diligence and foresight, within the exception from liability created by such act.

4. SAME—CONSTRUCTION.

Under Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), prohibiting confinement of live stock in transit for more than 28 hours, it is immaterial that a part of the period of confinement elapses while the stock is in possession of a connecting carrier; the carrier having possession of the stock being required to unload, feed, and water them as soon as the time limit is reached.

5. SAME—ACTIONS—ELEMENTS—WILLFULNESS.

Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), prohibits the confinement of live stock in transit for more than 28 consecutive hours, and section 3 provides that any common carrier who "knowingly and willfully" fails to comply with the law shall be subject to a penalty. *Held*, that a complaint under such act, failing to charge that defendant carrier "knowingly and willfully" restrained stock in its possession, which had been confined for a period longer than 28 hours, was fatally defective.

On Demurrer.

N. M. Ruick, U. S. Dist. Atty.

P. L. Williams and D. Worth Clark, for defendant.

DIETRICH, District Judge. This is an action to recover a penalty for the violation of what is commonly known as the "Twenty-Eight Hour Law." Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918). The salient facts alleged are that the defendant operates a line of railroad connecting with a line belonging to the Union Pacific Railroad Company at Green River, in the state of Wyoming, and extending westward to the town of Huntington, in the state of Oregon. On September 13, 1907, it received from the Union Pacific Railroad Company cars containing 660 head of swine, which at the time they were turned over to the defendant had been confined continuously for 19½ hours, and thereupon the defendant, while transporting them to Montpelier, Idaho, confined them, without food or water, for the additional period of 19½ hours, making a total continuous confinement without food or water of 39 hours. By the statute confinement of live stock in transit for more than 28 hours is prohibited, "unless (unloading is) prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight"; and it is contended by the defendant that the plaintiff, in order to state a cause of action, must expressly negative the contingencies contemplated by this provision.

Apparently the precise question is for the first time submitted for determination, although other features of the act and the procedure for its enforcement have had judicial consideration; the results being not entirely harmonious. While the act is penal in its nature, it expressly provides that the penalty prescribed "shall be recovered by civil action in the name of the United States," and there exists a difference of opinion as to whether the principles of civil or of criminal procedure apply. The opposing views are well exemplified in two recent decisions—*United States v. L. & N. R. R. Co.* (D. C.) 157 Fed. 979—where the rules of criminal law were rigidly adhered to, and *United States v. Southern Pacific Railway Company* (D. C.) 157 Fed. 459, where the jury was instructed to return a verdict according to the preponderance of the evidence. The answer to the present question is, however, in no wise dependent upon an election between these contending theories. Whether that which the plaintiff asserts be denominated "a public offense" or "a cause of action" is of slight importance. In either case it is a creature of the statute. In pleading a statutory cause of action it is, as a general rule, incumbent upon the plaintiff to set forth all that is necessary to constitute a complete description of the right. Every ingredient or element thereof as it is defined by the statute must be alleged. Neither more nor less is required in an information or indictment. Conceding that, if the clause relied upon were in a proviso or in a subsequent section, the complaint would be sufficient, counsel for the defendant contends that it is within the "en-

acting clause" of the statute, and that, therefore, the burden is upon the plaintiff to negative by appropriate averment the existence of the excepted conditions. The rule was formerly thus stated:

"If the exceptions themselves are stated in the enacting clause, it will be necessary to negative them in order that the description of the crime may in all respects correspond with the statute." 1 Chit. Crim. Law, 283.

Upon its face the rule seems simple enough, but the difficulty lies in its application. If by "enacting clause" reference were made to some particular portion of the statute susceptible of physical identification, either by its form or its relative position in the act, plainly it would be a comparatively simple matter to determine whether the exception is within or without the enacting clause; but unfortunately such is not the case. Symmetrical statutes, perfectly arranged, are rarely found, and, if the phrase ever was properly employed as designating the section, and the whole section, and only the section, in which the offense is defined, its meaning has been materially modified. In *United States v. Cook*, 84 U. S. 168, 21 L. Ed. 538, it is said:

"Commentators and judges have sometimes been led into error by supposing that the words 'enacting clause,' as frequently employed, mean the section of the statute defining the offense, as contradistinguished from a subsequent section in the same statute, which is a misapprehension in the term, as the only real question in the case is whether the exception is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts, omission, or other ingredients which constitute the offense. Such an offense must be accurately and clearly described, and, if the exception is so incorporated with the clause describing the offense that it becomes in fact a part of the description, then it cannot be omitted in the pleading, but, if it is not so incorporated with the clause defining the offense as to become a material part of the definition of the offense, then it is matter of defense and must be shown by the other party, though it be in the same section or even in the succeeding sentence."

In *Territory v. Burns*, 6 Mont. 72, 9 Pac. 432, it is held that:

"The enacting clause of the statute is not necessarily alone or only that which purports to be such, but comprehends every part of the statute which should be stated in order to define the offense with clearness."

In *State v. Bevins*, 70 Vt. 574, 41 Atl. 655, it is said:

"The term 'enacting clause' should be construed to mean all parts of the statutes which create and define the offense, whether in one or more sections or acts."

Also:

"Whether the exception is in the first section of the statute which enacts the offense, or in a subsequent section, or in an independent statute, is not determinative of the question, for some of our cases hold that the exception need not be negated when it is in the section of the statute which creates the offense."

These expressions are fairly representative of the prevailing view, and thus construed the phrase is a flagrant misnomer; and it follows that the rule itself, if it does not tend to mystify and confuse, is of little value as a guide. To say that the pleader must allege that, and only that, which is stated in the enacting clause, is to make no progress, but is only to reason in a circle, for by definition the enacting clause is that, and only that, which the pleader must allege. Whether

in the beginning or at the end, the material inquiry must be: What are the constituent elements or the essential ingredients of the offense or right of action as the same is defined by the statute? If the exception is so incorporated in the statutory definition that it in fact becomes a part of the description of the offense, to omit it leaves the pleading defective in a material respect, because the right of action or offense is not accurately and fully described.

Applying this principle, the answer to the present inquiry is not free from difficulty. The form of the clause and its proximity and close grammatical relation to that part of the section which is clearly descriptive of the offense strongly support the defendant's contention. But in my view, while these are material, they are not controlling, considerations. A test of great practical value is: Does the statute create a general offense, or one limited to particular conditions? If the former, the exception need not be negated, while in the latter it must be. Wharton, *Crim. Pleading*, 241. Here there is no room for doubt as to the legislative intent. The general purpose was to prohibit the inhumane treatment of domestic animals in the possession of common carriers. The statute denounces in comprehensive terms the confinement of live stock for a period in excess of 28 hours. The offense is not limited to certain conditions. Confinement in excess of 28 hours under any circumstances was deemed to be a cruelty. By the excepting clause a concession was made to necessity, and the carrier is protected against punishment for doing that which it could not avoid. The offense is thus not defined or qualified, but an excuse only is afforded to the carrier. And I therefore conclude the exception need not be negated. See *Sholp v. United States*, 81 Fed. 694, 26 C. C. A. 570.

Independent of the reasons already given, there is another consideration which in my judgment must lead to the same conclusion. Section 3 of the act provides that every common carrier "who knowingly and willfully fails to comply with the provisions" of the law shall be liable for the penalty therein prescribed. Admittedly, in order to bring the defendant within the statute, it is necessary to allege that in violating the law its conduct was willful. The exception under consideration excuses the carrier only in cases where its failure is due to "causes which cannot be anticipated or avoided by the exercise of due diligence and foresight." If it is prevented by such causes, its failure to comply with the law is not willful, and therefore the allegation that it acted willfully in itself negatives the exception. *Newport News & M. Val. Co. v. United States*, 61 Fed. 488, 9 C. C. A. 579. Before passing to a consideration of other phases of the demurrer, it may not be improper for me to say that I think counsel, both for the government and for the defendant, have overvalued the importance of this question of pleading in the prosecution and the defense of cases based upon the statute; and this is probably due to the assumption that, if the plaintiff is required to plead against the exception, it must also assume the burden of proof. Obviously it would be next to impossible for the government to anticipate and by proof eliminate all the possible contingencies covered by the excepting clause. Even if it were held to be necessary for the plaintiff to plead against

the exception, it might still be relieved from making proof, because it would thus plead a negative, and, further, because it pleads the absence of conditions, the evidence concerning which in many cases would be exclusively within the knowledge of the defendant. These exceptions to the general rule of proof are thus stated by Mr. Justice Story in *United States v. Hayward*, 2 Gall. 485, Fed. Cas. No. 15,336:

"But in other cases, as where the negative does not admit of direct proof, or the facts lie more immediately within the knowledge of the defendant, he is put to his proof of the affirmative. And, where the general facts which constitute a forfeiture within a statute are proved, and there are exceptions to its operation in particular cases, the better opinion certainly is that the party who would avail himself of the exception must prove it, although from the forms of pleading it may be necessary to negative every exception in the indictment or information. Such negative allegation is in such cases to be repelled by affirmative proof on the other side. * * * Without pretending to reconcile all the dicta in the books, it seems to me that in respect to negative allegations the reasonable rule is that the burthen of proof shall rest on the party who holds the affirmative, and especially where the facts are peculiarly within his privity and cognizance."

The second objection raised to the sufficiency of the complaint is that it does not allege that the defendant "knowingly" or "willfully" confined said swine for 28 hours, or that it "knowingly" or "willfully" failed to comply with the law; but the charge in that respect is only that the defendant "knowingly" and "willfully" confined the swine in the cars continuously during the period intervening between the time they were received at Green River and the time they were unloaded at Montpelier, which, as already stated, was 19½ hours. (See footnote for entire allegation.)

As I have heretofore observed, the plain intent of the act is to prohibit the continuous confinement of live stock by transportation companies more than 28 hours at any one time, and it is immaterial that a part of the period of confinement elapses while the stock are in the possession of a connecting carrier. It is the continuous confinement which is denounced, and, as soon as the 28-hour limit is reached, it is the duty of the carrier then having possession of the stock to unload and feed and water them. While this is true, it does not follow as a matter of course that a carrier keeping the stock in confinement after the lapse of 28 hours incurs the penalty. Only the carrier "who knowingly and willfully fails to comply with the provisions" of the law is liable to punishment. Assuming that the defendant had no knowledge, either actual or constructive, that the swine, at the time they were delivered to it, had been confined to exceed eight hours and a half, would it be contended that it "knowingly" violated the law? To state the question is to answer it. If the shipment had been made exclusively upon the defendant's line of road, it would not be doubted that, in order to state an offense, it would be incumbent upon the government to plead that the defendant "knowingly" confined the stock for a period in excess of 28 hours. But if in such a case, where it is almost impossible to imagine that the defendant could be without knowledge, it is necessary to plead that it acted "knowingly," what reason can be given for relieving the govern-

ment from pleading knowledge in a case like this, where the confinement took place in part before the stock came into the possession of the defendant? The only argument urged upon behalf of the government is that, if the burden be imposed upon it of pleading and proving knowledge, it would sometimes be difficult for it successfully to maintain an action to recover the penalty. In no case which has come under my observation brought to recover the penalty under this act, has the government omitted to allege that the defendant "knowingly" violated the law, and no principle or rule of pleading has been called to my attention by which the plaintiff can be relieved from alleging the essential ingredients of the offense as it is defined by the statute. In this respect the statute seems too plain to admit of construction, and the court cannot relieve the plaintiff from pleading that the defendant "knowingly" confined the swine in excess of 28 hours without doing violence to the plain provisions of the law.

It follows that upon this ground the demurrer must be sustained; and the plaintiff will be given 30 days in which to amend.

NOTE.—"That at the time said animals were so received by said Oregon Short Line Railroad Company at Green River, as aforesaid, the same had been continuously confined in cars without unloading for a period of 19½ hours, or from 8:30 o'clock in the forenoon of September 12, 1907, and the said swine were further, and without unloading, feeding, watering, or resting the same, and while so in transit over said defendant's railroad, between Green River, Wyo., and Montpeller, Idaho, knowingly and willfully, by said defendant company, confined in said cars until half past 11 o'clock, post meridian of the said 13th day of September, 1907."

HARVEY v. HOLLES.

(Circuit Court, N. D. Iowa, W. D. April 1, 1908.)

No. 255.

1. ADVERSE POSSESSION—VALIDITY OF TITLE.

Where the possession of public land by defendant and his grantors was not wrongful as to any one but the United States, and defendant and his immediate grantor entered under color of title and claim of right, and continued in uninterrupted adverse possession under such claim of title for more than 10 years prior to the commencement of a suit by an alleged subsequent homestead entryman, defendant acquired a valid title by adverse possession as against all but the state or the United States.

2. PUBLIC LAND—HOMESTEAD ENTRY—LAND IN POSSESSION OF OTHERS.

Rev. St. § 2289 (U. S. Comp. St. 1901, p. 1388), provides that every citizen who is the head of a family may enter a quarter section of land as a homestead which may at the time of the application be subject to pre-emption. On repeal of the pre-emption law by Act March 3, 1891, c. 561, § 5, 26 Stat. p. 1097 (U. S. Comp. St. 1901, p. 1388), section 2289 was amended so as to provide that a homestead entry might be made on "unappropriated public lands." *Held*, that such amendment did not change the character of the lands, as regards occupancy or improvement, that might be entered, and that only unoccupied and unimproved lands of the United States are subject to pre-emption or homestead settlement, though the possession of the prior occupant was wrongful as against the United States.

[Ed. Note.—Rights acquired by homestead settlement and entries, see note to *McCune v. Essig*, 59 C. C. A. 434.]

3. SAME—LAND DEPARTMENT DECISIONS—EFFECT—APPEAL.

Where a local land office and the Commissioner of the General Land Office adjudged that certain land in controversy which complainant attempted to enter as a homestead was not subject to entry, and that complainant acquired no right thereto, such decision, unappealed from, constituted a conclusive adjudication of all questions of fact, in the absence of fraud or mistake.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 303.]

4. SAME—LACHES.

Where complainant, after the rejection of his application to enter certain land as a homestead, knowing that defendant was in possession of the land and making improvements thereon under a claim of ownership, acquiesced in the decision of the Land Office for six years, he could not maintain a bill to compel defendant to convey to him the legal title to such land with the improvements, on the theory that defendant was a trustee of such title for complainant's benefit.

In Equity. On final hearing. Suit to require the defendant to convey to complainant the legal title to certain land in O'Brien county, this state, which it is alleged the defendant holds in trust for him. The complainant claims the right to the land under the homestead laws of the United States. The defendant holds a patent to it from the United States issued to him under the acts of Congress approved May 12, 1864, c. 84, 13 Stat. 72, and March 3, 1887, c. 376, 24 Stat. 556 (U. S. Comp. St. 1901, p. 1595). He also claims that he is entitled to it under the homestead laws. The facts are sufficiently stated in the opinion.

M. B. Davis, for complainant.

W. P. Briggs, for defendant.

REED, District Judge. The land is a part of that granted to the state of Iowa by the act of Congress approved May 12, 1864, c. 84, 13 Stat. 72, to aid in the construction of two railroads in that state, one of which was to be from Sioux City to the south line of the state of Minnesota. The state, by act of its General Assembly approved April 3, 1866, accepted the grant, and conferred upon the Sioux City & St. Paul Railroad Company, an Iowa corporation (hereinafter called the Sioux City Company), a part of the land in consideration of its constructing the road from Sioux City to the Minnesota line, a distance of some 83 miles. That company accepted the grant and filed a map of definite location of the road with the Secretary of the Interior July 16, 1872, and commenced the construction of the road, and in the same year completed 56.25 miles thereof from the south line of the state of Minnesota (where it connects with a road from Minneapolis and St. Paul) to LeMars in the direction of Sioux City, but never completed it to Sioux City. The Secretary of the Interior instead of issuing patents for the land upon certificates of the Governor of the state, showing the proper construction of completed sections of 10 consecutive miles each of the road, as required by the act of May 12th, issued to the state between October 16, 1872, and June 4, 1877, for the benefit of the Sioux City Company, patents for 407,870.21 acres of public land, including the land in controversy,

within the limits of said grant. Of this amount the state issued patents to the company for 322,412.80 acres, leaving 85,457.41 acres so patented to the state, including the land in suit, no part of which was ever patented to the company. The road not having been completed, as required by the act of Congress, the state, by act of its General Assembly approved March 16, 1872, resumed all of the lands not earned by the company, and in 1884 relinquished its right, title, and interest therein, except to the lands in Dickinson and O'Brien counties, to the United States. The Sioux City Company claimed all of the lands patented to the state for its use, notwithstanding the resumption and relinquishment thereof to the United States as stated. October 4, 1889, the United States pursuant to the adjustment act of Congress approved March 3, 1887, (24 Stat. 556, c. 376 [U. S. Comp. St. 1901, p. 1595]), brought suit against the Sioux City Company to quiet in the United States the title to the lands so patented to the state and not patented to the company in which suit it was finally decided by the Supreme Court, October 21, 1895, "that, in any view that could be taken of the company's rights, it had received some 2,005 acres of land more than it was entitled to receive for the road actually constructed by it"; and quieted the title in the United States to all of the lands not patented to the company. *Sioux City & St. Paul Ry. Co. v. United States*, 159 U. S. 349, 16 Sup. Ct. 17, 40 L. Ed. 177. The legislation of Congress and of the state of Iowa, relative to said grant is set forth at some length in the opinion of the court in that case, and in *Knepper v. Sands*, 194 U. S. 476, 24 Sup. Ct. 744, 48 L. Ed. 1083. It is also referred to in *Sioux City & St. Paul R. R. Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 117 U. S. 406, 6 Sup. Ct. 790, 29 L. Ed. 928, and reference is made to those cases for a full statement of such legislation and other record facts relevant thereto, which need not be further set forth here. After the decision of the Supreme Court in *Sioux City & St. Paul Company v. United States*, 159 U. S. 349, 16 Sup. Ct. 17, 40 L. Ed. 177, and on November 18, 1895, the Secretary of the Interior issued an order declaring the lands to which the title was so quieted in the United States restored to the public domain, and subject to disposal by the Land Department of the United States, and canceled all prior claims thereto, but reserved the right of prior claimants to present new applications therefor to the local land office upon a day to be fixed by that office, public notice of which it was required to give; and in case of conflicting claims to any of the lands directed that office to proceed in accordance with the rules of practice in contest cases. Pursuant to that order the local land office on November 27, 1895, fixed February 27, 1896, as the date upon which said lands would be open to public entry, and gave the required notice thereof. It also gave public notice to all claimants to any of said lands under the act of Congress of March 3, 1887, to file notice in that office of their intention to so claim the same on or before said February 27, 1896. The land in suit is a part of the 85,407.21 acres so patented by the United States to the state of Iowa for the benefit of the Sioux City Company, and not patented by the state to that company, and is within the overlapping or common indemnity limits of

the Sioux City Company and the Chicago, Milwaukee & St. Paul Railway Company (the successor in interest of the McGregor Western Railroad Company, one of the beneficiaries under the grant of May 12, 1864), and after the decision of the Supreme Court, March 29, 1886, in the suit between those companies, which was commenced April 7, 1879 (117 U. S. 406, 6 Sup. Ct. 790, 29 L. Ed. 928) it was allotted to the Sioux City Company in the division of the lands between them. It is the N. $\frac{1}{2}$ S. W. $\frac{1}{4}$ Sec. No. 29, Tp. 95, R. 42, in O'Brien county, and is opposite to or co-terminous with the fourth section of 10 consecutive miles of constructed road southerly from the Minnesota state line.

In the spring of 1884, the land being then unoccupied, and never having been cultivated, or improved, Simon Powers moved upon it with his family, erected small buildings thereon, and continued to reside upon and cultivate it until he sold it in 1888, as hereinafter stated. June 25, 1887, after the partition of the lands between the two railroad companies as decreed in the suit between them (117 U. S. 406, 6 Sup. Ct. 790, 29 L. Ed. 928), he made a contract with the Sioux City Company for its purchase, agreeing to pay therefor \$15.50 per acre, or \$1,080, which was its then fair market value. He paid \$40 upon the purchase price, and afterwards paid to that company other amounts required by his contract. December 7, 1888, he sold the land, and assigned his contract of purchase to Rasmus Larson for \$400 and delivered possession to him. Larson also assumed the amount due upon the contract with the railroad company, entered at once upon the land, made substantial improvements thereon, and continued to farm and cultivate the whole thereof until September 24, 1894. On that date Larson sold the land, and assigned the contract of purchase to the defendant Holles for \$600, who in addition assumed the amount owing to the Sioux City Company, which was then estimated to be \$1,050. Defendant at once took possession of the land, has ever since continued to farm and cultivate the same, and has paid all required taxes thereon. In 1895, he built a house on the land, and continued to reside thereon till the fall of 1901, except for a short time in the winter of 1895-6, when he moved off temporarily, intending to return, which he did in February, 1896, and made other permanent and substantial improvements upon it. The possession of the land by Powers, Larson, and the defendant has been open, continuous, and uninterrupted since June 25, 1887, under claim of right. January 15, 1896, defendant filed in the local land office notice of his claim to the land under the adjustment act of March 3, 1887, and caused it to be published as required by the order of that office. When defendant purchased the land he was a citizen of the United States, and was then and still is duly qualified to enter and hold the land under the homestead laws of the United States. February 8, 1896, complainant went upon the southeast corner of the south half of the quarter section—the tract immediately south of the land in suit—and erected thereon a small building of the value of \$15. It was not habitable, and he never occupied it or settled upon the land. June 25, 1887, Thomas Barry contracted with the Sioux City

Company for the purchase of this south half of the quarter section, and at once took possession and remained in actual possession thereof until after February 8, 1896. Complainant erected the structure upon that land without the knowledge or consent of either Barry or this defendant, and without permission of any one. He knew at such time that Barry had for many years been in the actual possession thereof, and that defendant and his grantors had for many years been in actual possession of the land in suit; and that defendant and Barry then claimed the land occupied by them respectively, and the right to the possession thereof, under their contracts of purchase from the Sioux City Company, and the adjustment act of March 3, 1887. Barry, upon learning of complainant's acts in entering and building upon the land, brought an action of forcible entry and detainer against him under the Iowa statute, and upon a trial thereof judgment was entered ejecting complainant, and removing his building from the land, after which he never returned to that tract, and has never been in possession of the land in suit or any part thereof. February 12, 1896, complainant made application to the local land office to enter the land in suit as a homestead, which application was on that date rejected, and he was notified of his right of appeal, which he never prosecuted. February 27th following he tendered a homestead application for the entire southwest quarter of section No. 29. In the contest arising upon that application the local land office rejected the application of complainant, and awarded the land in suit to defendant under the act of March 3, 1887. On complainant's appeal the Commissioner of the General Land Office decided that complainant was not entitled to any of the land; and also decided that defendant was not entitled to the land in suit under the act of 1887, but was entitled to enter the same as a homestead. Defendant thereupon made application to enter the land as a homestead and tendered the requisite fees therefor. The fees were not accepted, and the application was held for further action. The defendant was advised by his attorneys that it was necessary to appeal from the decision of the Commissioner to protect his right to the land, and relying upon that advice he did appeal to the Secretary of the Interior. The complainant took no appeal from the decision of the Commissioner. March 28, 1900, the Secretary of the Interior awarded the land to the defendant under section 4 of the act of March 3, 1887, and held that it was unnecessary to decide upon his homestead application. The defendant presented his homestead application in good faith, intending to fully comply with the homestead laws, and would have done so but for the decision of the Secretary of the Interior awarding him the land under the act of 1887. Upon the decision of the Secretary of the Interior the government price of the land—\$200—was paid to the United States by the Sioux City Company for the benefit of the defendant, and a patent to the land was duly issued to him February 27, 1901, under section 4 of the act of 1887. The United States have ever since retained the price of the land so paid to them. After the decision of the Commissioner of the General Land Office the complainant gave no notice to defendant

that he made, or intended to make, any further claim to the land until the commencement of this suit, and during all of the time had actual knowledge that defendant was in actual possession of the land, claiming to own the same, farming and cultivating it, and making improvements thereon. Defendant, at the time he bought the land from Larson and paid therefor, had no actual knowledge of the pendency of the suit of the United States v. the Sioux City Company, and neither he, Powers, nor Larson was made a party to that suit. The amount paid and agreed to be paid by them respectively for the land was its full value at the time of such agreements. May 9, 1905, after the decision of the Supreme Court in *Knepper v. Sands*, 194 U. S. 476, 24 Sup. Ct. 744, 48 L. Ed. 1083, the complainant brought this suit, praying that defendant be decreed to hold the legal title to the land in trust for, and required to convey it to him.

In *Knepper v. Sands* it is held that after the resumption of the lands by the state of Iowa in 1882, for failure of the Sioux City Company to complete the road, that company had no interest in the land not patented to it and so resumed by the state; and that a purchaser of any part thereof from that company after such resumption, and after the passage of the adjustment act of March 3, 1887, acquired no right thereto as against a homestead settler upon the land in good faith prior to the adjustment act, and prior to the purchase from the railroad company. No other question was presented to, or decided by, the court in that case. The land there involved was open and unoccupied in 1885 when Sands the appellee, settled upon it, erected a house, and made other improvements with a view of establishing a homestead in accordance with the laws of the United States. He continuously resided upon it afterwards claiming it as a homestead, but his application to enter it as such was rejected by the local land office, presumably for the reason that it was within the limits of the grant of May 12, 1864. After the passage of the adjustment act of March 3, 1887, Mrs. Knepper, the appellant, contracted with the Sioux City Company for its purchase. She never resided upon, cultivated, or improved the land in any manner, but claimed it solely under her contract of purchase from the company and section 4 of the adjustment act. Her position with reference to the possession and occupancy of the land is the same as that of complainant in this suit, except that she did not attempt to intrude upon the prior possession of Sands, while Sands' possession corresponds with that of defendant. It may be conceded that under the decision in that case the defendant acquired no rights to the land under his purchase from the Sioux City Company. But his possession of the land, and that of his grantors, was not wrongful as to any one except the United States, and they are not complaining. He and his immediate grantor, Larson, entered upon the land under color of title and claim of right, and have continued in the uninterrupted adverse possession thereof under such claim and title for more than 10 years prior to the commencement of this suit, which, under the Iowa statute, is sufficient to establish a good title to the land as against all except the state or the United States. *Hamilton v. Wright*, 30 Iowa, 480; *Colvin v. McCune*,

39 Iowa, 502; *Leffingwell v. Warren*, 2 Black, 599-605, 17 L. Ed. 261; *Bicknell v. Comstock*, 113 U. S. 149-152, 5 Sup. Ct. 399, 28 L. Ed. 962. The land being so in possession of the defendant and his grantors, the complainant could not, while they were in possession, make a valid homestead settlement upon it. Section 2289, Rev. St. (U. S. Comp. St. 1901, p. 1388), provides:

"Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States * * * shall be entitled to enter one quarter section of land as a homestead * * * which may, at the time the application is made, be subject to pre-emption. * * *

Originally it was only lands subject to pre-emption that might be settled upon as a homestead. Upon repeal of the pre-emption law by the act of March 3, 1891, section 2289 was amended, and as amended it provides that a homestead entry may be made upon "unappropriated public lands." Chapter 561, § 5, 26 Stat. 1097 (U. S. Comp. St. 1901, p. 1388). The amendment, however, does not change or alter the character of the lands, as regards occupancy or improvement, that may be entered, and the uniform holding of the Supreme Court of the United States is that it is only the unoccupied and unimproved lands of the United States that are subject to pre-emption or homestead settlement, though the possession of a prior occupant, if there be one, may be wrongful as to the United States. *Atherton v. Fowler*, 96 U. S. 513, 24 L. Ed. 732; *Hosmer v. Wallace*, 97 U. S. 575, 24 L. Ed. 1130; *Quinby v. Conlan*, 104 U. S. 421, 26 L. Ed. 800. *Atherton v. Fowler* above, involved a question of the right to pre-empt lands, the possession of which was held under a Mexican grant which had been adjudged void, and the land declared to be a part of the public domain. After such adjudication numerous persons who had previously no interest in, claim to, or possession of any part of the land forcibly entered upon it without consent of those in possession, dispossessed them, and built upon and cultivated parts of the land under pretense of establishing a right to pre-empt the several parts so seized by them. When the land was restored to the public domain and became subject to public entry it was in possession of those who had settled upon it under the Mexican grant and had erected dwellings upon and otherwise improved it. In speaking of those claiming it under the invalid grant, Mr. Justice Miller said:

"Unless some reason is shown, not found in this record, these (the persons in possession under the Mexican title) were the persons entitled to make pre-emption, and no one else. But, supposing they were not? Does the policy of the pre-emption law authorize a stranger to thrust these men out of their homes, seize their improvements, and settle exactly where they settled, and by these acts acquire the initiatory right of pre-emption? The generosity by which Congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling house did not mean to seize some other man's dwelling. It had reference to vacant land, to unimproved land; and it would have shocked the moral sense of the men who passed these laws, if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass,

by violence, by robbery, by acts leading to homicides, and other crimes of less moral turpitude. * * * In the case of *Frisbie v. Whitney*, before mentioned, this court said that, while it was not necessary to decide it, there were serious difficulties in regard to complainant's right to make a valid pre-emption by a forcible intrusion upon land cultivated, inclosed, and peaceably occupied by another man. In the present case, we are met with that question directly in our way, and we are of opinion that it cannot be done. It follows that the defendants could not have made any lawful entry on the lands, * * * in this case; that no law existed which gave them any right to make such an entry; that they were naked trespassers, making an unwarranted intrusion upon the inclosure of another—an inclosure and occupation of years, in which time and labor and money had been expended—and that in such a wrongful attempt to seize the fruits of other men's labor there could be no bona fide claim of right whatever. The instruction of the court that this could be done, founded on an erroneous view of the pre-emption law, was itself erroneous, and the judgment founded on it must be reversed."

In *Hosmer v. Wallace*, 97 U. S. 575-579, 24 L. Ed. 1130, it is said:

"To create a right of pre-emption there must be settlement, inhabitation, and improvement by the pre-emptor, conditions which cannot be met when the land is in the occupancy of another. Settlement, inhabitation, and improvement of one piece of land can confer no rights to another adjacent to it, which at the commencement of the settlement is in the possession and use of others, though upon a subsequent survey by the government it prove to be part of the same sectional subdivision. Under the pre-emption laws * * * the right to make a settlement is to be exercised on unsettled land; the right to make improvements is to be exercised on unimproved land; and the right to erect a dwelling house is to be exercised on vacant land; none of these things can be done on land when it is occupied and used by others."

See also, *Quinby v. Conlan*, 104 U. S. 421, 26 L. Ed. 800; *Haws v. Vitoria Mining Co.*, 160 U. S. 303-319, 16 Sup. Ct. 282, 40 L. Ed. 436.

The defendant's remote grantor moved with his family upon the land in suit in the spring of 1884; erected small buildings, and resided thereon until he contracted for its purchase in 1887. The land was then unoccupied, and the right to it in litigation between the two railroad companies, each claiming it under the act of May 12, 1864. In June, 1887, after the settlement of that litigation and the land had been allotted to the Sioux City Company, he made a contract with that company for its purchase, and continued to reside upon it under that contract until December 7, 1888, when he sold it to Larson defendant's immediate grantor, who at once entered into possession, made further improvements and continued in possession until September, 1894, when he sold it to the defendant. Defendant immediately took possession, made other improvements, including a dwelling house, and continued to reside upon the land, except for a short time in February, 1896, until after he obtained his patent from the government in February, 1901. After the title of the railroad company was extinguished in 1895, he applied to the proper local land office, in compliance with the order of the Land Department, to purchase it under the adjustment act of March 3, 1887. The local land office awarded it to him under that act, but the Commissioner of the General Land Office held that he was not entitled to it thereunder, but was entitled to enter it as a homestead. The Secretary of the Interior upon appeal reversed the decision of the commissioner and affirmed that of

the local land office. The government price of the land was then paid to the United States by the railroad company for the benefit of the defendant, and a patent was duly issued to him therefor. If by reason of his prior settlement upon, and improvement of, this land (it being within the common indemnity limits of both roads) the defendant was entitled to enter it as a homestead, a question not necessary to now determine, the fact that a patent was issued to him upon other grounds would not invalidate his title, nor entitle a stranger to deprive him thereof. So long as the United States do not complain his title should be upheld. *Cooper v. Roberts*, 18 How. 173, 182, 15 L. Ed. 338; *Field v. Seabury*, 19 How. 323-330, 15 L. Ed. 650, 655; *Deweese v. Reinhard*, 61 Fed. 777-780, 10 C. C. A. 55.

Complainant never settled upon the land, his right to enter it as a homestead has never been recognized by the Land Department, and his unlawful attempt to intrude upon the defendant's prior peaceable possession in February, 1896, after the title of the railroad company was extinguished in October, 1895, gives him no right thereto. The local land office and the Commissioner of the General Land Office so adjudged, he prosecuted no appeal from the decision of the latter, and that decision is final and conclusive upon all questions of priority of entry and other questions of fact in the absence of fraud or mistake, neither of which is alleged nor shown. *Vance v. Burbank*, 101 U. S. 514-519, 25 L. Ed. 929; *Smelting Co. v. Kemp*, 104 U. S. 636, 640, 26 L. Ed. 875; *Moore v. Robbins*, 96 U. S. 530-535, 24 L. Ed. 848; *De Cambra v. Rogers*, 189 U. S. 119-122, 23 Sup. Ct. 519, 47 L. Ed. 734. Knowing that defendant was in possession of the land and making improvements thereon, claiming to own the same, he acquiesced in the decision of the Land Department for six years, and then comes into a court of equity asking that the land be awarded to him with the improvements placed thereon by the defendant. He is not entitled to such relief. *United States v. California Land Co.*, 146 U. S. 31-43-5, 13 Sup. Ct. 458, 37 L. Ed. 354; *United States v. Detroit Timber Co.*, 131 Fed. 668-676, 57 C. C. A. 1, affirmed 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499; *Gertgens v. O'Connor*, 191 U. S. 237-246, 24 Sup. Ct. 94, 48 L. Ed. 163; *Deweese v. Reinhard*, 61 Fed. 777, 10 C. C. A. 55; *Hartmann v. Warren*, 76 Fed. 157-163, 22 C. C. A. 30; *Germania Iron Co. v. James*, 89 Fed. 811, 32 C. C. A. 348; *Linkswiller v. Schneider* (C. C.) 95 Fed. 203.

Other questions are presented and fully argued by counsel, but they need not be considered, for the conclusion is that complainant has shown no equities that entitled him to the land and that the bill should be dismissed at his costs. It is accordingly so ordered.

LINEBECK v. VOS.

(Circuit Court, N. D. Iowa, W. D. April 1, 1908.)

No. 265.

1. PUBLIC LANDS—HOMESTEAD ENTRY—POSSESSION BY OTHERS.

Complainant could not rightfully initiate a homestead right to public land in possession of other citizens of the United States qualified to hold the land under the homestead or other laws of the United States, who had filed in the local land office notice of their intention to claim the land under such laws.

[Ed. Note.—Rights acquired by homestead settlements and entries on public lands, see note to *McCune v. Essig*, 59 C. C. A. 434.]

2. SAME—EFFECT OF APPLICATION—RIGHT TO SUE.

Complainant's application to so enter the land gave him no interest in or right thereto which would enable him to maintain an action to recover possession against the assignee of the prior entryman.

3. SAME—ENTRY OF PATENTED LAND.

An attempt to enter lands under the homestead laws after the lands had been patented to prior entrymen did not confer any interest therein, the land having been withdrawn by the patent from the jurisdiction of the Land Department.

In Equity. On final hearing. The land involved in this suit is the S. E. $\frac{1}{4}$ of Sec. No. 29, Tp. 96, R. 42, in O'Brien county, this state, and is a part of the 85,457.41 acres patented to the state of Iowa under the act of Congress of May 12, 1864, c. 84, 13 Stat. 72, for the benefit of the Sioux City & St. Paul Railroad Company, but never patented to that company, for the reasons stated in *Sioux City & St. Paul R. R. Co. v. United States*, 159 U. S. 349, 16 Sup. Ct. 17, 40 L. Ed. 177.

J. A. Miller, for complainant.

W. P. Briggs and A. C. Parker, for defendant.

REED, District Judge. The facts regarding the possession and occupancy of this land are: On August 27, 1887, John Brokaw made a contract with the Sioux City & St. Paul Railroad Company for its purchase, agreeing to pay therefor \$2,080 in 10 annual installments, which was then its full market value. He had been in possession of the land prior thereto and continued to remain in possession after making such contract. December 19, 1887, he assigned his contract of purchase to W. B. Bowne, and W. H. Sleeper for \$230 which they paid to him in cash, and in addition assumed and agreed to pay to the railroad company \$2,000, the amount then owing to it upon the contract of purchase. They at once took possession of the land, made valuable improvements thereon, and continued in the open and undisturbed possession of it until October 20, 1902, when they sold it to the defendant Vos, who in good faith and without actual notice of any defect in the title paid and agreed to pay for it \$10,160, that being its then fair value. Defendant Vos at once took possession, and has remained in the open, continuous and undisturbed possession thereof ever since. January 27, 1896, pursuant to the order of the local

land office of November 18, 1895 (see *Harvey v. Holles*, 160 Fed. 531), Bowne and Sleeper filed in that office notice of their intention to claim the land under the act of March 3, 1887, c. 376, 24 Stat. 556 (U. S. Comp. St. 1901, p. 1595). On the same date complainant filed a notice of his intention to claim it under the same act, but upon what he based his claim does not appear. February 27, 1896, the date fixed upon which the land would be subject to disposal by the United States, complainant made application to enter it as a homestead, and withdrew his claim to it under the act of March 3, 1887. Others also applied to enter it as a homestead. Upon a hearing of these several claims the local land office on May 8, 1896, rejected the claim of Bowne and Sleeper, and awarded the land to complainant upon his homestead application. Upon appeal by Bowne and Sleeper and others, the Commissioner of the General Land Office August 7, 1899, reversed the decision of the local land office, and held that complainant had never settled upon the land, and was not entitled to enter it as a homestead; that Brokaw or his assignees, Bowne and Sleeper, had been in the open and undisturbed possession of the land under the contract of purchase from the railroad company since the date of that contract, and awarded it to Bowne and Sleeper under the act of March 3, 1887. Complainant did not appeal from this decision, but other parties interested in the controversy did so appeal to the Secretary of the Interior, who on November 2, 1900, ordered a rehearing of the controversy before the local land office as to parties other than complainant and in his decision made this order:

"In the further proceedings in each of these cases all claimants who have heretofore become eliminated from the controversy by reason of their failure to appeal from a decision adverse to them will be considered as still eliminated and in no wise interested in the controversy."

In compliance with this order a rehearing was had before the local land office March 11, 1902. April 11, 1902, that office awarded the land to Bowne and Sleeper, under the act of March 3, 1887. The complainant was not notified of the rehearing, and took no appeal from this decision. The local land office certified the facts and its decision upon the rehearing to the Commissioner of the General Land Office, who on June 28, 1902, affirmed the decision. No appeal was ever taken from such decision of the Commissioner. July 29, 1902, a patent was duly issued to Bowne and Sleeper upon the payment for them of \$400, the government price of the land, which amount the United States have ever since retained. Bowne and Sleeper were each citizens of the United States and qualified to enter and hold land under the homestead or other laws of the United States. August 6, 1904, after the decision of the Supreme Court in *Knepper v. Sands*, 194 U. S. 476, 24 Sup. Ct. 744, 48 L. Ed. 1083, the complainant again made application to the local land office to enter the land as a homestead, which application was rejected upon the ground that the land had been patented by the United States, and was no longer within the jurisdiction of the Land Department. On appeals by complainant this decision was affirmed by the Commissioner of the General Land Office and the Secretary of the Interior, respectively.

No notice of these proceedings was ever given to the defendants, and they had no knowledge thereof until the commencement of this suit, which was September 29, 1905. It does not appear that complainant was ever upon this land; and the findings of the Land Department that he had never settled upon it, and that Brokaw and Bowne and Sleeper had been in the open, continuous and undisturbed possession thereof from August 27, 1887, until the patent was issued to Bowne and Sleeper in July, 1902, are conclusive upon those questions of fact. The complainant could not therefore rightly initiate a homestead right to the land while it was so in possession of Bowne and Sleeper. *Atherton v. Fowler*, 96 U. S. 513, 24 L. Ed. 732; *Hosmer v. Wallace*, 97 U. S. 575, 24 L. Ed. 1130; *Harvey v. Holles*, 160 Fed. 531. And his application to so enter it gave him no interest in or right to the land that will enable him to maintain this suit. *Frisbie v. Whitney*, 9 Wall. 187, 193, 19 L. Ed. 668; *The Yosemite Valley Case*, 15 Wall. 77, 21 L. Ed. 82; *Deweese v. Reinhard*, 61 Fed. 777, 10 C. C. A. 55; *Hartman v. Warren*, 76 Fed. 157-163, 22 C. C. A. 30; *Norton v. Evans*, 82 Fed. 804, 27 C. C. A. 168. In the last-named case the complainant alleged that he sought to enter the land as a homestead prior to the act of March 3, 1887, but was prevented from so doing by wrongful acts of the defendant, and that he thereby acquired a vested interest in the land, which could not be taken from him. But it was held by the Court of Appeals, this circuit, Mr. Justice Brewer delivering the opinion, that even if he had been allowed to make the entry that would not have given him a vested interest in the land as against the United States. The attempt of complainant to enter the land as a homestead after it had been patented to Bowne and Sleeper clearly does not clothe him with any interest therein, for the land was not then within the jurisdiction of the Land Department. *Moore v. Robbins*, 96 U. S. 530-532, 24 L. Ed. 848; *United States v. Schurz*, 102 U. S. 378-396, 26 L. Ed. 167; *Bicknell v. Comstock*, 113 U. S. 149-151, 5 Sup. Ct. 399, 28 L. Ed. 962; *Deweese v. Reinhard*, 61 Fed. 777, 10 C. C. A. 55.

In *Deweese v. Reinhard*, Judge Thayer, for the Court of Appeals, this circuit, said:

"It will be found, we think, on a critical examination of all the federal adjudications, that in no case has a person who had merely an equitable claim to a tract of land as yet been allowed to maintain a bill to cancel a patent, or to quiet his title, as against an outstanding patent issued to a third party for the same land, or to have the patentee adjudged to be a trustee of the legal title, unless the equitable title asserted by the complainant had its origin in a settlement made upon the land before the patent was issued, and before the patentee had done any act with a view of appropriating the property and securing a patent therefor. In no case does it appear that a bill of the present nature has been successfully prosecuted by a claimant whose rights had their origin years after the government had parted with the legal title."

This conflicts with nothing that is held in *Knepper v. Sands*, for there the homestead rights of Sands were initiated long before Mrs. Knepper made her contract with the Sioux City Company for the land. Here, Bowne and Sleeper had made valuable improvements upon, and were in actual possession of, the land when complainant first applied to enter it as a homestead. A patent had been issued to them by the

government, and they had sold the land in good faith to defendant before he next applied to enter it. He is simply speculating, or taking the chances, upon a supposed defect in the title of the defendant. Equity does not regard with favor such attempts, and should not permit them to succeed.

Complainant cites the cases of *Ostrom and Runger v. Wood* (C. C.) 140 Fed. 294, as sustaining his right to the land. In the *Runger Case* the land was unoccupied when he made his homestead settlement upon it in the spring of 1888. He was in possession thereof at the time Wood bought of the railroad company and afterwards remained in possession, and in the litigation between him and Wood over such possession after Wood's purchase in October, 1888, the possession was awarded to him by the state courts. In the *Ostrom Case* possession was taken by Ostrom under an agreement with Wood for the purpose of enabling him (Ostrom) to make a homestead settlement upon the land. Neither therefore unlawfully intruded upon the prior possession of Wood, if in fact Wood was ever in possession. In neither case was any question remotely suggested upon the hearing that plaintiffs, or either of them, had unlawfully intruded upon the prior possession of Wood, and no such question was considered or determined in either of the cases.

The conclusion therefore is that the bill should be dismissed at complainant's costs, without prejudice to any rights of the United States. It is accordingly so ordered.

DOCKENDORF v. BASSETT et al.

(Circuit Court, N. D. Iowa, W. D. April 1, 1908.)

No. 238.

PUBLIC LANDS—HOMESTEAD ENTRY.

Where at the time complainant attempted to move on public land in controversy he knew that defendants were then in open and undisturbed possession thereof and had been for several years, claiming to own it under a contract of purchase from a railroad company, complainant was not entitled to enter the land as a homestead, nor did his entry create any rights therein.

[Ed. Note.—Rights acquired by homestead entries on public lands, see note to *McCune v. Essig*, 59 C. C. A. 434.]

In Equity. On final hearing.

M. B. Davis and Henderson & Fribourg, for complainant.

W. D. Boies and A. C. Parker, for defendants.

REED, District Judge. The land involved in this suit is the S. W. $\frac{1}{4}$ of Sec. 5, Tp. 96, R. 42, in O'Brien county. November 12, 1887, it was purchased by Rachael B. Calvert from the Sioux City & St. Paul Railroad Company under a written contract whereby she was to pay \$2,880, in 10 annual installments. November 30, 1888, she sold the land and assigned her contract to Levi S. Bassett and the defendants for \$1,000, they agreeing in addition to assume and pay the amounts

due upon the contract with the railroad company. Subsequently Levi S. Bassett assigned his interest to the defendants. To December 1, 1892, there had been paid by Mrs. Calvert and the defendants to the railroad company upon the contract, \$1,977.56; and they had also paid all taxes upon the land. Mrs. Calvert and the defendants have been in continuous, open, and undisturbed possession of the land from the time of her purchase thereof, except that in the latter part of October, 1895, the complainant erected a small house or shanty thereon of the value of \$35 or \$40. The house was uninhabitable, but he slept there a few nights. He erected the structure without the knowledge or consent of the defendants, and they removed him and his shanty not long after he placed it on the land by proceedings of forcible entry and detainer under the Iowa statute. Pursuant to the order of the Land Department restoring the land to the public domain, the defendants on January 18, 1896, filed in the local land office notice of their intention to claim the land under the adjustment act of March 3, 1887. February 27, 1896, L. S. Burton and several other parties other than the complainant made application to enter it as a homestead. March 7, 1896, the complainant sent by mail from Sheldon, Iowa, an application, together with the requisite fees, to so enter it, accompanied with an affidavit that because of illness he could not attend in person. The application was received at the local land office March 8, 1896, and the fees were at once returned to complainant. Upon a hearing of these several applications the local land office on September 11, 1896, rejected all of the homestead applications, and awarded the land to the defendants under section 4 of the act of March 3, 1887, c. 376, 24 Stat. 557 (U. S. Comp. St. 1901, p. 1596). Upon appeal of the complainant, and two other homestead applicants, the Commissioner of the General Land Office reversed the decision of the local land office upon the authority of the then recent decision of the Secretary of the Interior in the case of *Olson v. Traver et al.*, 26 Land Dec. Dep. Int. 350, which held that a modified agreement, like that shown in this case, was an abrogation of the original agreement, and that defendants could not therefore be regarded as good faith purchasers of the land from the railroad company. Upon appeal of defendants the Secretary of the Interior on February 6, 1900, overruled his decision in *Olson v. Traver et al.*, reversed the decision of the Commissioner of the General Land Office, and awarded the land to the defendants. *Burton et al. v. Dockendorf*, 29 Land Dec. Dep. Int. 479. The government price of the land—\$400—was thereupon paid to the United States by the railroad company for the defendants, which price they have ever since retained, and a patent was duly issued to defendants February 27, 1901. The complainant afterwards made no claim to the land until the commencement of this suit, which was on July 30, 1904, shortly after the decision in *Knepper v. Sands*, 194 U. S. 476, 24 Sup. Ct. 744, 48 L. Ed. 1083. The land with its improvements was then worth some \$10,000.

When complainant attempted to move on to the land in October, 1895, he knew that defendants were then in the open and undisturbed possession of it, and had been for several years, claiming to own it under the contract of purchase with the railroad company. The un-

disputed facts bring the case within the rule in *Harvey v. Holles*, 160 Fed. 531, and following that decision the bill is dismissed at complainant's costs, without prejudice to the United States if they shall elect to assert any. It is accordingly so ordered.

LYLE v. PATTERSON et al.

(Circuit Court, N. D. Iowa, W. D. April 1, 1908.)

No. 210.

PUBLIC LANDS—HOMESTEAD ENTRY—PRIOR POSSESSION.

A homestead entry on public land then in the open and undisturbed possession of another constituted an unlawful trespass on such possession, and gave the entryman no rights or interest in the land as against a bona fide purchaser from such prior possessor to whom a patent had been duly issued.

[Ed. Note.—Rights acquired by homestead entries and settlements on public lands, see note to *McCune v. Essig*, 59 C. C. A. 434.]

In Equity. On final hearing.

M. B. Davis and Henderson & Fribourg, for complainant.
W. D. Boies, for defendants.

REED, District Judge. This suit was commenced May 24, 1901, to require the defendant Thomas Beacom to convey to complainant the legal title to the S. W. $\frac{1}{4}$ of Sec. No. 3, Tp. 97, R. 42, in O'Brien county, this state (except one acre in a corner thereof used as a school-house site), which it is alleged said defendant holds in trust for complainant. The land is a part of that granted by the act of Congress approved May 12, 1864, to the state of Iowa, to aid in the construction of two railroads in that state, was subsequently patented to the state for the benefit of the Sioux City & St. Paul Railroad Company, but never patented by the state to that company, because of its failure to construct the road. From the evidence it appears that on June 21, 1887, J. H. Pasco made a contract with the railroad company for its purchase at the agreed price of \$2,146.50, its then full value. He paid a part in cash, and agreed to pay the remainder in 10 annual installments. Pasco at once took possession, broke the land, and cultivated it until July 17, 1889, when he assigned his contract of purchase, and delivered possession of the land to the defendant G. W. Patterson, and his father, A. Patterson, in consideration of the payment by them to him of \$800, they in addition to pay the amount due the railroad company upon the contract of purchase. A. Patterson subsequently died, and G. W. Patterson succeeded to his interest in the contract and land. July 17, 1889, the defendant G. W. Patterson leased the land to a tenant who occupied and cultivated the same under that lease until January 30, 1901, when Patterson sold and conveyed the land by warranty deed to the defendants T. H. and Wm. M. Smith for \$6,360, its full value, which deed was duly recorded in the proper records in O'Brien county January 31, 1901, and they on March 31, 1901, in good faith sold and conveyed the land by warranty deed to

defendant Thomas Beacom for \$6,600. The Smiths and defendant Beacom took immediate possession of the land on their respective purchases of the same.

After the land was restored to public entry under the order of the Land Department of November 18, 1895 (see *Harvey v. Holles* [just decided] 160 Fed. 531), and notice thereof by the local land office, the defendant Patterson on January 17, 1896, filed in the local land office notice of his intention to make proof of his claim under the act of March 3, 1887. January 21, 1896, James A. Beacom, and February 23, 1896, the complainant, respectively filed notices of their intention to claim it under the same act. February 27, 1896, Louis Hoffman, the intervener, and others made application to enter it as a homestead. March 23, 1896, complainant, and April 12, 1896, James A. Beacom, also made applications to so enter it. Upon a hearing of these several claims the local land office in 1897, rejected the application of defendant Patterson, upon the authority of *Olson v. Traver et al.*, 26 Land Dec. Dep. Int. 350, because he had made a modified agreement with the railroad company like the one in that case, and awarded the land to intervener Hoffman as the first homestead applicant. Upon appeal by Patterson, James A. Beacom, and complainant, the Commissioner of the General Land Office, on August 28, 1899, sustained the decision rejecting the claim of Patterson, but reversed it so far as it awarded the land to Hoffman, and awarded it to James A. Beacom as the first homestead applicant. From this decision Patterson, Lyle, and Hoffman appealed to the Secretary of the Interior, who on April 11, 1900, sustained the decision upon the facts, but reversed it upon the appeal of Patterson, and awarded the land to him under section 4 of the act of March 3, 1887, c. 376, 24 Stat. 557 (U. S. Comp. St. 1901, p. 1596), upon the authority of *Burton et al. v. Dockendorf*, 29 Land Dec. Dep. Int. 479, and rejected the homestead application of the others. The government price of the land—\$400—was then paid by the railroad company to the United States for the benefit of Patterson, which sum they have ever since retained, and a patent was duly issued to him March 23, 1901. The findings of the local land office upon the homestead application of complainant are as follows:

"The evidence submitted in behalf of Roscoe Lyle shows that on the 22d of October, 1895, he drove a covered wagon on the land in controversy, stayed in the wagon overnight, built a small house the next day, did some plowing in the afternoon of that day, and on the next day his house was moved off the land by Beacom, and other parties assisting him. The next day he went over to the land to move the house back, but was prevented from doing so by the Beacoms. He had no further connection with the land until the 23d of March, 1896, when he filed his homestead application. There is no evidence tending to support his claim under the act of March 3, 1887, and his application under such act is hereby rejected."

These findings were approved by the Commissioner of the General Land Office, who said:

"When, however, Lyle went upon the land it was already in possession of Beacom, who had gone on and took up his residence early in the day, while Lyle did not go on until about 7 o'clock in the evening of that day, and put on his house in the morning of the 23d; this house was moved off on the 24th by some men, and upon his attempt to replace it, he was threatened with its destruction if he did so."

The finding that Beacom was in possession of the land was upon the theory that Patterson had no right of possession or other right to the land because of his modified agreement with the railroad company though he (Patterson) was in fact in the undisturbed possession of the land, and had been since July 17, 1889.

The testimony does not show any connection between James A. Beacom, the homestead applicant, and the defendant Thomas Beacom. Neither the complainant nor the intervener Hoffman have ever made any improvements upon the land, and have never paid the government fees for a homestead entry. In fact it does not appear that the intervener was ever upon the land, and their attempts to settle upon it, if the intervener did so attempt, were but unlawful trespasses upon the prior open and undisturbed possession of Patterson, and gave them no rights to or interest in the land; and neither has any equities in it as against the defendant Thomas Beacom, who appears to be a good-faith purchaser under a warranty deed, from the defendant Smith before the commencement of this suit for full value paid, and secured to be paid, without notice of any defect in the title. *United States v. California Land Co.*, 148 U. S. 31, 44-45, 13 Sup. Ct. 458, 37 L. Ed. 354; *United States v. Detroit Timber Co.*, 131 Fed. 668, 67 C. C. A. 1, affirmed 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499; *Linkswiller v. Schneider*, 95 Fed. 203.

Following the rule held in the cited cases, and in *Harvey v. Holles* (just decided) 160 Fed. 531, the bill should be dismissed at complainant's costs, without prejudice to the United States, and it is so ordered.

M'KENNA v. ATHERTON.

(Circuit Court, N. D. Iowa, W. D. April 1, 1908.)

No. 213.

1. PUBLIC LANDS—RIGHT OF ENTRY—FINDINGS OF LAND DEPARTMENT—CONCLUSIVENESS.

Facts found by the Land Department in a contest concerning the right to enter public land are conclusive on the court in a subsequent suit to recover the land from the patentee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 301-306.]

Decisions of Land Department. Their conclusiveness and effect, see notes to *Hartman v. Warren*, 22 C. C. A. 88; *Carson City Gold & Silver Mining Co. v. North Star Mining Co.*, 28 C. C. A. 344; *Unita Tunnel Mining & Transportation Co. v. Mining & Milling Co.*, 57 C. C. A. 207.]

2. SAME—OCCUPIED LAND—RIGHT TO ENTER—RIGHTS OF PATENTEE.

Complainant entered on the northeast quarter of a section of public land in 1884, built a house and barn on the west part of the quarter, and subsequently broke and cultivated a part of the same, intending to establish his right to the entire quarter section as a homestead. He was maintaining such possession, claiming the entire quarter on March 19, 1887, when T. purchased the east one-half of the quarter from a railroad company which had no right thereto, and both T. and defendant, to whom he subsequently assigned his claim, had full knowledge at the time of his entry of complainant's possession and claim when they respectively acquired their rights under the contract of purchase. *Held*, that an award

of the east one-half of the quarter section to defendant by the Secretary of the Interior on the ground that defendant was a bona fide purchaser from the railroad company, and the issuance of a patent to her, was erroneous, and complainant was entitled to have defendant declared a constructive trustee of the title for him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 344.]

3. SAME—FEES.

Where the fees and commissions tendered by complainant to enter certain public land as a homestead were rejected by the local land office because it was then supposed that the land was not subject to homestead entry, and complainant thereafter established his right to the land as against a patentee, complainant was only entitled to a decree for a conveyance on depositing such fees and other sums chargeable to him on the completion of his homestead entry for the use of the United States.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 344.]

In Equity.

This suit was commenced July 25, 1901, to require defendant to convey to complainant the legal title to the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section No. 11, Tp. 9S, R. 42, in O'Brien county, this state, which it is alleged the defendant holds in trust for complainant. The land is a part of that granted by the act of Congress approved May 12, 1864, c. 84, 13 Stat. 72, to the state of Iowa, to aid in the construction of railroads in that state, and was patented to the state for the benefit of the Sioux City & St. Paul Railroad Company, but never patented to that company because of its failure to complete the road as required by the act of Congress. After the decision of the Supreme Court in *Sioux City & St. Paul R. R. Co. v. United States*, 159 U. S. 349, 16 Sup. Ct. 17, 40 L. Ed. 177, and following the order of the Land Department of November 18, 1895, restoring so much of said lands as were not patented to the company, to public entry, the complainant made application to the local land office to enter the northeast quarter of section No. 11, as a homestead, and tendered the requisite fees therefor. He also made application to purchase it under the act of March 3, 1887, c. 376, 24 Stat. 556 (U. S. Comp. St. 1901, p. 1595). The defendant Atherton also made application to enter the east half of the northeast quarter, the land in suit, as a homestead; also to purchase it under the act of March 3, 1887. Upon a hearing of the respective claims so presented, it appeared from the testimony before the local land office that complainant in 1883, the land being then unoccupied and unimproved, made application to enter the northeast quarter of section No. 11 as a homestead, he being then qualified to enter it as such, which application was rejected. In February, 1884, the land remaining unoccupied and unimproved complainant moved onto the northeast quarter intending to establish title to it as a homestead, built a house and barn upon the westerly part of the quarter section, and in 1884, 1885, and 1886, broke and cultivated the land to crops, 60 acres thereof being upon the east half of the quarter section. In March, 1887, C. W. Toothaker came upon the east half of the quarter section and commenced plowing on McKenna's plowing. McKenna asked him by what authority he came upon the land, and Toothaker answered that he had bought it from the railroad company and was going to hold it with McKenna's plowing. McKenna told him that he regarded the claim under the railroad company as invalid, and ordered him off the premises. After some words both withdrew, and went to cropping different parts of the land. In May, 1887, while McKenna was sowing on the east half of the northeast quarter, Toothaker came and commenced breaking thereon, and was again ordered off by McKenna. Toothaker came again in a day or two and sowed a couple of times across the field with millet seed and went away. McKenna sowed the land to flax and harvested the crop that year. Toothaker continued to harass McKenna by coming upon the land, threatening to take his crops, and to purchase the whole quarter section from the railroad company. Toothaker's claim rested upon a contract made by him with the Sioux City Railroad Company, March 19, 1887, for the

purchase of the east half of the quarter section. His interference with McKenna continued until May 17th, when they made an agreement whereby McKenna was to lease from Toothaker all of the land broken on the east half of the quarter section prior to March, 1887, Toothaker to retain possession of the entire 80-acre tract after September 17, 1887. In February, 1887, an agent of the railroad company at Sheldon, in O'Brien county, wanted McKenna to help sell the railroad lands for the company, and promised him that if he would stay at Sheldon and have nothing to do with the squatters, and try to sell the lands, he would sell to him the whole northeast quarter of the section for \$1,000, if he (McKenna) would accept the offer that evening. McKenna the next morning concluded to accept the offer, but the agent then refused to sell to him because he had not accepted the evening before. Following this the sheriff began evicting settlers from the railroad lands, and, to save trouble, McKenna concluded to purchase the west half of the northeast quarter, the east half having been sold, but the agent refused to sell him that 80 acres unless he would relinquish his right to the east 80 to Toothaker, which McKenna refused to do. The agent then sent one John Harkins to McKenna to advise him to make the relinquishment, which Harkins told McKenna was in a lawyer's office at Sheldon. After an hour or more of persuasion McKenna yielded, went to Sheldon, signed the relinquishment, and got from the agent a contract for the west half of the quarter section. Toothaker then erected a line fence between the east and west 80, thus cutting McKenna off from possession of the east half of the quarter section, and since then McKenna, to avoid trouble, has not cultivated any of his breaking on that 80. Following these transactions McKenna in July, 1887, wrote the Commissioner of the General Land Office stating in a general way the facts as above stated, and asked if by buying from the company he was barred from homesteading the land, and if the "speculator" Toothaker could compel him to give up possession of that part of the land; and whether or not he had forfeited any of his rights to any of the land by what he had done. The Commissioner replied, in substance, that if his statements were true he had forfeited none of his rights, and that in the event of the restoration of the land to public entry he, as an actual settler, would have the preference right of entry. McKenna has continued to reside on the west half of the northeast quarter since he settled there in 1884, claiming the entire quarter section as a homestead, but has not cultivated the east half of the quarter since he was barred therefrom as above stated. The defendant Atherton is the mother-in-law of Toothaker, is a widow, and has resided with Toothaker since 1883, on the northwest quarter of section No. 12, adjoining the land in suit, which he owned. June 27, 1891, Toothaker assigned his contract for the purchase of the east half of the northeast quarter to her for the expressed consideration of \$1,000, upon which she claims to have paid more than \$600. She has not cultivated the land or made any improvements since her purchase, but has rented it out to others. In October, 1895, she was absent visiting a sister, when she received a telegram from Toothaker to come home. She returned on October 25th, found a house on the land moved there by Toothaker in her absence from his home place, and was told by him to go on to the land and live there, which she did. For this house she says that she agreed to pay Toothaker \$200, but the testimony of other witnesses is that it was a dilapidated summer kitchen, worth only \$20 to \$25. When she moved into the house McKenna gave her verbal notice to quit, and she said, in substance, that she wished Toothaker would send for her, that she did not know what she was kept there for. Upon this testimony the local land office rejected the claim of complainant, and awarded the east half of the northeast quarter of the section to Mrs. Atherton, under the act of March 3, 1887, as a bona fide purchaser from the railroad company. Upon appeal by complainant the Commissioner of the General Land Office on July 10, 1899, reversed the decision of the local land office and awarded the entire quarter section to the complainant under his homestead settlement and application. The defendant appealed to the Secretary of the Interior, who on March 29, 1900, approved the facts as found by the Commissioner, but reversed his decision, and awarded the east half of the quarter section to Mrs. Atherton, and the west half to the complainant, under his homestead

settlement and application. A petition for review was filed by the complainant and subsequently denied by the Land Department. Thereupon the railroad company paid to the United States \$200, the government price of the east half of the northeast quarter for the defendant, and a patent was duly issued to her for said land, which price the United States have ever since retained. Thereupon this suit was brought by complainant July 25th, following the issuance of the patent to compel her to convey to him the legal title to the land so acquired and held by her.

M. B. Davis and Henderson & Fribourg, for complainant.
Wright, Call & Sargent, for defendant.

REED, District Judge (after stating the facts as above). In reversing the decision of the local land office the Commissioner of the General Land Office said of the facts:

"It is clear from the evidence in this case that McKenna has been a constant and persistent claimant for this land since 1884, and that Mr. Toothaker was at the time of the contract and long before well aware that McKenna was residing upon, cultivating, and claiming the whole of the N. E. $\frac{1}{4}$ as a homestead settler. As Mrs. Atherton was at that time living with Toothaker on the adjoining land, and continued to live with him during the years following, I cannot assume that she had no knowledge of his claim and of the differences between McKenna and Toothaker as to the right to the said E. $\frac{1}{2}$ N. E. $\frac{1}{4}$. This knowledge of a prior claimant and occupant of the land as government land was sufficient to indicate to Toothaker that there was a probable defect in the title of the company, and he cannot be held to have been a bona fide purchaser under the act of March 3, 1887, c. 376, 24 Stat. 556 (U. S. Comp. St. 1901, p. 1595), and of this claim and occupancy Mrs. Atherton must also have had knowledge; and I must hold her purchase also as not bona fide. I give no account to her personal entry on the land in October, 1895, as the incidents thereof convince me it was not made in good faith, but was simply an attempt to 'hold down' the land, and she ignored this claim of homestead settlement upon the hearing of the case. I therefore overrule the award of the district officers to Mrs. Atherton, and reject her application to purchase under the act of 1887.

"The right of McKenna to enter the W. $\frac{1}{2}$ N. E. $\frac{1}{4}$ being without question, the only matter remaining for consideration is his right to the E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ in view of his recognition, by the lease, of the right of Toothaker, and his yielding possession of said 80 acres to him. With all the circumstances surrounding this transaction and leading up to it, as shown at the hearing, I reach only the conclusion that McKenna was coerced into making that lease, and yielding the actual possession to Toothaker. * * * It was not a free will act, and he was uneasy under it, and wrote to this office to know if it would affect his homestead right to the land. I therefore conclude and decide that said lease does not affect his rights, but that he has always claimed, and constructively been in possession of said E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ and is entitled to include the tract in his homestead application."

The Secretary of the Interior in reviewing the decision of the Commissioner of the General Land Office, said:

"The record history and facts in the case are fully and correctly set forth in the decision appealed from and will not be here recited except in so far as is necessary for the determination of the case. * * * McKenna went upon this land in 1884, claiming the entire N. E. $\frac{1}{4}$ of said section under the settlement laws. In 1887 McKenna purchased or claims to have purchased the W. $\frac{1}{2}$ of the said N. E. $\frac{1}{4}$, only to avoid trouble with the railroad company and other parties. He now claims the entire N. E. $\frac{1}{4}$ under his settlement on the same in 1884, and your office decision is based principally upon the theory that his occupancy of and settlement on the land prior to the purchase of the land by Toothaker, and also by Mrs. Atherton, defeated the right of

Mrs. Atherton to said land. McKenna's settlement on the land was long subsequent to the patenting of the same to the state of Iowa for the benefit and use of the railroad company, and under the decision of this Department in the case of *Tow v. Manly*, 29 Land Dec. Dep. Int. 504, decided February 16, 1900, said settlement will not defeat the right of a bona fide purchaser of the land from the railroad company to confirmatory patent, under section 4 of the act of March 3, 1887, *supra*. Accordingly your office action in denying Mrs. Atherton's application to confirmatory patent to the land applied for must be and is hereby reversed.

"While it appears from the testimony of McKenna that he contracted for the purchase of the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of said section 11, from the railroad company in 1887, and made several payments thereon, he did not offer such contract in evidence, and he appears to be relying upon his claim thereto under the homestead law, and such being the case, and it appearing that he is entitled to the said W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, his homestead application will be allowed as to that land. McKenna's homestead application as to the E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of said section 11 is, for the reasons herein stated, rejected."

The facts so found by the Land Department are conclusive upon the court. But if they were not, there would be no hesitancy in finding the facts as the Commissioner of the General Land Office found them. From such facts it clearly appears that complainant entered upon the northeast quarter of section No. 11 in 1884, built a house and barn upon the west part of the quarter, and subsequently broke and cultivated the same and 60 acres upon the east part, intending to establish his right to the entire quarter section as a homestead under the homestead laws of the United States, and he was so in possession and claiming the entire quarter section on March 19, 1887, when Toothaker purchased the east half of the northeast quarter from the railroad company, and that both he and the defendant, his mother-in-law, had full knowledge of complainant's possession and claim when they respectively acquired their rights under the contract for its purchase. The legal conclusion of the Secretary of the Interior that the defendant Atherton is entitled to the land as a bona fide purchaser thereof from the railroad company subsequent to the Act of March 3, 1887, and while the complainant was in possession thereof, claiming it in good faith as a homestead, is contrary to the holding of the Supreme Court in *Knepper v. Sands*, 194 U. S. 476, 24 Sup. Ct. 744, 48 L. Ed. 1083, and of Judge Shiras in *Manley v. Tow* (C. C.) 110 Fed. 241, and *Ostrom and Runger v. Wood* (C. C.) 140 Fed. 294. The rule deducible from these authorities and *Linkswiller v. Schneider* (C. C.) 95 Fed. 203, is that the prior right to land, situated as this was, is in him, or her, who first enters and makes substantial improvements thereon in good faith, claiming it under some law of the United States, in ignorance of a claim or right to it by others. In accordance with that rule, and especially with the decision in *Knepper v. Sands*, above, it must be held in this case that it was an error of law upon the part of the Secretary of the Interior to award the land in suit to the defendant; and that she now holds the legal title thereto in trust for complainant.

It appears that the fees and commissions tendered by the complainant to enter the land as a homestead were rejected by the local land office, presumably because it was then supposed by that office that the land was not subject to homestead entry, and he has not since paid

them. The government is not a party to this suit, and will not be precluded by the decree from recovering the fees due it from complainant. The complainant, however, should pay such fees and other sums that may be due from him upon the completion of his homestead entry, and he will be required to deposit such amount with the clerk of this court within 30 days after the filing of this opinion, for the use of the United States. Upon such deposit being made, a decree may be entered requiring the defendant within 30 days thereafter to execute and deposit with the clerk for the complainant a good and sufficient deed to him of the premises in question. It is ordered accordingly.

UNITED STATES v. MANN.

(District Court, S. D. Georgia, W. D. December 5, 1907.)

POST OFFICE—"MONEY ORDER FUNDS"—EMBEZZLEMENT.

Rev. St. § 4045 (U. S. Comp. St. 1901, p. 2751), defines "money order funds" to consist of "all money received for the sale of money orders, including all fees thereon, all money transferred from the postal revenues to the money order funds, all money transferred or paid from the money order funds to the service of the Post Office Department," and declares that all money order funds transferred from one postmaster to another shall be deemed and taken to be money order funds and money in the treasury of the United States. Section 4046 declares that every postmaster, assistant, clerk, or other person employed in or connected with the business or operations of any money order office, who converts to his own use, in any way whatever, any portion of the "money order funds," shall be deemed guilty of embezzlement, etc., and that it shall be prima facie evidence of a balance against him to produce a transcript from the money order account books of the Sixth Auditor. The post-office regulations authorize rural letter carriers to take and receipt for money from patrons of their routes and to purchase and forward money orders to the persons or corporations for which they are designed. *Held*, that money received and receipted for by a rural letter carrier from patrons of his route, to be used in the purchase and forwarding of money orders, while in the possession of such carrier and before surrender at the post office, did not constitute "money order funds," for the embezzlement of which the carrier could be prosecuted under section 4046.

Alexander Akerman and Robert E. Storrs, for the United States.
Marmaduke G. Bayne, for defendant.

SPEER, District Judge. When the arguments in this case were concluded, the court felt obliged, *sua sponte*, to direct a verdict of not guilty. The reasons for this action, if sound, would indicate that the large sums which are daily intrusted by the people throughout the country to the rural letter carriers for the purpose of purchasing money orders have not as yet been brought within the scope of the statute defining embezzlement of money order funds.

The accused was a rural letter carrier. He was indicted for the conversion "to his own use" and the embezzlement of "a portion of the money order funds of the United States, to wit, \$1.50," intrusted to him by a Mrs. Banks for the purchase of a post office money order, payable to E. V. Rodden & Co., at Chicago; in another count for a

similar embezzlement and conversion of the sum of \$2.37, which had come into his possession as rural letter carrier for the purchase of a similar money order for one Mrs. E. N. Goodwin, payable to the Sears-Roebuck Company, at Chicago; and in a third count for a similar conversion of \$2.60 in money, which had been delivered to him by one G. W. Thornton for a purchase of a money order on behalf of the said Thornton.

The government relied entirely upon proof that the money reached the hands of the defendant, that it was not heard of thereafter, and that no such money orders were purchased or forwarded. The indictment was framed expressly under section 4046 of the Revised Statutes (U. S. Comp. St. 1901, p. 2752). This provides:

"Every postmaster, assistant, clerk, or other person employed in or connected with the business or operations of any money order office who converts to his own use, in any way whatever, or loans, or deposits in any bank, except as authorized by this title, or exchanges for other funds, any portion of the money order funds, shall be deemed guilty of embezzlement; and any such person, as well as every other person advising or participating therein, shall, for every such offense, be imprisoned for not less than six months nor more than ten years, and be fined in a sum equal to the amount embezzled; and any failure to pay over or produce any money order funds intrusted to such person shall be taken to be prima facie evidence of embezzlement; and upon the trial of any indictment against any person for such embezzlement, it shall be prima facie evidence of a balance against him to produce a transcript from the money order account books of the Sixth Auditor."

This section is gathered from Act June 8, 1872, c. 335, 17 Stat. 299 (U. S. Comp. St. 1901, p. 2751), and Act March 3, 1873, c. 272, 17 Stat. 604 (U. S. Comp. St. 1901, p. 2751). As stated above, it designated those against whom the penalty of the statute may be leveled for embezzlement of any portion of the money order funds. These persons are every "postmaster, assistant, clerk, or other person employed in or connected with the business or operations of any money order office." It enacts what may be prima facie presumption of guilt; that is, "any failure to pay over or produce any money order funds intrusted to such person." The section immediately preceding section 4045 of the Revised Statutes, taken also from Act June 8, 1872, 17 Stat. 299, gives a precise definition of what are money order funds. It provides that:

"All money received for the sale of money orders, including all fees thereon, all money transferred from the postal revenues to the money order funds, all money transferred or paid from the money order funds to the service of the Post Office Department, and all money order funds transferred from one postmaster to another shall be deemed and taken to be money order funds, and money in the Treasury of the United States. And it shall be the duty of the Assistant Treasurer of the United States to open, at the request of the Postmaster General, an account of 'money order funds' deposited by postmasters to the credit of the Postmaster General, and of drafts against the amount so deposited, drawn by him and countersigned by the Sixth Auditor."

It is obvious that these provisions, taken from cognate acts of Congress and from contiguous sections of the Revised Statutes, must be construed together. Here, then, is a definite statement of what are money order funds—a definite statement of those officers who may be indicted for embezzlement thereof. The rural mail carrier legislation is by no means so definite. This, it seems, may all be found in sec-

tion 3874 of the United States Compiled Statutes of 1901 (U. S. Comp. St. Supp. 1907, p. 750). This comprehends all legislation relative to the rural free delivery service from Act April 21, 1902, c. 563, to Act March 2, 1907, c. 2513. In none of this legislation is there any such definition of the crime of embezzlement, or any enlargement of the money order fund, which would create a penal offense, denouncing the action of this defendant as described in the indictment. The Postmaster General is empowered to make, and has made, many regulations for the government and control of these officials; but it is not contended that such regulations could have the effect to enact a criminal statute, or define the crime for which a penalty may be imposed.

Among these regulations there is one which authorizes the rural letter carrier to take and receipt for money from what was termed in the argument the "patrons" of his route, to purchase money orders and forward the same to the persons or corporations for which they are designed. It was charged that in the exercise of this power the defendant became guilty of conversion and embezzlement of funds intrusted to him by the persons named in the indictment; but can it be said that the Congress, in the enactment of sections 4046 and 4045 of the Revised Statutes, had any reference to the rural carriers, who were authorized by a law enacted 30 years later, or that the sums handed to the rural carriers by their patrons can in any manner be regarded as within the scope of the "money order funds" as defined in section 4045?

In order to connect the rural letter carrier, who converts the fund intrusted to him, with the penalties defined in section 4046, the government relies exclusively upon the language, "or other person employed in or connected with the business or operations of any money order office." This is at least debatable. It is a wise general rule, where the constitutional rights of a party are involved, that a penal statute, which may deprive him of such inherent rights, should be strictly construed. *U. S. v. Hartwell*, 6 Wall. 395, 18 L. Ed. 830. It is obvious that Congress did not in 1872 or 1873 have in mind the rural letter carrier, who came within the classified service in 1902 and the subsequent years. I pretermit further discussion of this point. The question must be determined upon the inquiry whether the sums handed the rural letter carrier by the person who lived along his route for the purchase of money orders can be regarded in any sense as a part of the "money order funds" which Congress has sought to protect by sections 4045 and 4046 of the Revised Statutes, which must be construed together. Are they money received for the "sale of money orders"? We think not, for at the time of the transaction there has been no such sale. The intention of Congress here obviously related to the method of handling money order funds at the time its early legislation on the subject gave this definition. At that time the term "sale of money orders" related to the executed transactions, when the money order clerk at the post office, at his appropriate place in the post office building, had sold the money order to an applicant and received the price, which then became part of the "money order funds." Had Congress intended to enlarge its exact and copious definition of the "money order funds," so as to include the executory transaction between the rural carrier and his

patron, it would have enlarged the definition in language apt and specific for such purpose.

Nor is this "money transferred from the postal revenues to the money order funds," nor is it "money transferred or paid from the money order funds to the service of the Post Office Department," nor is it "money or funds transferred from one postmaster to another." It is nothing more or less than money which the regulation of the Postmaster General authorizes his qualified employé to accept from the citizen, with the duty of purchasing a money order therewith. It becomes no part of the "money order funds" until that purchase has been made, and then it is within the category of the first class of the definition, viz., "money received for the sale of money orders."

Besides, there is much in the language of section 4046 to show that Congress did not have in mind any such person as the defendant or any such fund as that which he received from his patron. The penalty is for not less than six months nor more than ten years, and a fine equal to the amount embezzled; and stronger than all, in the same sentence enumerating the "postmaster, the assistant, the clerk, or other person employed in or connected with the business or operations of any money order office," and defining as against them the crime of embezzlement of money order funds, this clause is also found:

"And upon the trial of any indictment against any person for such embezzlement, it shall be prima facie evidence of a balance against him to produce a transcript from the money order account books of the Sixth Auditor."

Can it be possible that in the enactment of section 4046 Congress could contemplate that a balance appearing on a transcript from the money order account books of the Sixth Auditor could be placed in evidence against this rural mail carrier for such transactions as those mentioned in these indictments?

I conclude, therefore, that section 4045 defined, and section 4046 made penal, the embezzlement of "money order funds," and that neither affords a definition, or defines a crime, against the rural mail carrier, who, through the permission or direction of the Postmaster General, accepts money from his patron with a view to buy for him or her a postal money order.

PHILADELPHIA TRANSP. & LIGHTERAGE CO. V. MECHLING BROS. MFG. CO.

(District Court, E. D. Pennsylvania. March 26, 1908.)

No. 75.

WHARVES—INJURY TO VESSEL—OBSTRUCTIONS ON BOTTOM.

The owner of a lighter, which sank by the stern and dumped her deck load while lying at respondent's wharf, *held*, on the evidence, to have failed to establish the allegations of its libel that the accident was the result of injury received from obstructions on the bottom at the berth there being no evidence of a hole or leak in the bottom of sufficient size to account for her sinking.

In Admiralty. On final hearing.

Horace L. Cheyney, for libellant.

Preston K. Erdman and Alfred Driver, for respondent.

HOLLAND, District Judge. This action was brought to recover damages for the injury sustained by a barge belonging to the respondent, alleged to have been sunk along side of the respondent's wharf on Cooper's creek, Camden, as a result of striking some rocks in the bed of the creek within the limits of the berth. The respondent, on March 27, 1903, contracted with libellant to carry 200 tons of kieserite from the steamship Arcadia, lying at Philadelphia, upon a deck lighter, to the wharf of respondent on Cooper's creek. The lighter employed is about 108 feet in length and 23 feet 6 inches wide. The cargo was loaded upon the deck of the lighter the entire width, in three heaps, about 7 to 8 feet high, and occupied the entire width of the vessel. The hold, which was about 7 feet in depth, was empty. With her cargo so stowed, the lighter was towed to a point within about 400 feet below respondent's wharf in Cooper's Creek, Camden, where she lay, head upstream, arriving there on Saturday afternoon. Cooper's creek is about 60 feet wide at the place of the accident. It has a depth of 10 to 12 feet in the middle, with sloping sides at the bottom. At this point it makes a curve, and the respondent's wharf, with a frontage of about 200 feet, and R. D. Wood & Co.'s wharf, which lies immediately below that of respondent's, adjoining it at the lower end, are on the outer side of the curve. A fence divides the two properties, and a willow tree stands close to the fence on the respondent's side, about 8 or 10 feet from the creek. The lighter had a mast amidship, used in hoisting from the hold.

The next day (Sunday) the master met one Sims, who said to him: "I would not go down along the wharf. The tide falls low down here." To which the master replied: "I was there at 5 o'clock this morning, and sounded, and know all about it." He subsequently, on Sunday morning in the presence of respondent's superintendent, sounded the bottom opposite the respondent's wharf, to find, as he said, "if it was a safe place to lie there." The lighter then lay with her stern made fast to R. D. Wood & Co.'s wharf, sufficiently close for a person to step from the stern of the lighter to the wharf. A line was run out from the bow and made fast to a tree on the extreme upper end of the wharf of respondent, with her bow more than 10 feet out in the creek. About one-half of the lighter was off the wharf of the respondent, and the other half was opposite the Wood Company's wharf. About 10 o'clock on Sunday evening the pumps were tried and no water found. About 1 o'clock Monday morning the master was aroused and found water coming down the hatchway into the cabin. He discovered the boat was sinking, and, after an attempt to start the pumps, he, with the others on board, jumped ashore, and almost immediately the lighter careened inshore, and her deck load was dumped into the water. She then righted, her stern, however, remaining down; but the bow was out of water. The lighter was subsequently shifted, and lay on the bottom of the creek until Wednesday, when she was raised and taken to the dry dock for repairs. There were some marks found

on her bottom, but no hole, and the chime seams somewhat open. There were limbs of the willow tree on her mast, which showed that she was, as claimed by the respondent, lying about equal portions of her length in front of the respondent and the Wood Company's wharf.

There was no water in her hold at 10 o'clock, and it was high tide about 1 o'clock, when she careened. At this time water was pouring in her hatches at the stern, and her stern was down. If she had rested on any submerged obstruction in the creek prior to that, and had been twisted, as claimed, so that the chime seams had opened and permitted water to leak in, there certainly would have been some evidence of it at 10 o'clock, when the master tried the pumps but found nothing to indicate a leak. The burden of affirmatively proving the negligence on the part of the respondent is upon the libelant, and in this we think they have failed. There is nothing to show that the sinking of this lighter was the result of injury received from an obstruction at the berth; but the fact that it careened inshore, then righted itself after dumping the load, and the fact that there was no evidence of a hole or leak of sufficient size to account for submerging the stern, as found by the captain when he awoke, all tend to show there was some other cause for the accident than that of a leak caused by reason of an obstruction in the bottom of the creek.

It is not necessary to consider the question as to whether the attempted explanation of the respondent, which was not pleaded, to wit, that the stern of the lighter caught on the wharf of Wood Company, and as the tide arose gradually became submerged, because as we have said, the libelant failed to establish affirmatively that the cause of the accident was as set forth in the libel, and therefore the libel is dismissed; the costs to be paid by libelant.

PHILADELPHIA TRANSPORTATION & LIGHTERAGE CO. v. PENNSYLVANIA R. CO.

(District Court, E. D. Pennsylvania. March 26, 1908.)

No. 79.

WHARVES—LIABILITY OF OWNERS FOR INJURY TO VESSELS—SUBMERGED PILES.

The owner of a dock, who had removed one of the piers therefrom, leaving submerged piles therein, is liable for the loss resulting from the grounding of a lighter on one of such piles while properly in the dock unloading a steamship, and which was properly moved and handled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Wharves, §§ 86, 87.]

In Admiralty. On final hearing.

Horace L. Cheyney, for libelant.

John Hampton Barnes, for respondent.

HOLLAND, District Judge. This libel is filed by the complainant to recover damage to one of its lighters, resulting from a submerged pile left by the defendant in the dock between piers 46 and 48, on the Delaware river. It appears that in the month of May, 1903, the com-

plainant was engaged in lightering a cargo of chalk from the steamship Minnesota, which vessel lay head in on the south side of pier No. 46, and complainant's lighter was lying head in along the south side of the steamship, receiving a cargo of chalk therefrom. After the lighter had been loaded, it became necessary to shift away from the steamship, and in doing so the alleged accident occurred. A careful examination of the evidence warrants the finding of the following facts:

(1) The defendant, at the time of the accident, was the owner of piers Nos. 46 and 49, and had removed from between these two pier 47. In this work of removal a number of submerged piles were left in the dock, several of them near the bulkhead from 4 to 8 feet from the surface, and one about 10 feet from the bulkhead about 18 inches from the surface of the water at ebb tide.

(2) The complainant's lighter, at the time of the accident, was properly loaded with about 275 or 280 tons of chalk, and whatever list there may have existed was not the cause of the accident.

(3) That the lighter was drawing about 6 feet of water fore and 6½ feet aft; that at this point the maximum high tide is about 6 feet, and the minimum high tide about 5½ feet; that on the day of the accident the tide was high about 2 o'clock, and that the accident happened somewhere between 3:30 and 4 o'clock; that there was about 6 feet of water over the highest submerged pile at the time of the accident.

(4) That the lighter was properly moved by the man in charge, and the accident was not the result of anything done or omitted to be done by them; that in removing the lighter toward pier No. 48 it ran aground upon the submerged pile, and as the tide lowered it listed to port, and, being top-loaded to the height of about 10 feet, overturned.

Convinced that this accident was caused as the facts above found would indicate, we conclude that the defendant is responsible for whatever damages resulted, and a decree is accordingly entered in favor of the complainant and against the respondent for damages and costs of suit.

Ex parte DURAND.

(District Court, D. Oregon. March 16, 1908.)

No. 4,998.

ALIENS—STATUTES—REPEAL—SAVING CLAUSE—EFFECT—EXCLUSION—PROSTITUTES.

Act Cong. March 3, 1903, c. 1012, § 2, 32 Stat. 1214, and Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898, provide for the exclusion of alien prostitutes. Section 21 of the 1903 act (32 Stat. 1218) provides for the deportation of aliens found in the United States "in violation of this act" within three years of their landing. Section 21 of the 1907 act (34 Stat. 905) provides for the deportation of aliens subject to deportation under that act or "any" other federal law within the same period. Section 28 of the 1907 act (34 Stat. 907) provides that such act shall not affect any prosecution, suit, action, or proceeding brought, or any "act, thing or matter, civil or criminal, done or existing at the time of the taking effect of" the act, and that as to all such "acts, things or matters," etc., the laws or parts of laws repealed or amended are continued in force. *Held*, that section 28 con-

tinues in force the 1903 act as to the exclusion of alien prostitutes, and saves the government's right to deport one who landed in 1906, though no proceeding was brought for that purpose until 1908.

James Gleason, for petitioner.
Wm. C. Bristol, U. S. Atty.

WOLVERTON, District Judge. The applicant is being held on a warrant issued by Hon. Herbert Knox Smith, Acting Secretary of Commerce and Labor of the United States of America, bearing date February 5, 1908, which recites the following:

"That whereas, it appears to me from proof submitted to J. H. Barbour, local inspector at Portland, Oregon, that Louise Reaux, alias Flora Durand, who landed at the port of New York, ex. S. S. Lucania, on the 14th day of January, 1906, in violation of acts of Congress approved February 20, 1907, and March 3, 1903, and that said alien is a prostitute and was such at the time of her entry into the United States, and that she entered the United States for the purpose of prostitution, and that she was found an inmate of a house of prostitution within three years after her entry; and whereas, the period of three years after landing has not elapsed—I, Herbert Knox Smith, Acting Secretary of Commerce and Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said alien to the country whence she came. * * * For doing so this shall be your sufficient warrant."

It is urged that the petitioner is being unlawfully held by reason of the fact that she landed in the United States while Act Cong. March 3, 1903, c. 1012, 32 Stat. 1213, was in force, and prior to the adoption of Act Feb. 20, 1907, c. 1134, 34 Stat. 898; it being argued that the latter act repeals the former, without any saving clause adequate to its continuance in force in so far as it relates to the act of the petitioner in coming within the territory of the United States, being a prostitute. The act of 1903 (by section 2) provides:

"That the following classes of aliens shall be excluded from admission into the United States: * * * Prostitutes, and persons who procure or attempt to bring in prostitutes or women for the purpose of prostitution."

By the twenty-first section of the act it is further provided:

"That in case the Secretary of the Treasury shall be satisfied that an alien has been found in the United States in violation of this act he shall cause such alien, within the period of three years after landing or entry therein, to be taken into custody and returned to the country whence he came, as provided in section 20 of this act," etc.

The act of 1907 provides (section 2):

"That the following classes of aliens shall be excluded from admission into the United States: * * * Prostitutes, or women or girls coming into the United States for the purpose of prostitution or for any other immoral purpose."

Section 21 of this act provides as follows:

"That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by section twenty of this act," etc.

Section 28 provides:

"That nothing contained in this act shall be construed to affect any prosecution, suit, action, or proceedings brought, or any act, thing, or matter, civil or criminal, done or existing at the time of the taking effect of this act; but as to all such prosecutions, suits, actions, proceedings, acts, things, or matters the laws or parts of laws repealed or amended by this act are hereby continued in force and effect."

And section 43 repeals the act of 1903, except section 34 thereof.

The sole question for consideration is whether the saving clause, or section 28 of the act of 1907, by intendment continues in force the act of 1903 as it relates to the exclusion of prostitutes from admission into the United States. It is conceded that, if any suit or proceeding had been pending relative to the deportation of the applicant at the time the act of 1907 took effect, such suit or proceeding would have been saved by section 28; but it is denied that such section is effective as to the act of the individual where no suit or proceeding has been begun. The language of the section is very specific, and relates to "any act, thing, or matter, civil or criminal, done or existing at the time of the taking effect of this act." As to all of such "the laws or parts of laws repealed or amended by this act are * * * continued in force and effect." The act of 1903 plainly provided that prostitutes should be excluded. The act of 1907 also provides for the same thing; and they may be deported within three years from the time of their entry into the United States. The act, offense, or transgression of law is the same in both statutes, and to my mind section 28 of the later act clearly continued the former in force as to that act, offense, or transgression of law of the petitioner whereby she is subject to deportation. The saving clause is unusual, by reason of including acts and things not in suit or action; but the very fact that such acts and things are specifically named shows the intendment of Congress to save the old act as to them, as well as to matters in suit or proceedings brought.

Another thought confirms this view. The time after entry into the United States within which deportation may be had is made the same—three years—in the new act as in the old; and section 21 of the later act is made to apply to an alien "subject to deportation under the provisions of this act or of any law of the United States," while the old law applies to an alien "found in the United States in violation of this act," thus showing a purpose to embrace any law of the United States, and an intendment to include the act of 1903 so far as in force. So that, construing this section with section 28, it is made reasonably clear that the act of 1907 was intended to embrace "acts" and "things" falling within the purview of the law of 1903, for which deportation would have been proper if arising within three years.

The petition will therefore be denied.

COURTNEY v. PRADT et al.

(Circuit Court of Appeals, Sixth Circuit. January 25, 1908.)

No. 1,772.

1. APPEAL AND ERROR—MODE OF REVIEW—NATURE OF SUIT.

The difference between causes of action at law and in equity is matter of substance and not of form, and the fact that a suit based upon a legal right of action is brought in equity in a state court, for the purpose of obtaining an attachment under a state statute, does not make it an equitable cause after its removal into a federal court, and the judgment therein is reviewable on error and not by appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, 10-14, 17.]

2. ATTACHMENT—FOREIGN ATTACHMENT—JURISDICTION.

Civ. Code Prac. Ky. § 194, which gives a plaintiff the right to an attachment at or after the commencement of an action for the recovery of money against a nonresident defendant, does not create a new right of action, and one who would not otherwise be subject to suit in the courts of the state, if personally present or personally served with process in the state, is not made so subject by such statute.

[Ed. Note.—Federal courts following state practice as to attachment, see notes to O'Connell v. Reed, 5 C. C. A. 606; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 393.]

3. EXECUTORS AND ADMINISTRATORS—SUIT AGAINST FOREIGN EXECUTOR—JURISDICTION.

It is the general rule that, in the absence of any statute so providing, an executor or administrator cannot be sued in his representative character on an indebtedness of his testator or intestate, either at law or in equity, in the courts of any state or country other than that in which he received his appointment, and such is the rule in Kentucky, subject to the exception that a foreign executor or administrator may be there sued where he has removed to and settled in the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 2344.]

Appeal from the Circuit Court of the United States for the District of Kentucky.

A. P. Humphrey and W. B. Dixon, for plaintiff in error.

H. C. Gillis and Neal Brown, for defendants in error.

Before LURTON and RICHARDS, Circuit Judges, and KNAPPEN, District Judge.

KNAPPEN, District Judge. The plaintiff in error, a citizen of Kentucky, brought suit in the circuit court for Powell county, Ky., by attachment, under section 194 of the Kentucky Code of Practice, which gives the plaintiff the right, at or after the commencement of an action, to an attachment against the property of the defendant, including garnishees, as security for the satisfaction of judgment in an action for the recovery of money against a nonresident defendant. The defendants are all nonresidents of Kentucky. The defendant Louis A. Pradt is executor, and the other defendants legatees and beneficiaries, under the will of Merritt B. Atwater, who died a citizen of and domiciled within the state of Wisconsin, by whose courts the

will has been admitted to probate and letters testamentary issued to the executor named; the estate not being closed.

The cause of action is upon an alleged indebtedness from the testator and William C. Atwater, as copartners, to the plaintiff. The will has not been proven in Kentucky, nor has any administration, ancillary or otherwise, been had therein. No service, actual or constructive, was had upon and no jurisdiction obtained over any of the defendants, unless such jurisdiction was obtained over the defendant Louis A. Pradt, executor. As to him, constructive service was attempted to be had by garnishing the Atwater & Allen Land & Lumber Company, a Wisconsin corporation, on account of an alleged indebtedness from said company to said executor, by way of a dividend declared since the testator's death upon stock in said company held by him, and since his death by his executor, as such. By reason of diverse citizenship of the parties the suit was removed to the United States Circuit Court. The defendant Pradt, executor, moved to dismiss the suit for lack of jurisdiction in the Kentucky courts to maintain suit against him upon the cause of action mentioned, also for lack of jurisdiction over the garnishee defendant, and for various irregularities in the attachment proceedings. The suit was dismissed.

To review this judgment the plaintiff, because of uncertainty whether the action is to be treated as one at law or in equity, has taken both an appeal and a writ of error. The uncertainty arises from the fact that under the Kentucky procedure the plaintiff is required to file a petition in equity where attachment is sought against nonresident defendants, and this suit was thus, in the state court, in equity. The difference between causes of action at law and in equity is matter of substance, and not of form. The suit being upon a legal right of action, the fact that by the state procedure the remedy by attachment is given in equity does not make the cause an equitable one in the federal courts. *Highland Boy Gold Min. Co. v. Strickley*, 116 Fed. 852, 54 C. C. A. 186; *Files v. Brown*, 124 Fed. 133, 59 C. C. A. 403; *Board of Councilmen v. Deposit Bank*, 124 Fed. 18, 59 C. C. A. 538. The appeal will be dismissed, and the writ of error retained. *Hurst v. Hollingsworth*, 94 U. S. 111, 24 L. Ed. 31.

The question which first claims attention is whether the plaintiff has a right of action in the courts of Kentucky upon the claim in suit against the defendant, as a foreign executor, the defendant personally being likewise a nonresident of the state. For unless the defendant, as such foreign executor, could have been sued in Kentucky for the cause of action in question, had he been within the jurisdiction of the court and personally subject to process, this suit cannot be maintained. Attachment suits, generally speaking, do not attempt to create legal rights. They merely provide remedies for the enforcement of existing rights of action. As expressed in *C., R. I. & P. Ry. Co. v. Sturm*, 174 U. S., at page 715, 19 Sup. Ct., at page 799 (43 L. Ed. 1144):

"The essential service of foreign attachment Laws is to reach and arrest the payment of what is due and might be paid to a nonresident to the defeat of his creditors."

There is nothing in the language of the statute here involved which indicates an intention to create a new legal right as against a foreign executor. The only provision which is pertinent here is the following:

"The plaintiff may, at or after the commencement of an action, have an attachment against the property of the defendant, including garnishees, as is provided in section 227, as a security for the satisfaction of such judgment as may be recovered—1. In an action for the recovery of money against (1) a defendant, who is a foreign corporation or a nonresident of the state."

This provision is found under the title "Provisional Remedies." The remedy is given as well after as at the time of the commencement of action. The cases of *C., R. I. & P. Ry. Co. v. Sturm*, supra, *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023, and *Pittsburg, etc., Ry. Co. v. Bartels*, 108 Ky. 216, 56 S. W. 152, furnish no authority for the proposition that one who would not be subject to suit in the courts of a state if personally present, or personally served with process therein, is made so subject by a provision for attachment of the kind here in question. Each of the cases referred to involved the effectiveness of a judgment against a garnishee defendant under foreign attachment proceedings. The garnishee defendant was held garnishable in the foreign jurisdiction because he was otherwise suable there by his creditor. The right of the plaintiff in the attachment suit to sue his foreign debtor in the courts of the plaintiff's residence was expressly recognized; and there is nothing in either of the cases cited which lends color to the proposition that a defendant, not otherwise suable, could be subjected to suit by attachment merely because such process was authorized "at or after the commencement of an action." Nor is there anything to such effect in the cases of *Peterson v. Poignard*, 6 B. Mon. (Ky.) 570, or in *Hefferman v. Forward*, Id. 567. In each of these cases the right to suit existed independently of the provision for attachment. The fact that in several states, where an administrator or executor is by statute subject to suit, process of attachment is provided for is not material to the question presented here.

Coming back, then, to the original question of the right of the plaintiff to sue the defendant as a foreign executor in the courts of Kentucky, we find the general rule well established by the decisions of the courts, both state and federal, that an executor or administrator cannot be sued in his representative character unless he is made liable by statute, either at law or in equity, in the courts of any state or country other than that in which he has received his appointment. Among the numerous authorities declaring this doctrine are *Story on Conflict of Laws*, § 513; 1 *Williams on Executors* (7th Am. Ed.), page 428 and following; *Dixon's Executors v. Ramsay's Executors*, 3 Cranch, 319, 2 L. Ed. 453; *Vaughan v. Northup*, 15 Pet. 1, 10 L. Ed. 639; *Noonan v. Braley*, 9 Wall. 394, 17 L. Ed. 278; *Johnson v. Powers*, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112; *Hopper v. Hopper*, 125 N. Y. 400, 26 N. E. 457, 12 L. R. A. 237; *Mellus v. Thompson*, 1 Cliff. 125, Fed. Cas. No. 9,405; *Security Ins. Co. v. Taylor*, 2 Biss. 446, Fed. Cas. No. 12,607.

In *Story on Conflict of Laws*, *supra*, it is said:

"It has hence become a general doctrine of the common law, recognized both in England and America, that no suit can be brought or maintained by any executor or administrator, or against any executor or administrator, in his official capacity, in the courts of any other country except that from which he derives his authority to act in virtue of the probate and letters testamentary or the letters of administration there granted to him. * * * If a creditor wishes a suit to be brought in any foreign country, in order to reach the effects of a deceased testator or intestate situated therein, it will be necessary that letters of administration should be there taken out in due form, according to the local law, before the suit can be maintained; for the executor or administrator appointed in another country is not suable there, and has no positive right to or authority over those assets, neither is he responsible therefor."

In *Dixon's Executors v. Ramsay's Executors*, *supra*, Chief Justice Marshall held that an executor could not maintain a suit in the District of Columbia upon letters testamentary, granted in a foreign country, saying:

"It is not and cannot be denied that he sues by virtue of his letters testamentary; and consequently, in this particular, he comes within the principle which was decided by the court in the case of an administrator."

In *Vaughan v. Northup*, *supra*, Justice Story held, citing *Dixon's Executors v. Ramsay's Executors*, *supra*, that an administrator appointed by the courts of one state is not liable to be sued, in the District of Columbia, in his official character, for assets lawfully received by him in that district, by virtue of his original letters.

In *Noonan v. Braley*, *supra* (at page 400 of 9 Wall. [17 L. Ed. 278]), Justice Field, in deciding that an administrator appointed in one state cannot, by virtue of such appointment, maintain an action in another state, in the absence of a statute of the latter state giving effect to that appointment, to enforce the obligation to his intestate said:

"Upon this point the law is well settled. All the cases on the subject are in one way. In the absence of any statute giving effect to the foreign appointment all the authorities deny any efficacy to the appointment outside of the territorial jurisdiction of the state within which it was granted. * * * The same doctrine is as applicable to the case of executors as to that of administrators; the right to sue in both instances depending upon the letters."

In *Mellus v. Thompson*, *supra*, which was a suit against a foreign executor, Judge (later Mr. Justice) Clifford, after a careful review of the authorities, said (page 134 of 1 Cliff. [Fed. Cas. No. 9,405]):

"Nothing is better settled than the rule that a person claiming under a will proved in one state cannot intermeddle with or sue for the effects of a testator in another state, unless the will be first proved in that other state, or unless he be permitted to do so by some law of that state authorizing such proceeding. He cannot sue for the personal estate of the testator out of the jurisdiction of the power by which the letters of administration were granted, and upon the same principle, and for the same reason, he cannot be sued or compelled to defend a suit in any jurisdiction to which his authority as executor does not extend."

In *Security Ins. Co. v. Taylor*, *supra* (which was an action against an executor), Judge Blodgett said (page 448 of 2 Biss. [Fed. Cas. No. 12,607]):

"The mere fact that one of the executors came within the jurisdiction of the court upon other business does not make him amenable to the process of

this court in his representative capacity; his official mantle falls when he leaves the jurisdiction in which he was appointed. If persons having claims against the estate * * * wish to pursue their remedy here, they must either take out letters of administration against the estate in this jurisdiction, or procure the executors to probate the will within this state, before the courts of this state, either state or federal, can obtain jurisdiction in personam of the executors or of the property of the decedent."

Turning to the decisions of the courts of Kentucky, we find the same rule there established as in the cases cited above, with this exception—that in that state, as in some others, a suit against a foreign administrator or executor is permitted when such executor has removed to, and settled within, the state.

In *Baker v. Smith*, 3 Metc. 264, the Court of Appeals of Kentucky said:

"An administrator or executor who is appointed and who qualifies in another state, and there receives assets into his hands, may be sued in the tribunals in this state by the person or persons entitled to such assets if he shall have removed to and settled in this state. Such seems to be the well-settled doctrine. *Manion's Adm'r v. Titsworth*, 18 B. Mon. (Ky.) 597, and cases there cited. But the right to sue a foreign administrator has never been extended further. * * * The rule is thus stated by Judge Story: 'If a creditor wishes a suit to be brought in any foreign country, in order to reach the effects of a deceased testator or intestate situated therein, it will be necessary that letters of administration should be there taken out in due form, according to the local law, before the suit can be maintained; for the executor or administrator appointed in another country is not suable there, and has no positive right to, or authority over, those assets, neither is he responsible therefor.'"

It is urged that *Baker v. Smith* is in conflict with the earlier Kentucky decisions. Reference to those earlier decisions, however, shows that they recognize no different rule than stated in *Baker v. Smith*. Thus, *Peterson v. Poignard*, 6 B. Mon. 570; and *Hefferman v. Forward*, Id. 567, were suits brought against the heirs at law (there having been no administration), under a statutory authority which gave to any creditor the right to file a bill for the settlement of the estate.

In *Davis v. Connelly's Executor*, 4 B. Mon. (Ky.) 136, it was simply held that, where a testator had been sued in the courts of another state, and the executors appointed in Kentucky had voluntarily appeared and asked leave to defend the suit after their testator's death, a judgment so obtained against the executors was enforceable in Kentucky.

In *Atchison's Heirs v. Lindsey*, 6 B. Mon. (Ky.) 86, 43 Am. Dec. 153, the intestate was a citizen of Kentucky, and there domiciled at the time of his death. Administration was had in Kentucky, and another administrator, a resident and citizen of Kentucky, was appointed over property in South Carolina. It was held that such foreign administrator, so residing and found in Kentucky, was responsible there to the distributees, for any surplus in his hands after the payment of the debts claimed and allowed in the state where the administration was granted. The decision was based upon the proposition that the law of the domicile of one dying intestate governs the distribution of assets wherever they be, and that the administrator was

personally liable to suit upon the proposition that he was a citizen and resident of Kentucky, there having assets in his hands.

In *Manion's Adm'rs v. Tittsworth*, 18 B. Mon. (Ky.) 582, 597 (cited in *Baker v. Smith*), it was said:

"It is the well-settled doctrine in this state that an administrator or executor, who is appointed or who qualifies in another state, and there receives assets into his hands, may be sued, in the tribunals of this state, by the person or persons entitled to such assets, if he shall have removed to, and, settled in this state. *Dorsey's Executor v. Dorsey's Adm'r*, 5 J. J. Marsh. (Ky.) 280, 22 Am. Dec. 33; *Atchison's Heirs v. Lindsey*, etc., 6 B. Mon. (Ky.) 86, 43 Am. Dec. 153."

The decisions of the Court of Appeals of Kentucky since *Baker v. Smith* are not out of harmony with the rule there stated. Thus, in *Keiningham v. Keiningham's Executors*, 71 S. W. 497, 24 Ky. Law Rep. 1330, an executor appointed and qualified in another state, who had as guardian made a settlement with the foreign court of appointment by which a balance remained in his hands, was held liable to suit in the courts of Kentucky, by the legatee and ward, for the recovery of such balance devised by the will, upon the proposition that the executor had not carried out in good faith the spirit and intention of the testator's will, in performing the trust created thereby. While it does not affirmatively appear from the decision that the defendant was a resident of Kentucky at the time suit was brought, such appears inferentially to be the case from the fact that the executor's liability to suit in the courts of Kentucky was sustained by reference to the cases of *Dorsey's Executor v. Dorsey's Adm'r*, *Atchison's Heirs v. Lindsey*, and *Manion's Adm'rs v. Tittsworth*, all of which were decided before *Baker v. Smith*.

But it is earnestly contended that even if it be conceded that a foreign administrator could not have been sued in Kentucky under the circumstances existing here, yet an executor is, nevertheless, liable to suit therein for an indebtedness to his testator; that a clear distinction exists in this regard between an executor and an administrator, in that the former derives title by virtue of the will to the whole estate wherever it may be at the instant of the testator's death, while the administrator derives his title solely from the government which appoints him, and then only to the personal estate within the territorial jurisdiction of the court making the appointment. It is urged that through an overlooking of this distinction, a confusion has been created in the authorities, for which it is suggested the statement in *Story on Conflict of Laws*, above quoted, is responsible.

It is true that a distinction does exist as between executors and administrators with respect to title to property, both real and personal, liability with reference to trusts, and relations in other regards towards the estates they represent; and such distinction has been repeatedly recognized by the courts. This distinction is referred to in 1 *Williams on Executors* (7th Am. Ed.), page 436 and following, the note to which contains many valuable citations. It was recognized, for example, in *Lewis' Lessee v. McFarland*, 9 Cranch, 151, 3 L. Ed. 687, where it was held, in an opinion by Chief Justice Marshall, that:

"It is not necessary that the executor of a will made in Virginia, devising to the executor land in Kentucky should take out letters testamentary in Kentucky to enable him to maintain an ejectment for the land in Kentucky."

But we are cited to no decisions which recognize any distinction, between foreign executors and foreign administrators, with respect to suability, in the absence of statute therefor, on account of debts owing from the decedent personally. It is true that the cases of *Stacy v. Thrasher*, 6 How. 44, 12 L. Ed. 337, and *Hill v. Tucker*, 13 How. 458, 14 L. Ed. 223, recognize the existence of a qualified privity between executors of a common testator acting in different states which is not recognized as between administrators so representing the estate of an intestate—in that it is held in the former case that a judgment obtained in Mississippi against an administrator appointed there is not even prima facie evidence against an administrator of the same decedent appointed in Louisiana, while the latter case, although distinctly holding that the privity between executors is not such as to make a judgment in one state against an executor there conclusive evidence against an executor "qualified in a different state from that in which the judgment was rendered," does hold that it is evidence for the purpose only of showing that the demand had been carried into judgment in another jurisdiction against one of the executors, and that the other executor was thus precluded from pleading prescription or the statute of limitations. But these decisions fall far short of recognizing the alleged distinction under consideration.

Dixon's Executors v. Ramsay's Executors, supra, and *Moore v. Tanner's Adm'r*, 5 T. B. Mon. (Ky.) 46, 27 Am. Dec. 35, are cited as basing the reason for the rule forbidding a foreign executor to sue for property in another jurisdiction (notwithstanding the difference between executors and administrators with respect to title to property and the source thereof), upon the proposition that the executor maintains suit on account of property in another jurisdiction only by virtue of his letters testamentary, and so has no right to sue in a foreign jurisdiction, although he has title to the personalty there, until he first complies with the conditions imposed upon him by the government of that jurisdiction; for the reason that no man can sue in the courts of any country, whatever his rights may be, unless in conformity with the rules prescribed by the laws of that country. It is argued that the reason for the rule does not exist, and that so the rule falls in the case of suits against executors.

It is by no means clear that the rule forbidding suits by foreign executors is based upon a different foundation than that which sustains the rule forbidding suits against such executors on account of the personal indebtedness of the testator. On the contrary, the Court of Appeals of New York, in *Hopper v. Hopper*, 125 N. Y., at page 403, 26 N. E., at page 457, 12 L. R. A. 237, states the same basis for both rules, drawing the distinction between contracts of an executor and contracts of an intestate thus:

"The foreign executor may make a contract here which our courts will compel him to perform because it is his contract; but where it is the testator's only, he cannot sue or be sued upon it, since the right or the liability is purely representative, and exists only by force of the official character, and so

cannot pass beyond the jurisdiction which gave it. *Johnson v. Wallis*, 112 N. Y. 230, 19 N. E. 653, 2 L. R. A. 828, 8 Am. St. Rep. 742. And thus it is not the residence of the executor out of the state which makes him a foreign executor, but the creation of his official character under and by force of a law foreign to our own."

It will also be noted that Judge Clifford, in *Mellus v. Thompson*, supra, based the foreign executor's exemption from suit upon the same ground as that which forbids his maintaining suit, saying further:

"That letters testamentary or of administration granted abroad, without new probate authority, give no right to sue or be sued is a principle almost universally acknowledged by courts of justice. It was so held in *Carther v. Crosts*, Godb. 33, decided in 1585, and since that period has been the received doctrine in most jurisdictions to the present time,"—citing authorities, both English and American.

But whatever may be said as to the foundation of the rule, which, in the absence of statute, forbids suit against a foreign executor, on an indebtedness of his testator, except in the event of his removal to the state, or his coming therein with assets of his testator, the rule is too well settled, and has been too repeatedly enforced, to now admit of questioning it. It is now not only the rule recognized generally, but in the state of Kentucky as well. It is certain that a foreign executor could not sue in Kentucky for a debt due his testator without complying with the statutory conditions. In *Marrett v. Babb's Executor*, 91 Ky. 88, 15 S. W. 4, it is held that qualification by an executor in another state does not authorize him to sue in the courts of Kentucky, but that by pursuing the statutory remedy he may sue for the debt of the deceased only. It would seem reasonable that the right to sue and the liability to suit should be correlative, and that an executor who is disqualified to sue for a debt due to his testator should not be liable to suit on a debt due from his testator. The recent decision of the Court of Appeals of Kentucky, in *McClelland's Adm'r v. Troendle*, 99 S. W. 329, 30 Ky. Law Rep. 611, recognizes this correlative nature. It is there held that where a foreign administrator cannot be sued in Kentucky, no suit can be maintained against him.

The case of *Tunstall v. Pollard's Adm'r*, 11 Leigh (Va.) 1, cited in support of the proposition that the right to sue and the liability to suit are not correlative, is not applicable to the facts here. That case was one in equity, by legatees, for an accounting against a foreign executor, who had come into the jurisdiction where the suit was instituted, bringing with him into that jurisdiction assets of the testator. The case cited distinctly recognizes the rule that a foreign executor is suable, by creditors, on account of the debts of the testator, only when such foreign executor comes into the jurisdiction bringing with him assets of the testator.

Unless section 428 and following, c. 3, tit. 10, of the Kentucky Code of Practice, which give a representative or creditor, or one claiming under the will of a deceased person, a right to bring an action in equity for the settlement of the estate, shall be held to apply to the estate of a nonresident testator, we are cited to no statute in Ken-

tucky providing for suit against a foreign executor for the recovery of an indebtedness of the testator, except sections 3878 and 3879 (Ky. St. 1903), which give a right of action in cases where the foreign executor, as a condition of his right of action for the debts due his testator, files his letters testamentary, and gives a bond conditioned to pay any debt due by the testator to any resident of the state to the extent assets shall come into his hands. Sections 3898 to 3900 provide for ancillary administration upon the Kentucky assets of deceased nonresidents, in the event of which administration such assets can be subjected to the claims of creditors. Neither of these statutes has been invoked, nor is the Code provision referred to here involved. The defendant executor was therefore not suable in Kentucky for the testator's debt. He has not removed to Kentucky, nor has he come, even temporarily, into the state.

The judgment of the circuit court, dismissing the suit, is affirmed.

NOTE.—The following is the opinion of Cochran, District Judge:

COCHRAN, District Judge. For convenience sake I will treat this suit as if Louis A. Pradt, executor of Merritt B. Atwater, deceased, were the sole defendant. The presence of the other defendants requires no different disposition of the cause from what would be made were he the sole defendant. The object of the suit is to subject an indebtedness of the Atwater & Allen Land & Lumber Company, a Wisconsin corporation, to the decedent, a citizen of Wisconsin at the time of his death, which has passed to the defendant as his executor, also a citizen thereof, to the payment of an indebtedness of said decedent to the plaintiff, a citizen of Kentucky. The corporation is not a defendant to the suit. Its indebtedness to the decedent is attempted to be reached by the service on it of an attachment, sued out against the property of the defendant, and summoning it to answer as a garnishee herein. Two attachments have been so sued out—one on January 14, 1905, when the petition was filed and a warning order, by which constructive service of defendant was sought to be had, was made, and the other on March 2, 1905, after another warning order had been made on February 25, 1905. The first warning order required the defendant to appear in state court, where the suit was begun, at its March term, 1905, and on the first day thereof to defend. It was defective in that it should have required him to answer within 30 days after the making of the order. To cure this defect the second order was made, and it was in proper form. Because the first attachment had been issued upon a defective warning order, the second attachment was sued out after the second warning order was made. Both attachments were executed on the corporation by delivering a copy thereof to J. M. Kennon, as its duly appointed and authorized agent upon whom process could be served in this state. The defendant had appeared specially for the purpose of objecting to the jurisdiction of the court, by said proceedings, to subject the indebtedness of the corporation to him as executor aforesaid, to the payment of the indebtedness of said decedent to plaintiff, and has moved the court to quash both of said attachments and the return thereon, because the court is without such jurisdiction.

Jurisdiction of the court to so subject the indebtedness of the corporation to the defendant cannot be based upon the ground that such indebtedness has any situs in this state. It has no such situs. It can only be based upon the idea that, at the time of the issuance and service of said attachments, the corporation was suable in this state by defendant on account of said indebtedness. And it must be conceded that if at that time it was so suable, then the court has jurisdiction to so subject said indebtedness, notwithstanding the defendant itself was not otherwise suable therein by the plaintiff. This was so held by the Supreme Court in the cases of *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797, 48 L. Ed. 1144; *Harris v. Balk*, 198 U. S. 223, 25 Sup. Ct. 625, 49 L. Ed. 1023. In the *Sturm* Case an Iowa corporation was garnished in Iowa by a creditor of a nonresident creditor of the

corporation, and it was held that the judgment of the Iowa court, subjecting the indebtedness of the corporation to the nonresident creditor, to the payment of the latter's indebtedness to the plaintiff, was valid. It was so held because, at the time of the garnishment, the corporation was suable in Iowa by the nonresident creditor. In the Balk Case, Harris, a resident of North Carolina, was garnished in Maryland by Epstein, a resident of Maryland and a creditor of Balk, a resident of North Carolina and a creditor of Harris, and it was held that the judgment of the Maryland court, subjecting the indebtedness of Harris to Balk to the payment of Balk's indebtedness to Epstein, was valid. It was so held because at the time of the garnishment Harris, being temporarily in Maryland, was suable therein by Balk.

The question here then comes to this: Was the Atwater & Allen Land & Lumber Company, at the time it was garnished herein, suable in this state by the defendant? If it was, then under the authority of these two cases it must be held that this court has jurisdiction, nothing else being in the way, to subject the indebtedness of said corporation to defendant to the payment of decedent's indebtedness to plaintiff. Its suability in this state at that time depends entirely upon whether it was then doing business in this state. If it was, then it was suable. If it was not, it was not suable. Of course, I am speaking here of its suability apart from an entry of appearance by it in a suit by defendant against it.

As to the suability of a corporation in a jurisdiction other than that which created it, the question first arose whether it was suable at all therein—i. e., in any state of case—it being contended that it was not. That it might be suable therein was settled by the Supreme Court in the cases of *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *B. & O. R. Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853. In the case of *St. Clair v. Cox*, 106, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222, the condition of its suability therein was determined by that court. That condition is, apart from its voluntary appearance, that it is then doing business in such jurisdiction. And that such is the condition of its suability has been either laid down or recognized in the following subsequent cases, to wit: *Fitzgerald v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608; *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; *Barrow v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; *Mut. R. F. L. Ass'n v. Phelps*, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987; *Conley v. Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; *Geer v. Same*, 190 U. S. 428, 23 Sup. Ct. 807, 47 L. Ed. 1122; *Penn. L. M. F. Ins. Co. v. Meyer*, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810; *Remington v. Central P. R. Co.*, 198 U. S. 95, 25 Sup. Ct. 577, 49 L. Ed. 959; *Peterson v. Chicago, R. I. & P. Ry. Co.*, 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841; *Green v. Chicago, B. & Q. Ry. Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916.

A state statute providing for service on an officer or agent of a foreign corporation will, in the absence of a contrary construction by the courts of that state, be construed as having application only to a corporation doing business in such state. *St. Clair v. Cox*, supra. But, even though the courts of such state have given a contrary construction thereof, the federal courts thereof will not follow such construction, and that, even in a suit removed from the state court to the federal court. *Goldey v. Morning News*, supra. In every suit, then, against a foreign corporation, it must be made to affirmatively appear therein, in some way, that such corporation is doing business in the state where the suit is brought, to give validity to any proceedings had therein. *St. Clair v. Cox*. This condition of suability of a foreign corporation exists as well where such corporation has theretofore done business in the state where the suit is brought, but has then ceased to do business therein, as where it never has done business therein. *Conley v. Mathieson Alkali Works*, supra; *Geer v. Same*, supra.

In speaking as to the condition of suability, I have not had reference to the maintenance of any particular suit. Of course, in addition to the foreign corporation doing business in the state where a suit is brought, in order to its maintenance, it is necessary that process shall have been served on a proper officer or agent of the corporation. Service on any officer or agent is not suf-

ficient, but it must be served on some officer or agent who may properly be deemed to represent the corporation in such matter. That such is the case is brought out in certain at least of the above decisions of the Supreme Court; but I do not deem it important to make this good, as the question is not material herein. In every suit, then, against a foreign corporation, the maintenance of a particular suit against it depends upon two things: One is whether it was, at the institution of the suit, doing business in the state where the suit is brought. The other is whether process has been served on an officer or agent who may properly be deemed to represent the corporation in the matter of process.

Coming, then, to the case in hand: Was the Atwater & Allen Land & Lumber Company suable in Kentucky at the time it was served with said attachments and summoned to answer as a garnishee, apart from an appearance on its part to a suit therein? This depends, as heretofore stated, on whether it was then doing business in this state. At the time the special appearance was made herein by the defendant, and he filed his motion to quash said attachments and the returns thereon, it did not affirmatively appear that said corporation was at that time doing business in this state. It was not stated in the return on said attachments. All that was stated therein was that they had been executed on said corporation by delivering a copy thereof to said Kennon, its duly appointed and authorized agent, upon whom process could be served in this state. Nor was it stated anywhere else in the record. On the contrary, from the allegations of the petition it would appear that it was not then doing business therein. It is alleged therein that said corporation was empowered to buy, sell, own, and hold real estate in this state; and, so far as the petition goes, this was all that it was empowered to do. It is further alleged that prior to August, 1901, it did buy and own real estate in this state, and that practically all of its assets consisted of said real estate. If this is true, then its capital stock had been invested therein, and was not represented by anything else. But this is not all that it alleged. The petition goes further, and alleges that during August, 1901, the corporation sold said real estate, and realized a large sum of money. If so, then the proceeds thereof represented its entire assets. It then sets forth that the indebtedness of the corporation to the defendant, sought to be subjected herein, was a dividend declared by the corporation out of the proceeds of said real estate. A corporation formed to buy and sell real estate, which has bought real estate with its capital stock, which has sold the real estate and converted it into money, and has then apportioned the proceeds amongst its stockholders with a view to paying the same over to them, can hardly be said to be doing business anywhere. Practically it has come to an end. It has no capital on which it can do business. If it is to do any further business, it must have fresh capital with which to do it.

Such, then, was the condition of things at the time of the issuance and service of the attachments, according to the allegations of the petition, and as appeared from the record when the entry of appearance and notice to quash was made. Accompanying the motion was an affidavit by defendant, from which it appears that he was not only a stockholder by virtue of his testator's stock in said corporation, but a director therein, and familiar with its business affairs; that the facts regarding said corporation were as alleged in the petition; that the entire proceeds of sale of land had been collected prior to January 1, 1905; that on February 15, 1905, a special meeting of the stockholders was called for February 21, 1905, to wind up the affairs of the corporation; and that on said date such meeting was held, at which a resolution was adopted to liquidate the corporation, and a final distribution dividend was declared of all its assets. According to this, then, the corporation was certainly not doing business in Kentucky at the time the second attachment was issued and served. It was further stated in said affidavit that said Kennon was not, at the time of the service of the attachment on him, an agent of the corporation, nor had he ever been authorized, or appointed, or designated to act as such agent for said corporation, by any lawful or valid action of the directors or stockholders of the corporation.

But whilst, as stated, it should have been made affirmatively to appear that the corporation was doing business in Kentucky, yet I would think, if,

notwithstanding the foregoing, that fact has been made to appear on the hearing of the motion to quash, it is sufficient to uphold the court's jurisdiction to proceed. On the hearing thereof the plaintiff produced and filed the affidavit of Clarence J. Allen, the secretary of the corporation. It is necessary, therefore, to consider the contents of this affidavit before finally disposing of the motion. Said affidavit states that he has examined the records of the meeting of the stockholders and directors of the corporation, of which he is the custodian, and finds no minute of any meeting looking towards a withdrawal by the corporation from the state of Kentucky, or canceling the authority of the agent who had been designated as agent, upon whom process might be served, that on April 27, 1904, said Kennon was duly appointed as such agent, and the evidence thereof was the certificate signed by him as secretary, and filed in the office of the Secretary of State, a duly certified copy of which was attached to the affidavit, and that there was still due the corporation from one C. B. Allen, a resident of Kentucky, a sum of money for rent of certain of its lands leased by it to said Allen. Said affidavit fails to make out that the corporation was doing business in Kentucky at the time of the issuance and service of the attachments. The adoption of a formal resolution of withdrawal from Kentucky was not essential to the corporation ceasing to do business in this state. It ceased so to do by the fact that it sold out what it had in the state. In the Mathieson Alkali Works Case it was held that the corporation ceased to do business in the state of New York by selling and conveying the plant which it had theretofore been operating. This was so held notwithstanding the sale and conveyance was in consideration of the capital stock of the purchasing corporation, which it continued thereafter to own and hold.

As to whether Kennon was the agent of the corporation duly authorized to be served with process may be a question. It all depends on whether the action of the board of directors was essential to that end, or the mere action of the secretary was sufficient. It would seem that his authority depended solely on the action of the secretary. I do not deem it necessary to decide this question; for if he had been duly authorized, that fact did not affect the question as to whether the corporation was doing business in the state. Notwithstanding that fact, still it was not doing business therein. And in order to its suability, it was essential that it be doing so. That it had a duly authorized agent in the state simply made it possible, if it did business in the state, for process to be served on its duly authorized agent for that purpose, in a suit against it, so that jurisdiction of it could be acquired.

Then as to Allen being indebted to it for rent, that fact did not make it that the corporation was doing business in the state at the time in question, any more than the fact that the foreign corporation in the Mathieson Alkali Works Case acquired on the sale and conveyance of its plant the stock of the purchasing corporation, a New York corporation, and thereafter continued to hold it, make it that said corporation continued to do business in that state. It must be held, then, at the time of the issuance and service of the attachments herein, the garnishee was not doing business in Kentucky. Certainly such was the case when the second attachment was issued and served. Therefore the corporation had gone into liquidation. It is probable that the first attachment was void because issued on a void warning order, and therefore not at or after the commencement of the action. Proceedings in constructive service must be strictly pursued. The only order the clerk had power to make was to warn the defendant to answer within 30 days after the making of the order. The order made was to appear at the next March term, 1905, of the court, and defend on the first day. It does not say anything about answering, save inferentially. He is warned to do two things—to appear, and that, at the March term, without saying when, and to defend on the first day. Possibly a true construction thereof was to answer on the first day of the said term, and it is true that this time was longer than 30 days. But still it was not the order he was empowered to make. However this may be, I think it is still clear that the corporation was not doing business in this state when the first attachment was issued and served.

This being so the corporation was not suable in this state when either attachment was issued and served. And not being suable, it was not garnish-

able. The latter seems to follow necessarily from the former. It was because the garnishee was suable by the defendant in the jurisdiction where the garnishment process was sued out that it was held in the *Sturm and Balk* Cases that he was also garnishable therein. The principle of those cases is thus stated by Mr. Justice Peckham in the latter case: "The plaintiff in such proceeding in the foreign state is able to sue out the attachment and attach the debt due from the garnishee to his [the garnishee's] creditor, because of the fact that the plaintiff is really in such proceeding a representative of the creditor of the garnishee; and, therefore, if such creditor himself had the right to commence suit to recover the debt in the foreign state, his representative has the same right, as representing him, and may garnish or attach the debt, provided the municipal law of the state where the attachment was sued out permits it."

But it is said that a foreign corporation, though it may not be suable in a certain jurisdiction because not doing business therein, yet if it enters its appearance to a suit therein without raising the question of jurisdiction, the suit is thereafter maintainable against it, and that in this case the garnishee, before any question of jurisdiction was raised, filed its answer as such without raising the question, and therefore it was not open to the defendant thereafter to raise it. Both propositions are true, but the conclusion does not follow therefrom. Though the garnishee had the right to waive the question of jurisdiction so far as it was concerned, it had no right to waive it so far as defendant was concerned. A garnishee has no power to confer jurisdiction on a court, so far as the defendant is concerned, to subject its indebtedness to him to the payment of his indebtedness to another. A number of authorities are cited as to the right of a garnishee to waive defective service, but they have no application here. The garnishee owes the defendant a duty, and that duty is to give the defendant an opportunity to defend the action against him. This was recognized in the *Balk Case*, Mr. Justice Peckham there said: "It is recognized as the duty of the garnishee to give notice to his own creditor, if he would protect himself, so that the creditor may have the opportunity to defend himself against the claim of the person taking out the attachment." Amongst the defenses that a defendant has the right to assert in the suit against him is that the court has no jurisdiction of the suit, and a garnishee has no right to take this defense from his creditor, when sued in a foreign jurisdiction, any more than any other defense.

Something is said in the brief as to the defendant having entered his appearance generally. I cannot make this out. He has made four separate and distinct motions—more than there was any necessity for—and he has urged every possible ground in support of them. But as to all of them he entered his appearance specially to raise the question of jurisdiction, and the basis of all his motions is that the court is without jurisdiction to proceed against him.

I am therefore constrained to sustain the motion to quash the attachments and returns thereon, and to dismiss the suit.

SCOTT et al. v. ABBOTT.

(Circuit Court of Appeals, Eighth Circuit. March 27, 1908.)

No. 2,607.

1. CORPORATIONS—INCREASE OF CAPITAL STOCK—VALIDITY—"FICTITIOUS."

Const. Mo. art. 12, § 8 (Ann. St. 1906, p. 304), ordains that "no corporation shall issue stock * * * except for money paid, labor done or property actually received; and the fictitious increase of stock * * * shall be void." Rev. St. Mo. 1899, § 962 (Ann. St. 1906, p. 860), re-enacts such prohibition. Section 1327 (Ann. St. 1906, p. 1071) provides that "any corporation increasing its capital stock shall before the same shall take effect cause to be paid up of such increase * * * not less than fifty

per cent.," and section 1329 (Ann. St. 1906, p. 1072) requires the increase to be authorized by the stockholders, and a verified and acknowledged statement by the officers to be made, recorded, and furnished to the Secretary of State, setting forth the action of the stockholders, the present capital stock, the assets and liabilities of the corporation, the amount to which the capital is to be increased, and the percentage of such increase that has been actually paid up in lawful money, and that it is in the custody of the board of directors, whereupon the Secretary of State shall issue a certificate that the corporation has complied with the law and showing the amount to which its capital stock has been increased. A corporation duly voted to increase its capital, a statement in due form was executed, stating that all of the increased capital had been paid up, and was in the custody of the directors, and the Secretary issued the required certificate. No part of the increased stock had in fact been paid for, and the statement was also false as to the corporation's assets and liabilities, but it afterward issued and sold a large part of such stock receiving payment therefor. *Held*, that the statement was one of the details required for obtaining the certificate, and its truthfulness was not fundamental to the validity of the stock; that, the corporation having received payment for it in money, which was the substantial requirement, it was not "fictitious and void" under the constitutional provision.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3. p. 2754.]

2. BANKRUPTCY—CLAIMS AGAINST ESTATE—ESTOPPEL TO ASSERT.

Any person becoming a creditor of a corporation has a right to rely on the security afforded by the money paid by the stockholders for its capital stock; and although stockholders may have been induced to become such by false and fraudulent representations made by its officers, which would entitle them to rescind their contracts and recover the money paid for such stock as between them and the corporation, where they have remained stockholders and received dividends for some years, during which the corporation has contracted indebtedness, they cannot exercise such right of rescission as against its creditors after it has become a bankrupt, and share as creditors in its estate.

Appeal from the District Court of the United States for the Eastern District of Missouri.

The appellants, who by consent and on one record prosecute joint appeals to this court, were separate holders of preferred stock in the Tennent Shoe Company, a manufacturing and business corporation, organized under and pursuant to the general laws of the state of Missouri. The shoe company originally had a capital stock of \$400,000. It undertook to comply with the provisions of the statutes of Missouri to increase its capital stock to \$800,000, and to make \$300,000 thereof preferred stock and \$100,000 common stock. At a meeting of the stockholders called for the purpose, pursuant to the provisions of section 1329, Rev. St. Mo. 1899 (Ann. St. 1906, p. 1072), a resolution was adopted providing for the increase. Subsequently a statement of the proceedings of the meeting, showing compliance with the provisions of the statute, was duly signed, verified, acknowledged, and recorded in the recorder's office of the city of St. Louis, as required by law, and a certified copy of the same was filed in the office of the Secretary of State on December 28, 1903. Upon that day a certificate was issued by the Secretary of State, to the effect that the corporation had complied with the law for the increase of its capital stock, and that the same had been increased to the extent of \$400,000; \$300,000 preferred, and \$100,000 common stock. The instrument so recorded and filed contained the statement that the amount of capital stock of the company paid up was \$400,000, that the amount of assets of the company was \$1,387,066.82, that the amount of its liabilities was \$501,460.99; that the amount to which the capital stock was increased was \$800,000, and that all said increase of capital stock had been actually paid up in lawful money of the United States, and was in the hands of the board of directors of the company. Contemporaneously with securing this certificate the officers

of the company arranged with the Little & Hays Investment Company of St. Louis for the sale of the preferred stock, and placed in their hands, at the time, a written statement, over the signature of the corporation by its president, John H. Tennent, to the effect that \$300,000 of preferred stock had just been issued in strict conformity with the laws of Missouri; that all the common and part of the preferred stock was owned by the officers and directors of the company; that the total net earnings available for annual dividends would not be less than five times the amount required for dividends on the preferred stock. They also gave the investment company a written statement, falsely setting forth in detail the assets and liabilities of the company, and that it had received paid subscriptions to its increased capital stock amounting to \$400,000, which made its capital and surplus \$885,605.83. Those statements, together with others of similar character, were delivered to the investment company for the purpose of having them exhibited to the public, to bring about sales of the preferred stock. The investment company, making use of them for the intended purpose, in the course of a year sold some over 2,000 shares of the stock, accounted to the shoe company for about 90 per cent. thereof, and retained the balance as its commission. The appellants, Scott, Martin, and Gauss, were among the purchasers. The shoe company, through sales made by the investment company and others, making use of the same statements, realized about \$300,000 from the total sales of all stock. Soon after receiving the certificate of increase the shoe company commenced paying quarterly dividends on the preferred stock so sold, at the rate of 7 per cent. per annum, and continued so doing during the years 1904 and 1905, the last payment being made on January 1, 1906. In January, 1906, an examination of the books of the shoe company was made at the instance of the preferred stockholders, and disclosed the fact that the company was insolvent, and had been so for years, and was so when its capital stock was increased; that the statements made by the company to secure the increase of capital and otherwise to influence purchasers were false and fraudulent, and that the evidence of their falsity had been concealed from the stockholders and public by the president of the shoe company. It further turned out that the increased stock had not been subscribed or paid for at the time the statement was made for securing the increase, and never had been paid for, except as the investment company and others sold the same and turned over the proceeds to the shoe company. The appellants bought their stock upon the faith of the representations made in the statements so made and uttered by the shoe company and repeated by the investment company. Investigation into the affairs of the company proceeded during the months of January and part of February when, upon the advice of counsel, the appellants repudiated their contract of purchase, and tendered back the stock and dividends which they had received from the shoe company. About that time, on February 10, 1906, a petition in bankruptcy was filed against the shoe company, which was afterwards confessed by the company, and an adjudication followed on March 2, 1906. Appellants undertook to prove claims against the estate in bankruptcy for the amount of money paid by them, respectively, for their preferred stock less such dividends as they had received thereon. Their claims were disallowed by the referee, and his action was approved by the district court on proper proceedings bringing it there for review. The present appeal challenges the rulings so made.

Joseph S. Laurie and Frederick N. Judson (John F. Green, on the brief), for appellants.

B. Schnurmacher and Lee W. Grant (Leo Rassieur, on the brief), for appellee.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

ADAMS, Circuit Judge (after stating the facts as above). Appellants claimed below, and now claim here, that they are entitled to prove their claims against the estate of the shoe company in bankrupt-

cy, for two reasons: First, because the issue of preferred stock, of which they acquired a part, was fictitious and void, in that it was never subscribed or paid for, as required by the Constitution and statutes of Missouri, and consequently they never sustained the relation of stockholders to the company, but that of creditors to the extent of the money paid for their stock; second, because they were induced to purchase the same by false and fraudulent representations made by the corporation and its agents, and repudiated and rescinded their contracts of purchase upon discovering the fraud practiced upon them. We will consider these two propositions in the order in which they are stated.

Article 12, § 8, of the Constitution of Missouri (Ann. St. 1906, p. 304), ordains that:

"No corporation shall issue stock or bonds except for money paid, labor done or property actually received; and the fictitious increase of stock or indebtedness shall be void. The stock and bonded indebtedness of corporations shall not be increased, except in pursuance of the general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting called for the purpose, first giving sixty days' public notice, as may be provided by law."

The pertinent statutes enacted to carry this constitutional provision into effect are sections 962, 1327, and 1329 of the Revised Statutes of Missouri 1899 (Ann. St. 1906, pp. 860, 1071, 1072). Section 962 is a re-enactment of the constitutional prohibition providing that the shares of stock or bonds arising from an increase thereof shall only be disposed of "for money paid, labor done or money or property actually received," and that "all fictitious issues or increase of stock or of bonds shall be void." Section 1327, relating especially to "manufacturing and business companies," provides that:

"Any corporation increasing its capital stock shall before the same shall take effect, cause to be paid up of such increase of capital stock not less than fifty per cent. in lawful money of the United States."

Section 1329 makes provision for holding a meeting and taking the vote of stockholders on a proposition to increase or diminish the amount of capital stock, and provides that:

"A statement of the proceedings showing a compliance with the provisions of this article, the amount of capital actually paid in * * * the whole amount of assets and liabilities of the corporation, and the amount to which the capital stock shall be increased or diminished, shall be made out, signed and verified by the affidavit of the chairman, and be countersigned by the secretary; and such statement shall be acknowledged by the chairman, and recorded, as provided in section 1313, and a certified copy of such recorded instrument shall be filed in the office of the Secretary of State, who shall thereupon issue a certificate that such corporation has complied with the law made and provided for the increase or decrease of capital stock, as the case may be, and the amount to which such capital stock is increased or decreased; and such certificate shall be taken in all courts of this state as evidence of such increase or decrease of stock; and thereupon the capital stock of such corporation shall be increased or diminished to the amount specified in such certificate: * * * Provided, that in case of increase of capital stock, the statement above provided for shall set out the percentage of the increase that has been actually paid up in lawful money of the United States, and that it is in the custody of the board of directors."

1. The first contention of appellants is that the preferred stock was void ab initio; that money paid for it was without consideration, and is held by the corporation as money had and received, for the use of the depositor. It is not claimed that the shoe company, in its proceedings to effect the increase, failed to comply with any of the formal requirements of the statute. Neither is it claimed that the certificate of the Secretary of State evidencing such compliance and sanctioning the increase of stock is in any respect informal or incomplete; but it is claimed that the shoe company falsely stated, in its statement provided for by section 1329, that its proposed increased stock "had been actually paid up in lawful money of the United States, and was in the hands of its board of directors"; whereas, in truth and in fact, none of it had then been either subscribed or paid for. For this reason it is claimed the issue was fictitious and void, within the meaning of the Constitution and statutes of Missouri. It must be conceded, we think, from the proof before us that the statement so made was false. No part of the increase had actually been subscribed or paid for, and the excessive assets over liabilities as shown in the statement, which might have afforded the basis of an increase for the purpose of capitalizing the surplus, was fictitious, and did not exist in fact.

Does the fact that the authorized preferred stock had not been subscribed or paid for before the statement was made and the certificate of conformity was issued by the Secretary of State render the whole issue fictitious and void? As we interpret the statutes of Missouri on the subject of increasing the capital stock of an existing corporation, a scheme is provided by which such increase may be authorized, and thereby a subject of sale created. It is only after the increase is authorized that a company can have any increased stock to offer for subscription and sale. The Constitution of the state makes little reference to the method of authorizing or increasing capital stock. It provides merely that it shall not be increased, except pursuant to general law, with the consent of persons holding a majority in value of the stock, and after sixty days' notice, as may be provided by law. The important prohibition relates to the use to be made of the stock after it is authorized. It ordains that "no corporation shall issue stock * * * except for money paid, labor done or property actually received and all fictitious increases of stock * * * shall be void." The word "issue" here employed is obviously used in its ordinary commercial or financial sense, meaning "to emit," "put into circulation," or "dispose of securities" already authorized and prepared for disposition. Black's Law Dictionary; Century Dictionary; *Folks v. Yost*, 54 Mo. App. 55, 59. The word "fictitious" employed in the Constitution is found in immediate connection with the prior provision relating to the issue of stock, and by the most natural and familiar rule of construction ought to be construed in connection with it; and as so construed, it means, in our opinion, that all increases of capital stock which are not issued for money paid, labor done, or property actually received are fictitious and void. The record discloses that the shoe company disposed of or put into circulation much, if not all, of its increased stock. Such disposition, in our opinion, amounted to the issue of the stock within the contemplation of the constitutional pro-

vision. The shoe company received in actual money the substantial sum of about 90 cents on the dollar per share for all of its preferred stock, sold by or on its account, and this, of course, includes that sold to the appellants in this case. In view of this fact it cannot be successfully claimed that the stock so issued—that is, put into circulation or disposed of—was fictitious within the meaning of the Constitution of Missouri or the re-enactment of its provisions in section 962. This conclusion is supported by the following authorities: *Memphis, etc., Railroad v. Dow*, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. Ed. 595; *Sioux City, O. & W. R. Co. v. Manhattan Trust Co.*, 34 C. C. A. 431, 92 Fed. 428; *William Firth Co. v. South Carolina Loan & Trust Co.*, 59 C. C. A. 73, 122 Fed. 569; *Van Cleve v. Berkey*, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593; *State ex inf. Attorney General v. Hogan*, 163 Mo. 43, 63 S. W. 378; *Rumsey Mfg. Co. v. Kaime*, 173 Mo. 551, 73 S. W. 470; *Peoria & Springfield R. R. Co. v. Thompson*, 103 Ill. 187; *Stein v. Howard*, 65 Cal. 616, 4 Pac. 662.

Not only so, but section 1327, Rev. St., affords very persuasive evidence of the correctness of the foregoing conclusion. It provides, not that 50 per cent. at least of the increase must be paid for before the statement is made to secure its authorization, but before the increase "shall take effect." This phraseology seems to assume the completion of proceedings to secure an increase of stock before payment is required; and wisely provides that it shall not take effect as a recognized addition to the capital stock or increased liability of a corporation until it is at least half paid up. As further support to the conclusion reached attention is called to the fact that there is no statutory provision for making any preliminary subscription to increased stock like that made by section 1327 Rev. St. (supra), with reference to the original stock of a manufacturing and business corporation. That statute is in *pari materia* with the one under consideration, and may properly be considered in ascertaining the legislative intent.

2. In apparent conformity with the provision of section 1329, Rev. St. Mo. 1899, the recorded statement made by the officers of the shoe company set forth "that all of the increase of capital stock had been actually paid up in lawful money of the United States, and was in the hands of the board of directors of the company." This last statement was doubtless false in fact. None of it had then been sold, and no proceeds of sales were then in the hands of the board of directors. But the statement as a whole was correct in form, and set forth facts which justified the Secretary of State in issuing the certificate. He acted upon it, and issued the certificate of compliance, which operates under the laws of Missouri as an official declaration of a lawful increase of stock. The statement cannot now be assailed on the ground of its falsity in the particular just mentioned. Assuming that a statement on the subject falsified was one of the details required by law for securing a certificate of increase, its truthfulness was not fundamental to the validity of the increase. We have already seen that the stock was paid for when it was actually issued. The failure to have 50 per cent. or more of the increased capital actually paid for, and that amount of money actually in the custody of the board of directors before the required statement was executed

by the officers of the company, was, at worst, an irregularity in the method of paying up the increase. The subsequent sale of the stock by the shoe company and receipt by it of its fair and reasonable value were the substantial things. The appellants cannot in this collateral way challenge the regularity of the proceedings, or truthfulness of the statement of facts which resulted in the certificate issued by the Secretary of State. Otherwise any other stockholders could do the same thing, and the entire issue of stock would be subject to innumerable and constant attacks. In this way corporate enterprises would be ruinously harassed and embarrassed. The success of business, the stability of values, and an obvious wise public policy demanded some arbiter. The statute provided this arbiter in the Secretary of State, and made his decision, expressed in his certificate of compliance, conclusive as to all persons, except the state itself, of the validity of the issue. *First National Bank v. Rockefeller*, 195 Mo. 15, 93 S. W. 761; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *Handley v. Stutz*, 139 U. S. 430, 11 Sup. Ct. 530, 35 L. Ed. 227, and cases cited.

3. Do the false and fraudulent statements made by the shoe company and its agents warrant the attempted rescission by appellants of their contracts of purchase? There is some difference in the facts attending the purchase of stock by the three appellants. Scott acquired his directly from the shoe company, in reliance, however, upon one of the false statements furnished the investment company by the shoe company. Gauss and Martin purchased theirs directly from the investment company. But in the view we take of this case these differences are immaterial. Much evidence appears to have been taken and considerable attention was given below to the question whether the investment company originally purchased the stock from the shoe company, or whether it acted as its agent in disposing of it. This question was not answered by the referee or the court below, and in our opinion does not require determination by us. Whether the investment company sold it as owner or agent, it made use of the false statements purporting to show the true financial condition of the shoe company, which had been furnished to it by the shoe company for that purpose. The latter company, when it placed these false statements in the hands of the investment company, knew they were false, and intended they should be used to induce purchasers to buy its stock. In other words, it knew that the statements were adapted to deceive and were to be employed for that purpose. In such circumstances the law reinforces the plain moral obligation, and holds the maker of them liable to persons deceived by them. *City Bank of Columbus v. Phillips*, 22 Mo. 85, 64 Am. Dec. 254; *Clark v. Edgar*, 84 Mo. 106, 54 Am. Rep. 84; *Holmes v. Harrington*, 20 Mo. App. 661; *Gries v. Blackman*, 30 Mo. App. 2; *Bank v. Lanier*, 11 Wall. 369, 378, 20 L. Ed. 172; *Windram v. French*, 151 Mass. 547, 24 N. E. 914, 8 L. R. A. 750; *Peterson v. People's Building Loan & Savings Ass'n*, 124 Mich. 573, 83 N. W. 606; *Cazeaux v. Mali*, 25 Barb. (N. Y.) 578, 583; *Williams v. Wood*, 14 Wend. (N. Y.) 127; 1 Cook on Corporations (5th Ed.) § 144.

4. The record shows that at least \$275,000 of the present indebted-

ness of the shoe company was contracted after all the stock now in question had been purchased by the appellants. It also shows that the shoe company represented generally to the public and to persons from whom it sought credit (amongst other things already referred to) that it had a capital stock, fully paid up, of \$800,000, of which \$500,000 was common, and \$300,000 was preferred stock. It made statements to the same effect to R. G. Dun & Co., a widely known commercial agency, and in addition thereto it stated that \$400,000 of new money had been paid into the company as a result of the increase of its stock. Similar statements were made to banks of the city of St. Louis for the purpose of securing loans of money; and, as a result, large loans were actually made to the shoe company, many of which are still due and will never be paid, except in so far as the dividends which may be declared in the bankruptcy proceeding may do so. These dividends will be small. The record shows that claims amounting to \$633,439.97, exclusive of claims like those we are now considering, have been allowed against the estate, and that the assets amount to only about \$230,000. It thus appears as a fact proved in this case that creditors dealt largely with the shoe company, and made loans of money to it, after the increase of its stock, in reliance upon the fact and validity of that increase. Indeed, if it had not been proved, the law would indulge the presumption that credit was given to the shoe company in reliance upon its increased capital. *Palmer v. Bank of Zumbrota*, 72 Minn. 266, 75 N. W. 380. The record further discloses that dividends on the preferred stock were paid quarterly by the shoe company, at the rate of 7 per cent. per annum, and that each of the appellants received the regular dividends on his holdings from the time of their purchase until and including January 1, 1906. Each of them received from four to eight quarterly dividends on their stock, dependent upon the time when they, respectively, made their purchases.

From the foregoing summary of the main and essential facts we find ourselves confronted with the following question of law: Whether persons who have been induced by false statements of the officers of a corporation to innocently purchase some of its preferred stock, and who for a year or more have accepted dividends declared quarterly upon the stock purchased by them, may, after discovering the falsity of the statements made, and after a state of insolvency and actual bankruptcy of the corporation has supervened, repudiate their purchases, and participate in the assets of the insolvent estate pro rata with general creditors who innocently contracted their debts on the strength of the validity of the increase of stock and of the additional resources which appellants and others similarly situated have reasonably caused them to believe the corporation possessed? Ordinarily it is true that any person who has been deceived by false and material statements of another into making a contract with him may, by timely action and observance of other equitable principles, rescind the same and recover back money paid in its performance. And this is ordinarily true when individuals make contracts with corporations. The executive officers of the corporations, acting within the scope of their general authority, may so misrepresent material facts as to entitle per-

sons dealing with them to rescind their contracts. But is there nothing in the present case which differentiates it from such cases? Appellants have admittedly been for some time and now are *prima facie* stockholders of the shoe company, and nothing else. They have from the beginning allowed themselves to be held out as such. The real party against which they are seeking relief is the body of general creditors of their corporation. Whatever relief may be granted to them in this case will reduce the percentage which the general creditors will ultimately realize upon their claims. Although a corporation is in law treated as an entity separate from its component stockholders, the latter are, in substance, all there is to a corporation. They, by their duly chosen agents conduct all its business. They enjoy the net earnings which is the final object and purpose of a manufacturing and business corporation. They own all the assets, but own the same subject to a well-recognized prior right of creditors thereto.

In *Sawyer v. Hoag*, 17 Wall. 610, 623, 21 L. Ed. 731, Mr. Justice Miller, speaking for the Supreme Court on the relation of a corporation to its stockholders, uses the following language:

"It is very true that by the power of the Legislature there is created in all acts of incorporation a legal entity, which can contract with its shareholders in the ordinary transactions of business as with other persons. * * * But, after all, this artificial body is but the representative of its stockholders, and exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect. And the interest and power of legal control of each shareholder is in exact proportion to the amount of his stock. It is, therefore, but just that when the interest of the public or of strangers dealing with this corporation is to be affected by any transaction between the stockholders who own the corporation and the corporation itself, such transaction should be subject to rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him."

In *Sanger v. Upton, Assignee*, 91 U. S. 56, 60, 23 L. Ed. 220, Mr. Justice Swayne, speaking for the Supreme Court on the same subject, said:

"The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied. The creditors have a lien upon it in equity."

In *Hawkins v. Glenn*, 131 U. S. 319, 329, 9 Sup. Ct. 739, 742, 33 L. Ed. 184, Mr. Chief Justice Fuller, speaking for the court, said:

"A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member."

See, also, to the same general effect, the following cases: *Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. 867, 34 L. Ed. 262; *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104; *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371; 14 Sup. Ct. 127, 37 L. Ed. 1113.

From the principles just enunciated it follows that any persons loaning money to a corporation, or otherwise becoming its creditor, may do so in reliance upon the protection and security which the money invested by the shareholders in the capital stock of the company affords them. This is not only theoretically true, but common experience teaches that it is practically true also. It is a common thing for corporations of the present day to advertise the amount of their capital and surplus as a ground of confidence in them. Money is deposited in banks largely on the assurance which the capital and surplus affords, and banks, on the other hand, as well as others, loan their funds to corporate borrowers largely on the strength of their advertised capital. Accordingly, when the banks and others, who now occupy the position of general creditors of the estate of the bankrupt shoe company, loaned their money to the latter company, they were at liberty to regard, and did regard, the advertised paid-up capital, consisting in part, at least, of \$300,000, resulting from the sale of the increased stock in question, as an actual existing fund available to them for the satisfaction of their debts before the stockholders had any right to appropriate it; and the stockholders of the shoe company, including appellants, invested their money in its stock in full recognition of the law and presumably of the fact that others might deal with the company and become its creditors on the strength of the capital contributed by them. There is no difference between the holders of preferred and common stock in the respects just alluded to. The rights of the former as against creditors are in no respect different from those of the latter. The owners of preferred stock generally have certain rights of precedence over the owners of common stock in dividends and final distribution of assets; but the rights of both are alike subordinate to those of creditors.

In view of the foregoing facts and principles the rights of the innocent general creditors are superior to those of the deceived stockholders. It is a familiar, general principal of law, as well as of morals, that when one of two innocent parties must suffer by the fraud of another, the one who has enabled such third party to commit the fraud ought to sustain the loss. *United States Bank v. Bank of Georgia*, 10 Wheat. 333, 344, 6 L. Ed. 334; *Friedlander v. Texas, etc., Ry. Co.*, 130 U. S. 416, 425, 9 Sup. Ct. 570, '32 L. Ed. 991; *Rice v. Groffmann*, 56 Mo. 434, 437; *International Bank v. German Bank*, 71 Mo. 183, 197, 36 Am. Rep. 468; *Smith v. Armour Packing Co. (C. C. A.)* 158 Fed. 86; *Chapman v. Rose*, 56 N. Y. 137, 141, 15 Am. Rep. 401; *Scanlon-Gipson Lumber Co. v. Germania Bank*, 90 Minn. 479, 488, 97 N. W. 380. Reference may also be made to 16 Cyc. p. 703, for a statement of the rule and collection of many cases in which it has been recognized and followed. Applying this rule to the facts of the present case, there seems to be no escape from the conclusion that the purchasers of the preferred stock in question largely contributed to the ability of the shoe company and its officers to occasion loss to its general creditors. Within the limitation of the rule made appropriate by the peculiar facts of the case of *Western Union Telegraph Co. v. Schriver*, 72 C. C. A. 596, 141 Fed. 538, 4 L. R. A. (N. S.) 678, the same result would follow. The stockholders gave their agents, the

officers of the corporation, the opportunity, and endowed them with power to advertise and hold out to the public, as an inducement to extend credit to their company, the fact that their new stock had been sold, and that the proceeds thereof had been paid in; and the stockholders, including appellants, had reason to believe and must be held to have known that their agents, in the usual course of business, would avail themselves of their opportunity and exercise their power accordingly. Under any possible view of the case the appellants are estopped from asserting their claims against the right of the general creditors who acted to their prejudice upon the representations made by the agents of appellants and the other stockholders.

5. The Supreme Court of the United States, in the case of *Scott v. Deweese*, 181 U. S. 202, 21 Sup. Ct. 585, 45 L. Ed. 822, considered the double liability of stockholders in national banks, provided for by section 5151 of the Revised Statutes (U. S. Comp. St. 1901, p. 3465), and in that case a question arose, much like that now before us, touching the effect of false statements and false representations made by the officers of the bank. It was there said by Mr. Justice Harlan, speaking for the court (page 213 of 181 U. S., page 589 of 21 Sup. Ct. [45 L. Ed. 822]):

"If the subscriber became a shareholder in consequence of frauds practiced upon him by others, whether they be officers of the bank or officers of the government, he must look to them for such redress as the law authorizes, and is estopped, as against creditors, to deny that he is a shareholder, within the meaning of section 5151, if at the time the rights of creditors accrued he occupied and was accorded the rights appertaining to that position."

We find in the present case all the elements upon the assumption of which Mr. Justice Harlan made the observation just quoted. The appellants, at the time the rights of most, if not all, of the general creditors of the shoe company accrued, occupied the position of shareholders, and were accorded rights as such, including the right, which was frequently exercised, of sharing in the supposed net earnings of the company in the form of dividends.

In the *Scott Case* the Supreme Court had under consideration many phases of the relation of stockholders to national banks and to their creditors, both before and at the time of the failure of the bank, and the case contains an instructive consideration of the general subject, as well as a review of prior authorities on the same and kindred questions. While it is there assumed, without commitment, however, that a stockholder may, by proper proceedings, instituted in good faith and in due time before the suspension of a bank, secure a rescission of his contract of subscription for fraud practiced upon him by the officers, yet the case affords direct authority for what we deem to be a just and practical general rule: That when one has for a considerable period of time prior to the failure of a corporation occupied the position of one of its stockholders, and exercised and enjoyed the rights, privileges, and fruits of that relation, including the chance of enhanced value of his holdings, when fortune frowns, and the chances turn against him, it is too late to assert, as against creditors of the corporation, the right to rescind his contract of stock subscription on the ground of false representations after a state of

insolvency has supervened, and after proceedings to wind up the corporation for the benefit of creditors have been or are about to be instituted.

A case involving the foregoing elements inevitably discloses such want of diligence, such delay or inactivity, or such counter-equities in favor of creditors as within well-recognized principles precludes resort to a court of equity for redress by a defrauded stockholder. The rule just announced has not been established without opposition and vigorous dissent, but we think it is now so firmly fixed as to command general obedience. This appears, not only by the *Scott Case* already considered, but by the following cases: *Newton Nat. Bank v. Newbegin*, 20 C. C. A. 339, 74 Fed. 135, 33 L. R. A. 727; *Scott v. Latimer*, 33 C. C. A. 1, 89 Fed. 843; *Lantry v. Wallace*, 182 U. S. 536, 21 Sup. Ct. 878, 45 L. Ed. 1218; *Ib.*, 38 C. C. A. 510, 97 Fed. 865; *Hood v. Wallace*, 182 U. S. 555, 21 Sup. Ct. 885, 45 L. Ed. 1227; *Wallace v. Hood* (C. C.) 89 Fed. 11.

Learned counsel for appellants have called our attention to many cases, all of which have been carefully considered. Some of them have fallen by the way in the progress of the development of the rule just announced. Others being inconsistent with that rule, and with what we believe to be the doctrine of the Supreme Court, cannot receive our approbation.

Other minor questions were ably argued at the bar, but as they are unimportant in view of our conclusion on the more fundamental questions already considered, we will not prolong this opinion by discussing them.

The decree of the district court was for the right party, and it is accordingly affirmed.

SHEPARD v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. January 13, 1908.)

No. 2,477.

1. POST OFFICE—OFFENSES AGAINST POSTAL LAWS—MAILING MATTER RELATING TO OBSCENE BOOKS—INDICTMENT.

In an indictment under Rev. St. § 3893, as amended by Act Sept. 26, 1888, c. 1039, § 2, 25 Stat. 496 (U. S. Comp. St. 1901, p. 2658), an averment that defendant knowingly deposited in a post office for mailing circulars giving information how, where, of whom, and by what means obscene, lewd, and lascivious books might be obtained, and that defendant unlawfully and knowingly meant and intended thereby to give such information is a sufficient averment that defendant knew the character and contents of such circulars, and it is not necessary to set out the same, nor to further characterize or describe the books referred to therein, than to aver that they are obscene, lewd, and lascivious.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Post Office, § 70.

Nonmailable matter, see note to *Timmons v. United States*, 30 C. C. A. 79.]

2. SAME—MAILING OF PROHIBITED MATTER—DEPOSITING IN LETTER BOX.

Under such an indictment an averment that prohibited matter was deposited in a post office is sustained by proof that it was deposited in a letter box placed by the government for receiving mail, and was taken by

its agents from such box to the post office, and there stamped and sent out.

3. CRIMINAL LAW—EVIDENCE—ACCOMPLICES—DECOY LETTERS.

The writing of decoy letters by agents of the post office department to a person suspected of violating the postal laws which induced such person to send unmailable matter in return is legitimate, and does not make such agents parties to the offense so as to render their testimony subject to the rule relating to accomplices.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1086.]

4. SAME—INSTRUCTIONS—REASONABLE DOUBT.

It is the better practice to address instructions to the jury as a whole, and an instruction on the subject of reasonable doubt in a criminal case is not erroneous because it is so addressed and not to each juror individually.

5. POST OFFICE—OFFENSES AGAINST POSTAL LAWS—INDICTMENT FOR MAILING PROHIBITED MATTER.

An indictment charging that a defendant deposited in the mails unmailable matter includes the charge that he caused such matter to be deposited, it being immaterial whether he deposited it by his own hand or by an agent.

6. CRIMINAL LAW—WRIT OF ERROR—REVIEW—INSTRUCTIONS.

The charge of a court cannot be reviewed except as to matters to which exception was taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2656.]

7. POST OFFICE—OFFENSES AGAINST POSTAL LAWS—TRIAL—INSTRUCTIONS.

Instructions in a prosecution for depositing prohibited matter in the mails considered, and *held* free from prejudicial error.

In Error to the District Court of the United States for the District of Utah.

Jesse B. Roote and Harrison O. Shepard (S. P. Armstrong, on the brief), for plaintiff in error.

Hiram E. Booth, U. S. Dist. Atty. (William M. McCrea, Asst. U. S. Dist. Atty., on the brief), for the United States.

Before SANBORN, and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The plaintiff in error (for convenience hereinafter designated the defendant) was indicted under the act of Congress approved September 26, 1888, c. 1039, § 2, 25 Stat. 496 (U. S. Comp. St. 1901, p. 2658), for depositing in the mails letters, pamphlets, etc., giving information where, how, of whom, and by what means obscene, lewd, and lascivious books, adapted for indecent and immoral use might be obtained. He was convicted on two counts, and sentenced to imprisonment in the Utah State Prison, at hard labor, for 13 months. As by the judgment the sentences imposed were to run concurrently, if either of the counts of the indictment is sufficient in law it will support the judgment. It is, therefore, unnecessary to set out and review both counts, and we select the second count for consideration, on which the defendant was found guilty.

It charges that on or about the 1st day of June, 1905, in the state and district of Utah, the defendant received a letter addressed to the

Shepard Book Company, at Salt Lake City, Utah, of the following tenor:

"Denver, Colo., May 30, 1905.

"Shepard Book Co., Salt Lake City, Utah—

"Gentlemen: I believe you have a catalogue of erotic books which you have for sale, and I wish you would send me one. If you have on hand any books that are right and not listed in the catalogue, please advise me concerning them, and prices.

"Yours truly,

G. G. Latimer, Box 848."

The indictment then charges:

"That on the day and year first aforesaid the said Richard B. Shepard then and there had in his possession and under his control a large number (the exact number being to the grand jurors unknown) of obscene, lewd and lascivious books of an indecent character and intended and adapted for an indecent and immoral use, and that said Richard B. Shepard, in response to the said letter, on the first day of June, one thousand nine hundred and five, did then and there unlawfully, feloniously and knowingly, deposit in the post office of the United States at Salt Lake City, Utah, for mailing and delivery a written and typewritten letter and notice, and three printed circulars, giving information directly and indirectly to one G. G. Latimer, and divers other persons whose names are to the grand jurors unknown, and for that reason cannot be herein stated, how, where, of whom and by what means obscene, lewd, and lascivious books of an indecent character, and intended and adapted for an indecent and immoral use, might be obtained, which said letter and notice and which three circulars were then and there nonmailable matter, and were then and there contained in an envelope bearing and having thereon the address and superscription following, to wit, 'G. G. Latimer, Box 848, Denver, Colo.,' and which said letter and notice is of the following tenor:

"Salt Lake City, Utah, U. S. A., 6-1-05.

"G. G. Latimer, Box 848, Denver, Colo.—

"Dear Sir: In reply to yours of the 30th ult. would say that we send you our catalogue of erotic literature also our latest catalogue. Please return Catalogue No. 11 as it is a part of our file. Outside of what is listed in our catalogue, we have two or three unexpurgated editions of Boccaccio's Decameron and a book entitled "The Amorous Adventures of a Japanese Gentleman." If you are interested in these we will describe to you. This is all we have at present. If you desire any particular books on this subject, we can procure for you anything in the line. We inclose you herewith catalogues of erotic literature which we can furnish you at prices quoted in catalogue, you to pay duty if there is any. They are in Europe. If you desire any of them, remit us the amount and we will have them sent to you by prepaid. Please return the catalogue inclosed, also.

"Yours,

Shepard Book Company, Per ———."

"And the first of which said circulars consisted of sixteen (16) printed pages, and on the first and front page of which were printed the following words: 'List of Rare and Curious Books,' and on which said page of said circular were written the words 'Please return'; and the second of which said circulars consisted of four (4) printed pages, on the top of the first and front page of which were printed in red ink, the following words: 'Privately Printed English Books,' and on which said page were written the following words: 'Please return'; and the third of which said circulars consists of four (4) printed pages, on the top of the first and front page of which were printed the following words: 'Privately Issued Books,' and on which said page were written the words 'Please return'—and the grand jurors aforesaid, upon their oaths aforesaid, do further present that, on the day and year aforesaid the said Richard B. Shepard when he so deposited said last-named letter and notice and said three printed circulars in said post office, unlawfully, knowingly, and feloniously meant and intended thereby to give notice, and did thereby give notice and information to the writer of the said first-named letter, viz., to said G. G. Latimer, and divers other persons whose names are to the grand

jurors aforesaid unknown, where, how, of whom, and by what means obscene, lewd, and lascivious books of an indecent character, and intended and adapted for an indecent and immoral use, might be obtained, contrary," etc.

The defendant both demurred to and filed motion to quash said count. The principal grounds of objection raised are: (1) It does not allege that the defendant knew any of the books in his possession were obscene, lewd, or lascivious; (2) it does not allege that when said letter, etc., was deposited in the post office the defendant knew that the letter or circulars had any reference to any obscene, lewd, or lascivious books, or that he knew either the contents of the letters or of the alleged circulars; (3) it is not alleged what books are referred to; (4) it is not alleged that any book, pamphlet, letter, or other publication referred to was obscene, lewd, lascivious, or indecent; (5) it is not alleged that the circulars contained any reference to any obscene, lewd, or lascivious book, pamphlet, etc., of an immoral or indecent character; (6) there was no sufficient description of any book respecting which the defendant gave information as to where the same might be obtained; and (7) it does not set out the character and contents of said alleged book or books so that it can be seen whether the books are obscene, lewd, lascivious, or indecent. Other objections are but repetitions of the foregoing.

Counsel for the defendant seem to have misconceived the provision of the statute on which this indictment was predicated. The statute declares to be nonmailable, and inhibits the conveyance in the mails and delivery from any post office, or by any letter carrier, every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; also every article or thing designed or intended for the prevention of conception or procuring of abortion; and also every article or thing intended or adapted for any indecent or immoral use. It then declares that:

"Every written or printed card, letter, circular, book, pamphlet, advertisement or notice of any kind, giving information, directly or indirectly, where or how, or of whom, or by what means any of the hereinbefore mentioned matters, articles, or things, may be obtained or made, whether sealed as first-class matter or not, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails nor delivered from any post-office or by any letter-carrier.

"Any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, shall, for each and every offense, be fined upon conviction thereof not more than five thousand dollars, or imprisoned at hard labor not more than five years, or both, at the discretion of the court."

As shown from the foregoing transcript of the indictment, it is predicated of the provision inhibiting the use of the United States mails for giving information, directly or indirectly, where such article or thing adapted to such immoral use may be obtained. The underlying purpose and design of this statute is to deny the use of the post office department, maintained by the government to promote the public welfare, for the dissemination of that class of literature which, by reason of its obscenity, lewdness, lasciviousness, or of a like indecent character, is calculated "to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publica-

tion of this sort may fall, and where it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of the most impure and libidinous character." *Rex v. Hicklin*, L. R. 3 Q. B. 360; *United States v. Harmon* (D. C.) 45 Fed. 417.

The indictment in question, after setting out the letter addressed to the Shepard Book Company, which is alleged to have been received by the defendant, distinctly alleges that he then and there had in his possession and under his control a large number of obscene, lewd, and lascivious books of an indecent character, intended and adapted for an indecent and immoral use, and that in response to said letter he then and there unlawfully, feloniously, and knowingly, deposited in the post office at Salt Lake City, Utah, for mailing and delivery, a letter and notice, and printed circulars, giving information directly and indirectly to one G. G. Latimer, and divers other persons unknown, etc., how, where, of whom, and by what means such forbidden matter might be obtained. The letter alleged to have been so mailed by him is then set out *hæc verba*. In that letter he inclosed a catalogue of erotic literature, and advised the addressee that outside of the books listed in the catalogue he had some unexpurgated editions of Boccaccio's *Decameron*, and a book entitled "The Amorous Adventures of a Japanese Gentleman," and stating that if the addressee desired any particular books on such subject he could procure him anything in the line, stating that they are in Europe. The indictment further charges that when said Shepard deposited said last-named letter, notice, and printed circulars in said post office, he "unlawfully, knowingly, and feloniously meant and intended thereby to give notice, and did thereby give notice and information, to the writer of the first-named letter, viz., to said G. G. Latimer, and divers other persons whose names are to the grand jurors aforesaid unknown, where, how, of whom, and by what means obscene, lewd, and lascivious books of an indecent character, and intended and adapted for an indecent and immoral use, might be obtained." When it is averred that the defendant knowingly deposited such matter in the post office for mailing and delivery, giving information, etc., it certainly was an averment that he knew what the letter, circular, etc., were. If there was any uncertainty in this averment of knowledge of the contents, it is certainly supplied by the further distinct allegation that the defendant "unlawfully, knowingly, and feloniously meant and intended thereby to give notice, and did thereby give notice and information to the writer of the first-named letter, and divers other persons, * * * where, how, of whom, and by what means" the forbidden literature might be obtained. *De Gignac v. United States*, 113 Fed. 197, 52 C. C. A. 71; *Swearingen v. United States*, 161 U. S. 446, 16 Sup. Ct. 562, 40 L. Ed. 765. The indictment gives a sufficient description of the circulars or catalogues sent to enable the defendant to understand what books were referred to, and to sufficiently advise him in the preparation of his evidence to meet the issue. Section 1025, Rev. St. (U. S. Comp. St. 1901, p. 720), declares that:

"No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any

defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

There is nothing on the face of this statute indicating any difference whether an indictment is attacked after conviction or in limine for any of the specified defects. The plain declaration is that no indictment shall be deemed insufficient, or the trial, judgment, or other proceeding thereon be affected, by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. The evident purpose and mind of Congress in enacting this statute was that regard should be had to substance rather than form in construing indictments. So, while the indictment must, with intelligible, identifying description, affirmatively charge the substantive statutory offense, leaving nothing to mere inference, the trend of modern decisions in the federal courts is that the indictment is sufficiently explicit if it advise the accused, in advance of the trial, of the nature and character of the offense he may come to meet. Accordingly, Mr. Justice Harlan, in *Rosen v. United States*, 161 U. S. 30, 33, 16 Sup. Ct. 434, 40 L. Ed. 606, speaking of the constitutional provision requiring the accused to be informed of the nature and cause of the accusation, said:

"The defendant is informed of the nature and cause of the accusation against him if the indictment contains such description of the offense charged as will enable him to make his defense and to plead the judgment in bar of any further prosecution for the same offense."

Further on he said:

"He (the defendant) must have understood from the words of the indictment (that he unlawfully, willfully, and knowingly deposited and caused to be deposited the alleged obscene paper) that the government imputed to him knowledge or notice of the contents of the paper so deposited. * * * The ordinary acceptance of the words 'unlawfully, willfully, and knowingly,' when applied to an act or thing done, imports knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing."

In *Cochran v. United States*, 157 U. S. 286, 290, 15 Sup. Ct. 628, 39 L. Ed. 704, Mr. Justice Brown said:

"The true test is not whether it (the indictment) might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

Judge Adams, speaking for this court in *Clement v. United States*, 149 Fed. 305, 79 C. C. A. 243, has reviewed the decisions of the Supreme Court and expressed the same view of the requirements of criminal pleading. See, also, *Rinker v. United States*, 151 Fed. 755, 81 C. C. A. 379; *Stearns v. United States*, 152 Fed. 901, 82 C. C. A. 48; *Nurnberger v. United States* (C. C. A.) 156 Fed. 721. The insistence of counsel that the indictment should set out the contents of the circulars or pamphlets referred to in the correspondence would lead to such exaction in pleading as would but create intricate mazes to ensnare the prosecutor and obstruct justice. In *United States v. Grimm* (D. C.) 50 Fed. 522, Judge Thayer said:

"A letter is nonmailable if it in fact conveys, and was intended to convey, information to any person where obscene pictures or literature may be obtained, even though to a casual reader it may seem harmless. The court further holds that in a prosecution of this character the government is not confined to the letter itself, but may show by any competent extrinsic testimony that the letter gives information which the statute prohibits being given through the mail, and that it was in fact intended to convey such information. If the character of a letter cannot be thus shown by extrinsic facts, the statute under which this indictment is drawn could be easily evaded and would prove a dead letter."

This case was affirmed by the Supreme Court in 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550, the syllabus of which is as follows:

"A letter, however innocent on its face, intended to convey information in respect of the place or person where or of whom the objectionable matters described in the act could be obtained, is within the statute. In an indictment for a violation of that act it is sufficient to allege that the pictures, papers, and prints were obscene, lewd, and lascivious, without incorporating them into the indictment, or giving a full description of them."

The evidence in this case shows that for many years prior to the time in question the defendant had been a practicing lawyer, had attained considerable eminence in his profession, and was regarded by the community in Salt Lake City as a man of probity and honor. Not long prior to the indictment he became interested in the bookstore in question. Having a fondness for what he termed "erotic," or curiosities in, literature, without much discrimination as to their moral character as evinced by the evidence, he gave especial attention to the collection of such books. Finally he became actively engaged as the directing spirit of the bookstore. Coming under suspicion of being engaged in the sale and dissemination of obscene, lewd, and lascivious books, and of employing the public mails for exploiting them, inspectors, under the authority of the post office department, entered upon an investigation to ascertain the facts. One of these was Robert W. McAfee, a man of long experience in this branch of the public service, and one G. G. Latimer, Chief Clerk for the Denver Division of Post Office Inspectors, who opened correspondence with the defendant through the mails, evidenced by the letters named in the indictment. Other similar correspondence on the subject-matter passed between them and the defendant, which appears in evidence, admissible on the issue of the defendant's guilty knowledge as to the character of the books. That the defendant directed and conducted this correspondence, and gave especial attention to the class of books in question, clearly enough appears in the evidence. He not only had in his store some of the class of books named in the catalogue or circulars referred to, but he had arrangements by which he could obtain such books from Paris. The evidence also disclosed what these books were, and it is sufficient to say they are most salacious and immoral, of well-known vicious character; and that he also sold them and knew what they were. In the letter of June 16, 1905, from Latimer to the Shepard Book Company, acknowledgment is made of the receipt of the letter relative to "erotic" books in which the writer said, "I wish you would send me full particulars of 'Amorous Adventures of a Japanese Gentleman,' Boccaccio's Decameron, and Fanny Hill if you have one

in stock and can ship upon receipt of order." July 19, 1905, came a letter in reply from the Shepard Book Company in which it was stated that the Amorous Adventures of a Japanese Gentleman was privately printed on antique paper, is very erotic and very scarce; price \$7.50. That "Nights in a Moorish Harem, by Lord George Herbert, privately printed and a verbatim reprint, original wrappers, fair condition, cost \$3;" also Boccaccio's Decameron, translated into English, complete and unexpurgated, illustrated with 12 beautiful, but somewhat "free," photogravure plates; that the portfolio of extra plates, on account of their free character, was issued separately, with an extra page containing an English version of some "free" passages heretofore always given in a foreign tongue. It was stated that the Decameron of Giovanni Boccaccio, now first completely done into English prose and verse, privately printed, etc., could be had for \$12. Further on the letter said:

"In regard to Fanny Hill, we can get a copy as per the one in the catalogue sent you. We have none in stock. Please return us the catalogue we sent you as per request in our last letter. *Owing to the U. S. laws, we could not send these books to you either by mail or express (italics ours)*, but we will send them to you by freight prepaid upon receipt of price."

To this letter Latimer replied, inclosing \$7.50 for "The Amorous Adventures of a Japanese Gentleman," saying, "I would like a copy of 'Fanny Hill'—please advise further concerning it," etc. The receipt of this letter, with the money, was acknowledged on the 28th of July, 1905; and the letter further said:

"Would say that we sent the book by freight yesterday and inclose you bill of lading and trust you will receive it promptly. In regard to the Fanny Hill, we will write you in regard to it, in a few days."

In another letter he wrote that:

"The only Fanny Hill that we can furnish you, not having the same in stock, is a copy in the catalogue we sent you. We can have it sent you direct from Paris, on the terms prescribed in our letter to you, of the 19th inst. at the price, \$7.50, provided you pay duty, if any there should be on the book. The book is No. 59 of the list of rare and curious books we sent you. If you desire, let us know and kindly return to us the catalogues we sent you, as we need them."

In another letter sent by Latimer to the book company the receipt of The Amorous Adventures of a Japanese Gentleman was acknowledged. The letter said:

"This is certainly a dandy. Have you anything better? By 'better' I mean more erotic. If not, what have you that is just as good—something that will not have to be shipped from Paris."

The letter inclosed a money order for \$20.50, part of which was to pay for the Boccaccio Decameron, "complete and unexpurgated," with the pictures. This letter also asked for Nights in a Moorish Harem. Three days later a reply to this came from the book company, stating that:

"We to-day send you by prepaid express the set of Boccaccio's Decameron you ordered of us. We are sorry to say that we have sold the other book you mentioned and have given you credit for the \$8.00, which, if you wish returned, we will return to you or else just keep to your credit. *I (italics ours)* have

no pictures in stock, but have a great many books on classical erotica, but nothing as *rank* (italic ours) as the book we sent you by freight. The Carington matter is very erotic, but the only way we could get them would be to ship direct to you from Paris."

The evidence tended to show, as already stated, that this correspondence was directed by the defendant, and his admissions made to three witnesses, whom he did not take the stand to contradict, if credited, would clearly show that he was not only acquainted with the books as of the character denounced by the statute, but that he had been selling them, and employed the mails for the purpose of exploiting them.

What the assignment of errors lacks in quality is made up in quantity. They are 134 in number. As is generally the case, such interminable assignments instead of impressing the court with the thought of an imperfect trial, rather cast discredit upon the worth of any of them. In *Times Publishing Company v. Carlisle*, 94 Fed. 762-781, 36 C. C. A. 475, Judge Sanborn, quite aptly hit this too common practice:

"When counsel of the learning and ability of those who presented this case gravely announce to an appellate court that they rely upon 74 alleged errors for a reversal of the judgments against their clients, and some of those specified turn out to be as frivolous as those we have just cited, it is at least difficult to resist a suspicion that they themselves were not certain there was any substantial error in the case."

After a careful review of the evidence we perceive no reversible error in the admission or rejection of testimony. A large number of special instructions were asked by the defendant. We will consider such of them as are deemed of importance.

The first instruction requested a directed verdict. This was properly refused. The second, third, and fourth asserted that it devolved upon the government to show beyond a reasonable doubt that the objectionable matter was deposited by the defendant in the post office at Salt Lake City, or that the defendant caused the same to be so deposited. And that it must be shown that the defendant at the time knew the matter mailed contained the objectionable literature; and that the jury were trying the defendant only for the use of the mail, and not the selling or passing of obscene or indecent matter. The substance of these requests was more concisely and appropriately covered by the charge of the court.

The fifth instruction refused, among other things, requested the court to declare that if the jury should find that said letters were deposited in a letter box the offense charged was not sustained. The court's charge required that the jury should find that the depositing was in the post office at Salt Lake City, Utah. The presumption is that in finding the defendant guilty the jury found that the letters, circulars, or pamphlets in question were deposited in said post office. We fail to discover any evidence in the record that the letters named in the indictment were deposited in a letter box. The envelopes showed that they bore the stamp of the Salt Lake post office. Even if any of them had been first deposited in a letter box it would constitute no variance. Such boxes belong to the government and are under its exclusive control. They are placed in cities, like Salt Lake City, as a receptacle for mail matter for the convenience of patrons of the office. They

are but adjuncts of the post office. It is common knowledge that when a person deposits a letter or other article in a mail box, it is to be taken therefrom by a letter carrier or collector and carried to the post office, where it is stamped with the canceling stamp of the office and forwarded to its destination. In legal effect, as applied to this indictment, it is not different had the defendant laid the letter or other article, after addressing and stamping it, on his desk or other customary place, to be taken and carried by his clerk or servant to the post office for mailing. The denunciation of the statute is against the depositing of the inhibited matter "for mailing or delivery." The charge that such matter was deposited in the post office at Salt Lake City would be sustained by proof that it was deposited in a mail box in the city, then stamped and sent out by the post office of said city.

The next refused instruction is as follows:

"You are instructed that when a person is known to be about to commit a crime, any other person may join with him with the ostensible purpose of aiding in the commission of the contemplated offense, and if his real purpose is to secure evidence for the purpose of punishing the offender, the person so joining in the offense will not be a criminal or an accomplice by encouraging the offender; but if any person solicits another to do an act forbidden by the law, and the thing is done wholly as the result of such solicitation, and would not have been done otherwise, the person soliciting the act, if the act be criminal, becomes himself a principal offender and an accomplice, and is equally guilty with the person whom he solicited, notwithstanding his object may be merely to secure the conviction or punishment of the person whom he solicits to the offense, for the law does not permit any man to aid and encourage the breaking of the law merely to secure evidence that it has been broken; and, therefore, I instruct you that if you believe that any person, who has testified on behalf of the government in this case, is under the law, as I have stated it, an accomplice, then, you ought not to convict the defendant upon the testimony of any such person, unless he be corroborated upon some material point, which of itself and without the aid of the testimony of such witness, tends to prove the defendant guilty."

This instruction was leveled at the witnesses McAfee and Latimer, who had conducted the correspondence with the defendant's book concern. A resort to such means of obtaining information by the post office department as to whether the party suspected is engaged in employing the mails for the dissemination of such vicious, immoral literature, has been approved so often by the courts as to place the practice beyond the field of discussion. It was approved by Judge Thayer in *United States v. Grimm*, *supra*, in respect of a like action by the witness McAfee. This was affirmed by the Supreme Court (156 U. S. 604-610, 15 Sup. Ct. 470, 39 L. Ed. 550), in which Mr. Justice Brewer has so fully and effectually met counsel's criticism of such practice that nothing we might say would add to its weight or re-enforce its conclusiveness. See, also, *Andrews v. United States*, 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023.

Had the requested instruction been given in its entirety it would have been essentially vicious. In cunning phraseology it conveyed the thought that in the act itself the inspectors had subjected themselves to criticism; that the jury might regard them as accomplices by inducing the violation of the statute, unless they were "corroborated upon some material point, which of itself and without the aid of the

testimony of such witness, tends to prove the defendant guilty." This in the face of the uncontradicted fact that the letters and pamphlets had passed through the post office, that the defendant admitted authorship of the letters, and the indisputable evidence that he knew the vicious character of the books sought.

Touching this matter the court charged the jury as follows:

"Comment has been made as to certain decoy letters which were introduced in evidence. Considerable criticism has been indulged in at the expense of the writers of those letters. The defendant is the only person on trial before you—not the writers of those letters. It is no defense, even if those parties are guilty of wrongdoing; you are not called on to find them guilty of any offense—you are to be satisfied of the guilt of the defendant. But, if the evidence shows that in writing these decoy letters, any of the parties who have testified have acted in a reprehensible way, you can of course consider that fact in determining the weight that you will give to their testimony."

Further on the court said in its charge:

"Comment has been made upon the fact that McAfee, by a decoy letter, had induced the commission of the offense, and hence, his evidence should be discredited. Considering the fact that he did write the decoy letter, you can give it such weight as you think it is entitled to in determining the weight which you finally decide should be given to his testimony. It may be that in ferretting out crimes of the character here charged, it can only be successfully done by writing decoy letters; that the men concerned in breaking the law, the man who is the actual purchaser or desires to purchase, and the seller, are both likely to conceal that fact; and that the only way direct evidence can be obtained may be by this method. However that may be, so far as McAfee's testimony is concerned, you will give it that weight which you think it is entitled to. There is no evidence that the other witness, Mr. Sharp, who testified as to statements made by the defendant, was concerned in what has been declared to be a solicitation of a violation of the law. Besides that, the envelopes are introduced in evidence. You can compare the writing on these envelopes with any other writing which has been introduced in evidence in the case which you are satisfied, from the evidence, is the actual handwriting of the defendant, and in making such comparison, may draw any legitimate conclusion as to who was the writer of these envelopes."

The charge of the court was certainly favorable enough to the defendant. The defendant made several requests respecting the effect of the proof of the defendant's good character. It is sufficient to say that in the charge the court accorded to the defendant all the law entitled him to in this respect. The same is true of complaints made of the refusal of the court to give the repetitious instructions, in varying terms, respecting the weight to be given to the admissions of the defendant, testified to by witnesses. One of the instructions refused contained the usual proposition of the presumption of innocence, and the requirement that in order to convict the evidence must satisfy the jury beyond a reasonable doubt of the defendant's guilt; to which was added the following:

"And as long as any of you have a reasonable doubt as to the existence of any one of the several elements necessary to constitute the offense or offenses charged, the accused cannot be convicted."

The charge of the court was as follows:

"In this case the defendant is accused of an offense of which he is presumed to be innocent until his guilt is proven beyond a reasonable doubt. This presumption of innocence attends him throughout the case and until, after a

consideration of all the evidence, you are satisfied beyond a reasonable doubt of his guilt. By reasonable doubt is not meant every possible doubt, but is meant that kind of a doubt that would suggest itself to a reasonable man and of such weight as to deter him from acting or deciding in matters of the highest importance to him. If you have such a doubt of the defendant's guilt, it is your duty to find him not guilty. If, on the other hand, you have no such doubt, but are persuaded of that guilt to a moral certainty, it is your duty to find him guilty."

The objection pressed by defendant is that the charge of the court failed especially to suggest to the jury that so long as any one of their number entertained such reasonable doubt, no verdict of guilty could be returned. The charge of the court, as is customary, was directed to the whole jury. Some state courts have said that the accused is entitled to such special direction to each juror; but we are of opinion that the better reason, as the better practice, is to direct instructions on all questions of law and fact to the jury as a body, and not to them individually. A juror qualified to sit in the box knows that it requires the concurrence of the 12 to make a verdict. This includes his judgment upon every element of fact and law bearing upon the issue of guilt or innocence. Why, therefore, in an instruction seek to evoke the individual, independent notion of a juror, thereby arousing his self-assertion and possible antagonism to his fellows? Certainly it is not in accord with the spirit of what was said by Mr. Justice Brown, in *Allen v. United States*, 164 U. S. 501, 502, 17 Sup. Ct. 154, 41 L. Ed. 528:

"While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself."

Such an appeal to the individual notions of each juror in instructions would produce hung juries rather than promote the ends of justice. *State v. Taylor*, 134 Mo. 109, 35 S. W. 92, Sherwood, Judge; *State v. Rorabacher*, 19 Iowa, 154; 2 Thompson, Tr. § 2495; *Blashfield Instructions to Juries*, vol. 1, § 303, and citations.

Criticism is made of the charge of the court wherein he said that if the defendant deposited, or caused to be deposited, the mail matter in question in the post office it would be sufficient. Contention is made that this was an extension of the allegation of the indictment, which only charged that the defendant deposited the letters, etc. It would be a sufficient answer to this to say that no exception was taken to this part of the charge of the court. Moreover, in all the requests made by defendant touching this issue, he employed the same language, that the defendant deposited or caused to be deposited, as given in substance by the court. *Consensus tollit errorem*. *Noble v. Blount*, 77 Mo., loc. cit. 241. It is true the statute says "who shall deposit or cause to be deposited." The latter alternative was evidently added by the framer

of the statute out of abundant caution. But in legal effect it is embraced in the charge that the defendant deposited the letters, etc. If A. commits a letter to B. to take to the post office and mail it, the latter acts as A.'s agent. *Facit per alium facit per se.* *United States v. Flemming* (D. C.) 18 Fed. 907-908; *Bates v. United States* (C. C.) 10 Fed. 92.

Criticism is made in argument of the employment of the word "highest" in the charge above quoted respecting the matter of reasonable doubt. Even if it were conceded that the term was extreme, it is sufficient to say that no exception was taken thereto. The only exceptions taken to the court's charge are: (1) To the failure and refusal of the court to give each request made by the defendant which are not embraced in the instructions given (which was considered as having been made as to each request); (2) "to the giving of that part of the charge of the court in which the jury was instructed concerning the books on hand showing a knowledge on the part of the defendant as to their contents, or words to that effect; and also to that part of the charge of the court as to what would be a depositing or causing to be deposited of obscene matter."

Counsel for defendant have discussed many questions not raised at the trial, and not properly preserved in the bill of exceptions. A careful examination of the record satisfies us that the defendant had a fair and impartial trial, during which the court, under exasperating annoyances, displayed marked equipoise and judicial temper.

Finding no reversible error in the record, the judgment of the District Court must be affirmed.

TABER LUMBER CO. v. O'NEAL et al.

(Circuit Court of Appeals, Eighth Circuit. March 14, 1908.)

No. 2,599.

1. **APPEAL AND ERROR—REVIEW—FINDINGS OF FACT—CONFLICTING EVIDENCE.**
Where there is abundant evidence from which a fact found by the trial judge may have fairly been found, such finding will be sustained on appeal, unless an obvious error has occurred in the application of the law or a serious mistake in the consideration of the proof.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error. §§ 3983-3989.]
2. **ESTOPPEL—CONSENT TO DELAY—PENALTY.**
Where complainants in any manner secured defendant's consent to complainants refraining from shipping logs under a logging contract for five days to enable complainants to change certain spur tracks, and complainants acted on such consent, defendant was estopped to claim a contract penalty for such delay.
3. **LOGS AND LOGGING—CONTRACT—CONSTRUCTION.**
Where a logging contract provided that complainants should have the right to log certain land except the west half of township 60 north, of range 18 west, "unless railroad spur is built to Sand Lake," such provision contemplated a spur which, whether built by complainants or some one else, should be one which complainants could lawfully use as a matter of right to execute their contract, and hence the construction of such spur by a private corporation as a private enterprise to log other lands

in the vicinity was insufficient to entitle complainants to log the west half of such township.

4. **CONTRACTS—MUTUALITY.**

Where a contract to log certain land excepted the west half of a township, unless a railroad spur was built to a certain lake, the contract, in so far as the excepted tract was concerned, was unenforceable for want of mutuality.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 21-40.]

5. **SAME—CONSTRUCTION.**

Under the rule that a contract should receive a reasonable construction to execute the real intention of the parties, if a given act is not within such intention, it should not be held to be so merely because it is within the letter of the written instrument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 730.]

6. **ACCOUNT STATED—OBJECTION TO CHARGE.**

Defendant claimed a charge against complainants for demurrage by letter dated May 19, 1903, to which complainants replied on May 23, 1903, objecting to such charge, and asserting their right to cease loading the cars in question during the time in April for which the demurrage was charged. *Held*, that such charge did not constitute an account stated so as to estop complainants from thereafter contesting the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Account Stated, § 24.]

7. **DAMAGES—FUTURE PROFITS.**

Future profits on an alleged breach of contract are recoverable only when they are the result of special circumstances known to the parties at the time the contract was made, and when they are the natural and direct result of a breach and can be ascertained with reasonable accuracy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 74-76.]

8. **SAME—EVIDENCE.**

On a cross-bill for alleged breach of a logging contract, evidence held to sustain a finding that complainants at the time the contract was made were not informed that their failure to get out the required quantity of logs each season would result in special damage to defendant, so as to entitle the latter to recover for loss of future profits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 513.]

Appeal from the Circuit Court of the United States for the District of Minnesota.

W. D. Bailey (Washburn and Mitchell, on the brief), for appellant.
J. N. Searles, for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was a suit in equity brought by Eugene O'Neal and James O'Neal, constituting the firm of O'Neal Bros., against the Taber Lumber Company to reform a written contract and recover damages resulting from an alleged breach of it. The reformation prayed for concerned two provisions which, it is claimed, did not express the true intent of the parties. The desired reformation was allowed as to one provision and denied as to the other. As no error is assigned to that action of the court no further reference need be made to it, and the contract as reformed will hereafter alone be considered.

It was composed of a written proposition made by complainants and accepted by defendant, and is as follows:

"Stillwater, Minn., Nov. 1, 1902.

"We hereby agree to log all timber belonging to the Taber Lumber Company in township 61 North, of range 16 West; township 61 North, of range 17 West; township 61 North, of range 18 West; township 60 North, of range 17 West; township 60 North, of range 18 West; township 59 North, of range 17 West; township 59 North, of range 18 West—all in St. Louis county, Minnesota, excepting sections 1 and 11 in township 59 North, of range 17 West, and sections 23, 25, and 26 in township 59 North, of range 17 West, and except the western half of township 60 North, of range 18 West, unless railroad spur is built to Sand Lake. Timber to be loaded on cars at rate of 20 cars per day beginning January 1st each year until not less than 10,000,000, nor more than 12,000,000 feet are shipped, shipments to be continuous until full amount is shipped in each year. In case of our failure to have 40 cars loaded each alternate day, we agree to pay the Taber Lumber Co. whatever penalty they are forced to pay railroad company, unless such failure is caused by D. V. & R. L. Ry. Co.'s failure to deliver us cars, and in case of the railroad company's failure to furnish us the forty cars each alternate day, the Taber Lumber Co. agrees to pay us the same penalty. The price for the entire tract, as above, to be \$5.50 per thousand delivered on cars, we to bear all expenses, both for material and construction in building any spurs which we may decide to use in getting out logs. The Taber Lumber Co. to furnish 2½ miles of steel rails with the necessary angle bars for the same. The Taber Lumber Co. to advance us from \$10,000 to \$12,000 between November 1st, 1902, and January 1, 1903, this amount to be deducted from last payment made for logging season of 1902-3, and we to pay 6 per cent. interest. Terms of payment: Settlement to be made in cash on the 15th of each month for logs loaded on cars during preceding month. Payments to be based on surveyor general's scale as logs are loaded on cars, cost of scaling to be divided equally between Taber Lumber Co. and ourselves. All logs to be cut according to directions of Taber Lumber Co. and under their supervision, and we will board, free of charge, any men which the Taber Lumber Co. may place in camp for the purpose of looking after their interests and supervising cutting.

"O'Neal Bros.

"Accepted. Taber Lumber Co., by E. Carroll Taber."

Complainants claimed that they performed their part of the contract by cutting the logs and delivering them aboard the cars as required with the exception of such as grew on the western half of township 60, range 18, last referred to in the contract, and that there became due therefor the sum of \$49,149.74, of which only \$48,095.24 had been paid, leaving a balance of \$1,054.50 still due. Complainants also claimed that they were entitled under the terms of the contract to cut the logs from the western half of township 60, range 18, and to receive as compensation therefor the price fixed by the contract of \$5.50 per thousand feet; that defendant did not permit them so to do, and they were thereby unlawfully deprived of the profit which they might have made by doing it, claimed by them to be \$17,500. Defendant denied owing the claim of \$1,054.50 because of demurrage which it was required to pay the railway company for cars detained, which it claimed the right to charge and had charged to complainants to balance their account.

With respect to the second claim made by complainants, defendant's contention is that, because no railroad spur was built to Sand Lake within the meaning of the exception found in the first part of the contract, complainants had no right to cut the logs from the western half of

township 60, range 18, and if they had such a right there was no competent proof of damages sustained by them in not being permitted to exercise the right. Defendant also claimed that an account was stated between it and complainants at the end of each logging year and that complainants by failing to object thereto are estopped from making the claims now asserted by them. Defendant in its cross-bill claimed special damages in the sum of \$10,000 from complainants for loss of profits alleged to have been occasioned by complainants' failure to cut and deliver 10,000,000 feet of lumber as required by the contract during the first logging year of 1902 and 1903. The Circuit Court allowed complainants \$921.50 on their first claim and \$5,250 on their second claim, making a total of \$6,171.50, and allowed nothing to defendant on its cross-bill. The appeal brings up for review these rulings of the court.

As complainants have not appealed from the allowance to them of \$921.50 instead of \$1,054.50 on their first claim, the controversy now concerns the former sum only. Was that amount due complainants as a balance for logs actually shipped? It was, unless defendant was justified in charging complainants with demurrage paid by it to the railway company for cars unnecessarily detained by them during the five days of April 6, 7, 8, 9, and 10, 1903. The learned trial judge disposed of this item by saying:

"The facts seem to be that complainants requested a cessation of cars during these five days in order to enable them to change the spur tracks and that this was assented to by defendant. It seems to me, therefore, that defendant ought not to withhold any compensation that was due complainants on account of that demurrage and therefore, upon that ground alone, the complainants are entitled to recover what was charged against them and withheld for demurrage during those five days, which amounted to \$921.50."

There is some conflict in the proof as to whether defendant assented to complainants' cessation of shipment for the days in question, but there is abundant evidence from which that fact could fairly be found. In such case the finding of the trial court is presumptively correct and should be followed unless an obvious error has occurred in the application of law or a serious mistake has been made in the consideration of the proof. *Mastin v. Noble* (C. C. A.) 157 Fed. 506, and cases cited.

Whether the contract of November 1, 1902, gave complainants a right to refrain from shipping for five or any other number of days or not, it is clear that if complainants afterwards, in any manner, secured the consent of defendant to refrain from shipping during those days and acted upon that consent, defendant is estopped from penalizing them for doing so. We see no reason for disturbing the conclusion reached on this item by the Circuit Court.

Whether the next item of \$5,250 was properly allowed to complainants depends upon the true meaning of the contract of November 1, 1902. By clear language complainants were first given the right to clear the whole of township 60, range 18, together with other townships and ranges; and by equally clear language the western half of township 60 was excepted from the operation of the contract. Complainants acquired no right to clear that tract, and defendant incurred no obligation to complainants therefor "unless railroad spur is built to

Sand Lake." In other words, by an exception to the exception, the western half of township 60 was brought within the operation of the contract, provided, and upon the condition, that a railroad spur should be built to Sand Lake. The burden rested upon complainants to show that this spur had been built. Have they done so? In answering this question regard should be had to the facts and circumstances surrounding the parties at the time the contract was made.

It appears that the Duluth, Virginia & Rainy Lake Railway Company had constructed and was operating a line of railway, which we will hereafter call the Rainy Lake Railway, running in a northerly and southerly direction, substantially midway through the lands first described in the contract and reasonably near to all of them. This the pleadings show, and there is abundant evidence that both parties had reference to this railway in the various provisions of their contract. The timber last described, located on the western half of township 60 was some four or five miles distant from the main line just referred to, and speaking generally, it was located in close proximity to Sand Lake. Complainants by the contract in question undertook to deliver all logs cut by them upon cars standing on the main line or upon spurs connecting with the main line, and they undertook to build such spurs as they should find to be necessary or advisable in the prosecution of their work. Of the necessity or advisability of doing that, however, complainants were left to judge. Doubtless the distance of the western half of township 60 from the main line and the expense of building a spur to it had much to do with the first exception found in the written proposition of complainants. They, however, by the proviso or condition referred to, reserved the right to cut the logs from that tract if they or any one else should decide to build and should build a spur to Sand Lake. It must have been the intention of the parties that such a spur, whether built by complainants or anyone else, should be one which complainants could use lawfully and as a matter of right for the purpose of executing their contract. If complainants had decided to build it and had done so, it would have served their purpose. They also could have made use of it if any incorporated railroad company had built it for the purpose of operating it as a common carrier of freight. In either event they would have been able to get out the logs from the western half of township 60. If any private person or corporation had built it, it would have availed them nothing unless they could use it. This sole and only purpose which the proposed spur was to serve must be kept constantly in mind. The only spur actually constructed was built by the Virginia Lumber Company, which owned large bodies of timber in the region of Sand Lake. That company, some time after November 1, 1902, built a spur from the main line to Sand Lake, but built it for its own use exclusively. It was a private enterprise, not designed as a common carrier and never held out, operated, or used as such. Complainants, therefore, could not of their own motion and as a matter of right make use of it to secure transportation to the main line, and they did not secure or undertake to secure by private agreement from the Virginia Company the general right to use it for the transportation of such timber as they might cut from the tract in question. The coincidence that the Virginia Company employ-

ed the same construction company to build its spur which the Rainy Lake Railway Company had employed to construct its main line is unimportant in view of the conceded facts already narrated. It is clear that the spur constructed was not the railroad spur contemplated by the contract. Complainants, as a matter of right could not use it, and even if they might have made a private contract for its use on some terms, defendant clearly could not have compelled them to fix terms and make such contract. Want of mutuality in this respect is also fatal to complainants' present claim.

Literally speaking this private spur of the Virginia Company was "a spur built to Sand Lake," but within the spirit and purview of the contract it was far from it. Contracts should receive a sensible and reasonable construction to the end that the real intention of the parties may be executed. If a given act is clearly not within the intention of the parties it should not be held so, merely because it is within the letter. *Pressed Steel Car Co. v. Eastern R. Co.*, 57 C. C. A. 635, 121 Fed. 609, and cases cited. The same rule is applicable to the construction of statutes. *United States v. Kirby*, 7 Wall. 482, 19 L. Ed. 278; *Holy Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363.

We think the learned trial judge erred in awarding to complainants the item of \$5,250. Complainants failed to show a right to clear the western half of township 60 within the true meaning of the contract. This conclusion renders unnecessary any consideration of the other defense that complainants sustained no damages, even if they were deprived of the right to cut the timber.

Concerning the claim of estoppel arising out of the rendition of accounts each year by defendant to complainants, little need be said. The claim of \$921.50 only can be affected by its determination either way. The doctrine of estoppel by the receipt and retention, without objection, of an account stated rests on the presumption that the debtor's failure to object to it within a reasonable time is a voluntary admission of its correctness. *Patillo v. Allen-West Commission Co.*, 65 C. C. A. 508, 131 Fed. 680. It will be remembered that the claim for demurrage originally asserted by defendant against complainants was \$1,054.54. A claim or charge for this amount against complainants was made by defendant by letter of date May 19, 1903. Complainants did not admit the correctness of the charge as made. Instead of doing so they immediately, by a letter of date May 23, 1903, objected to it and asserted their right to cease loading cars during the five days in April for which the demurrage was charged. This protest effectually disposes of the claimed estoppel.

The cross-bill claims special damages resulting from complainants' failure to cut and deliver to defendant 1,105,370 feet of the quantity stipulated by the contract to be delivered the first year. It avers that defendant required the total amount of 10,000,000 feet per year for the operation of its mills; that a failure to get it would occasion a shut down and prevent defendant from supplying its customers with lumber; that complainants knew of these facts when the contract was

made and entered into it in view of the consequences specified, in case of a breach on their part. It further avers:

"That by reason of the failure of the plaintiffs to deliver the full ten million feet of logs to this defendant during said year, this defendant's mill was necessarily idle during a considerable portion of the year and of the sawing season thereof, and this defendant was short of lumber which it desired and required for its trade, and which its trade demanded, by reason of which this defendant suffered great loss and damage in a sum exceeding the sum of ten thousand dollars."

This cross-bill presents a claim for the gain and profits which defendant lost by not having the logs in question to saw and the lumber which might have been produced therefrom to sell. This was a claim for future profits which falls within the denomination of special damages, to which one is entitled if such damages are within the contemplation of the parties at the time the contract is made. Such damages, as distinguished from those ordinarily sustained, can be recovered only when they are the result of special circumstances known to the parties at the time the contract was made, when they are the natural and direct result of a breach, and when they can be ascertained with reasonable accuracy. *Cent. Coal & Coke Co. v. Hartman*, 49 C. C. A. 244, 111 Fed. 96; *Farmers' Loan & Trust Co. v. Eaton*, 51 C. C. A. 640, 114 Fed. 14; *McDonald v. Kansas City Bolt & Nut Co.*, 79 C. C. A. 298, 149 Fed. 360, 8 L. R. A. (N. S.) 1110.

Proof of knowledge, by the party charged to be in default, of the special circumstances which make exceptional damages likely to follow is an insuperable prerequisite to liability therefor. This proof the defendant undertook to make in the present case. It consisted of the testimony of two witnesses, which, when critically considered, discloses a good deal of uncertainty as to what defendant's officers really stated to complainant concerning their intended use of the logs when cut. One of the complainants who conducted the negotiations with defendant emphatically contradicts the interpretation now put upon that testimony. Moreover, the good faith of the claim made in the cross-bill is challenged by the fact that although it accrued in the spring of 1903, at the end of the first year's logging operations, and although the parties had intimate business relations for two years thereafter, it was never called to the attention of the complainants or much less demanded of them, until after this suit was instituted in 1906. It looks much like an afterthought. The learned trial judge disposed of the claim as follows:

"Although there is evidence on the part of the defendant that the nature of its trade was stated to complainants, and the fact that it was a manufacturer of lumber, and that its mills required a certain amount of logs, which would necessitate the cutting and delivery of at least ten million feet of logs on the part of the complainants, yet that testimony is denied by complainants, and there seemed nothing in the circumstances of the case to render it probable that such statements were then in fact made; and as the testimony is balanced with respect to the statements of the witnesses, I am obliged to hold that such statement or fact is not proven, and therefore that no substantial damages can be allowed, and that the counterclaim must be disregarded."

After a careful consideration of the proof we are unable to say that any mistake was made by the trial court in this particular. It results-

that the decree below in so far as it reformed the contract of November 1, 1902, was correct; but in so far as it awarded to the complainants a judgment for \$6,171.50 was erroneous. The only damages to which complainants are entitled on the reformed contract are \$921.50 with interest from the time that sum should have been paid, which was May 19, 1903. The decree is therefore reversed, and the cause is remanded to the Circuit Court, with directions to award a decree against the defendant for the sum of \$921.50 with interest as already indicated, in lieu of the amount of \$6,171.50, and in all other respects to enter the decree as before.

SANBORN, Circuit Judge (concurring). I concur in the result in this case, but my reason for the conclusion that the complainants cannot recover damages because they were prevented from logging the timber on the western half of township 60 differs from that of the majority of the court. It is that a careful reading and analysis of all the evidence on the subject have convinced me that the complainants failed to prove by a fair preponderance, or by any preponderance of it, that they sustained any damage by reason of their deprivation of an opportunity to cut and deliver that timber. Their right to log that timber seems to me to be established. The contract between the parties was that they should log it if a "railroad spur is built to Sand Lake." A railroad spur was built to Sand Lake during the term of the contract. The argument that while the parties contracted in writing that the complainants should log the timber if a "railroad spur is built to Sand Lake" their agreement was that they should log it only if a "railroad spur is built to Sand Lake" *by the Duluth, Virginia & Rainy Lake Railway Company, or by any other incorporated company for the purpose of operating it as a common carrier of freight*, is not persuasive to my mind. While the main line of the railroad was owned by the Rainy Lake Company, it was in the possession of the construction company in process of building. It had never been turned over to or accepted by the railroad company, and the construction company which was building it for the railway company was operating it. The business on the railroad was construction and logging. The same construction company built for the Virginia Company, a logging company, and operated the spur to Sand Lake. A part of the logs cut by the complainants under their contract were drawn out over a portion of this spur. The contract was a logging contract, the spur necessary to bring out the logs was a logging spur, and the spur built was a logging spur. There is no evidence that the Virginia Company, or the construction company, refused, or would have refused, to permit the use of this spur for a reasonable compensation by the complainants, or the defendant, for logging purposes, and there is no legal presumption to that effect. In my opinion it filled the condition of the contract and gave the complainants the right to log the timber.

The addition to the conditional term of a contract which is clear and unambiguous, which parties have selected and written down to express their agreement on the subject and which has been fully complied with as it reads, of other conditions, like those in italics above, by construction after the event whereby a compliance according to the reading of

the expressed condition becomes no compliance, seems to me to impinge upon the familiar rules that where the terms of a contract are plain no room is left for construction, that the intention of the parties should not be assumed and imported into their written agreements, but should be drawn from the writings, and that the common meaning of clear terms should not ordinarily be discarded for curious or hidden significations which the ingenuity of counsel and the exigencies of their case develop.

COLLIER v. GÖESSLING.

(Circuit Court of Appeals, Sixth Circuit. March 17, 1908.)

No. 1,738.

1. QUIETING TITLE—PLEADING.

Where the holder of a tax title sued out a writ of possession from a state court, and, in a suit to set aside his deed as a cloud on title, filed a cross-bill praying possession, he thereby confessed that the possession was in complainant.

2. SAME—SALE TO STATE—TAX LIST—REQUISITES.

Act Tenn. 1899, p. 1084, c. 435, requires the county trustee to make public sale of land subject to delinquent taxes, and requires that he strike off to the treasurer all lands in lots so sold, when the full amount of taxes, penalties, and costs are not bid at the sale by some private person, and that he shall then file with the clerk a certified list of the lands so struck off, specifying the days of sale, the amounts of the respective taxes for which the sale was made, and each item of cost thereof. *Held*, that where a list contained figures, between perpendicular lines, with nothing to indicate that the figures stood for dollars and cents, and there was no separation of the tax due the state from that due the county, or the amount of any special tax, the list was void, and did not operate to pass any title to the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1371.]

3. TAXATION—TITLE—DEED—CONCLUSIVENESS—STATUTES.

Act Tenn. 1899, p. 1143, c. 435, § 66, provides that a tax deed shall be an assurance of perfect title to the purchaser, and shall not be invalidated by any court except on proof that the land was not liable to sale for taxes, or that the taxes had been paid before sale, and that no suit shall be commenced in any court of the state to invalidate any tax title, after three years from the sale, except in cases of persons under disability, etc. *Held*, that such section was unavailable to validate a tax title, where the clerk was without authority to make the deed because the list filed by the county trustee did not comply with the statute, and that the limitation prescribed was also inapplicable under such circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1557.]

4. LIMITATION OF ACTIONS.

To start the running of a statute of limitations there must be some one capable of suing, some one subject to the suit, and a tribunal open for such suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 83, Limitation of Actions, §§ 217-219, 384.]

5. TAXATION—LIMITATIONS—COMMENCEMENT OF TERM.

Where a trustee sold certain land to the state for delinquent taxes, and two days before the period of redemption expired the clerk sold the land to defendant by statutory conveyance, the three-years limitation prescribed by Act Tenn. 1899, p. 1143, c. 435, § 66, within which a suit may be brought to contest such title, did not begin to run until the conveyance by

the clerk to defendant, no action being previously available which would have concluded the state, which could not be sued.

Appeal from the Circuit Court of the United States for the Western District of Tennessee.

A. W. Biggs, for appellant.

J. P. Holt, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This bill was filed in a chancery court of the state, and duly removed to the court below upon diversity of citizenship. The object of the bill is to remove a tax deed as a cloud upon the title to lots Nos. 16 and 17 of the Trezevant subdivision of land in Shelby county, Tenn., and to enjoin the execution of a writ of possession, issued by the state circuit court, to put the holder of the tax title into possession. An answer and cross-bill was filed by the defendant, and an amended bill and answer to the defendant's cross-bill was filed by the complainant. These pleadings put in issue the validity of the tax deed under which the defendant claimed, and the right of the complainant to maintain any suit to avoid the tax assessments, sale, or deed. Upon a final hearing the court below dismissed the bill; the decision, as indicated by the opinion, going wholly upon the ground that more than three years had elapsed between the tax sale and the filing of the bill.

1. It is useless to go into details about the title of the complainant. He had and has now, at least, such an equitable interest as to entitle him to maintain a bill to clear away a cloud and to enjoin a writ dispossessing him or those claiming under or through him. The lots were inclosed but vacant. That there was an existing possession by Collier, or those in privity with him, is not put in issue by the answer, and is in effect confessed by the suing out of a writ of possession from the state circuit court, as well as by the prayer for such a writ included in the defendant's cross-bill.

2. Laying aside all questions as to the validity of the original assessment for indefiniteness of description or because assessed to one not the owner, as well as the question as to whether as a precedent to a sale of land for taxes a distress warrant must not issue and a return be made of no personal estate, we shall deal only with the validity of the "list" which the trustee is required to file after a sale for delinquent taxes, which is the basis for any title obtained by a purchaser at a tax sale. Under the assessment law in force in Tennessee, the county trustee makes public sale of lands subject to delinquent taxes, and is required to strike off to the State Treasurer all lands or lots so sold when the full amount of taxes, penalties, and costs, etc., are not bid at the sale by some private person, and that he shall then file with the clerk of the circuit court of his county a "certified list of the lands so struck off," "specifying the days of sale, the amounts of the respective taxes for which said sale was made, and each item of cost thereof." This "list," the act declares, shall operate to "vest title" in the Treasurer for the use of the state as fully as a conveyance. It is also provided that the clerk may sell privately to any person who will

pay the taxes due upon the lands so bid off, and that such purchaser shall take the state's title subject to every right of redemption accorded by law to the owner, and that when the redemption period expires the clerk shall make deed to such purchaser, and that the circuit court shall at his demand issue a writ to put him in possession. The lots involved were sold by the county trustee July 5, 1900, and struck off to the Treasurer of the state for the use of the state. The period for redemption extended to July 5, 1902. On July 3, 1902, the clerk sold these lots to the appellee, and on July 10, 1902, made him a conveyance according to the statutory form. Nearly two years after this, appellee applied for a writ of possession, and this writ was in the hands of the sheriff when this bill was filed in June, 1904.

Section 66 of the act of 1899, p. 1143, c. 435, provides that this conveyance "shall be an assurance of perfect title to the purchaser of said land; no such conveyance shall be invalidated by any court, except by proof that the land was not liable to sale for taxes, or that the taxes for which said land was sold have been paid before said sale, and if any part of the taxes for which said land was sold is illegal, or not chargeable on it, but a part is chargeable, that shall not affect the sale, nor invalidate the conveyance thereunder, unless it appears that before sale the amount legally chargeable on the land was paid or tendered to the county trustee, and no other objection, either in form or substance to the sale, or the title thereunder, shall avail in any controversy involving them; and no suit shall be commenced in any court of this state to invalidate any tax title to land after three years from the time said land was sold for taxes, except in case of persons under disability, who shall have one year in which to bring suit after such disability is removed, nor until the party suing shall have paid or tendered to the clerk of the court in which the suit is brought the amount of the bid, and all taxes subsequently accrued, with interest and charges as herein provided. A writ of possession shall, upon application of the purchaser included in this section, be ordered by the court to which the tax sale has been certified."

The objection to this title which we deem it necessary to consider is that the "list" of lands struck off to the state and filed with the clerk of the circuit court was not made in compliance with the positive requirements of the act in that regard. The "list" which included the lots in question did not "specify the amount of the respective taxes for which said sale was made" nor show "each item of cost thereof." Opposite a description of these lots in a column at the top of which are the words and figures, "State, county and special taxes," "103 on \$100." Then appear the figures "1236." There is a ruled perpendicular line between figures "1" and "2" and another between "2" and "36." There is, however, no dollar mark at the top of the column, and nothing to indicate whether "1236" stands for dollars or cents. Neither is there any separation of the tax due the state from that due the county nor the amount of any "special tax" tax from either. To the right of the column in which occur these figures are ruled columns, one headed with the words "Interest from February 1, 189—," another headed "Clerk's Commissions, etc.," another "Penalty," and a fourth and last headed "Total tax, costs, etc.," but there are no figures ex-

tended in any of these columns. Under another column headed "Remarks," there occurs "Sold to state July 5, 1900," and under another headed "When and by whom paid" is the entry "Sold July 3, 1902, W. F. Goessling \$34.85 Sub. R. Deed Delivered July 14, 1902."

Identical provisions in the assessment act of 1897 were constructed by the Tennessee Supreme Court in the cases styled "Tax Title Cases," 105 Tenn. 245, 58 S. W. 259, and a clerk's deed conveying land, struck off by the trustee to the state, was held void, because the "list" filed by the trustee with the clerk of the circuit court of his county had not been "certified" as the act required. In reference to the provision in section 71 of the act of 1897, p. 37, c. 1, which is identical with that in section 66 of the act of 1899, that the clerk's deed should be an "assurance of perfect title to the purchaser of said land, and no such conveyance shall be invalidated in any court, except by proof that the land was not liable to sale for taxes, or that the taxes for which the land was sold have been paid before said sale," the Tennessee court said that this did not operate to close the door of investigation, and that that provision did not apply to a deed which the clerk was without authority to make. "Behind it," said the court, "must be the power to execute before it can have the efficacy now claimed for it." "It is left scope enough without embracing within it a conveyance which the clerk was without authority to make." Construing the act as requiring the trustee to file a "certified list" of lands struck off to the state, and that a list not certified did not operate to vest any title in the state, the court held that the clerk had no power to convey title where the state had none, and that his deed was impeachable and void. In *Condon v. Galbraith*, 106 Tenn. 14, 58 S. W. 916, the Tax Title Cases were followed, and a tax deed to a purchaser from the state held to pass no title where the trustee had neglected to certify the list filed by him. It was also held that the circuit court had no jurisdiction under the act of 1899, c. 435, to confirm the title of a purchaser at tax sales, and to award writs of possession to such purchasers, unless the required list had been duly certified. In *Hamilton v. Brownsville Gas Light Co. et al.*, 115 Tenn. 50, 154, 90 S. W. 159, the same court held that the list of sales by the trustee, furnished to the clerk of the circuit court, should be equally as specific and definite in showing the amount of taxes in dollars and cents, as well as each item of costs and penalties in dollars and cents, as would be required to make a valid assessment, and the lists failing to show specifically and definitely the amount of each item of taxes, costs, and penalties, the lists will be insufficient and invalid to divest title out of the owner of the property, and to vest it in the state, or in the purchaser from the state. Among other things the court in the case last cited, said:

"Without passing upon the other assignments, we are of opinion that the sale to the oil company by the clerk of the circuit court was without authority, invalid, and void, and conferred no title upon the oil company as purchaser, and the complainant is entitled to have the cloud, caused by said void sale, removed from the title of the land involved, upon the condition that it pay the amount of taxes assessable against the land for the year 1899, and all subsequent taxes and proper interest on all the same, but without any penalties or costs."

The "list," under which the title was claimed in the case just cited, was subject to the precise defects we have pointed out in the case before us. The court said of it:

"There are certain figures entered on the lists between perpendicular lines, but there is nothing to show or indicate what is meant by these figures. There is no dollar mark attached to any of them, nor does the dollar mark appear anywhere upon the lists, except in the valuation of the property. It has been held in a number of cases that the absence of the dollar mark to indicate what is meant by the figures in the assessment of property is fatal to the assessment, and that perpendicular lines between the figures, separating them, will not suffice to make the assessment good."

Under these Tennessee decisions, construing this very assessment law and applying that construction to "lists" defective precisely as the "list" which is the basis for the deed under which the appellee claims, we are inevitably led to hold that this deed was void, and the judgment awarding a writ of possession void as having been rendered by a court having no jurisdiction. This brings us to the question of limitation of time within which such a suit as this may be brought as provided in the section of the act of 1899, heretofore set out.

If the provisions of this statute declaring a tax title unavailable except in two specific cases does not apply where the clerk is without authority to make a deed because the "list" filed by the trustee with him does not comply with the provisions of the statute, it is equally plain that the limitation in the latter part of the same section is inapplicable whenever the clerk was without power to make a deed to a purchaser from the state. The clerk's power to sell land which had been struck off to the state and his power to make a conveyance which shall convey the title is a statutory power. In *Marx v. Hanthorn*, 148 U. S. 172, 180-182, 13 Sup. Ct. 508, 510, 37 L. Ed. 410, it was said:

"A statutory power to be validly executed must be executed according to the statutory directions. It is, no doubt, true that there may be provisions in tax laws that are made in the interest of the public, and which do not concern the taxpayer; and a failure to punctiliously observe them may furnish him with no just ground of complaint. But the well-established rule is, as above stated, that observance of every safeguard to the owner created by the statute is imperatively necessary. So, too, is the rule, when not modified by statute, that the burden of proof is on the holder of a tax deed to maintain his title by affirmatively showing that the provisions of the law have been complied with."

Touching the legislative power to make a tax deed conclusive, the court, in the same case, said:

"It is competent for the Legislature to declare that a tax deed shall be prima facie evidence, not only of the regularity of the sale, but of all prior proceedings, and of title in the purchaser, but that the Legislature cannot deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity, and it cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land. Mr. Cooley sums up his examination of the cases on this subject in the following statement: 'That a tax deed can be made conclusive evidence of title in the grantee we think is more than doubtful. The attempt is a violation of the great principle of Magna Charta, which has been incorporated in our Bill of Rights, and, if successful, deprive the citizen of his property by proceedings absolutely without warrant of law or of justice; it is not in the power of any American Legislature to deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its

own validity. It cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land, or of the possible jurisdictional facts which would make out title. But the Legislature might doubtless make the deed conclusive evidence of * * * everything except the essentials."

If every defense is cut off after the lapse of three years, that would include even the fact of a sale by the trustee at all, or that the taxes had in fact been paid, or that the tax was void. So extreme a purpose is not to be lightly attributed to the Legislature, and tends strongly to induce us to hold that this limitation was not intended to apply to those matters upon which the power of the clerk and the jurisdiction of the court depended. This interpretation and application of the limitation clause of this act is not only in clear accord with the Tennessee decisions cited above, but it is in line with the view taken of such statutes by other courts. *Radcliffe v. Scruggs*, 46 Ark. 96, 106; *Alexander v. Gordon*, 101 Fed. 92, 41 C. C. A. 228; *Boyles v. Boyles*, 37 Iowa, 592; *Feller v. Clark*, 36 Minn. 338, 340, 31 N. W. 175. A statute of Florida provided that no suit should be commenced to set aside a tax deed and recover possession, unless within one year from the recording of the deed, "except upon the grounds that the lands were not subject to taxation, or that the taxes were paid or tendered," etc. The recording of the deed was also made an assurance of title and entry sufficient to authorize suit as for an actual entry. The Florida courts held that this statute did not protect a void deed, and the Florida decisions were reviewed and applied to a tax deed where the assessment was insufficient in description to impart notice to the owner by the United States Supreme Court in *Bird v. Benlisa*, 142 U. S. 664, 12 Sup. Ct. 323, 35 L. Ed. 1151. See, also, *Kraus v. Montgomery*, 114 Ind. 103, 16 N. E. 153; *Early v. Whittingham*, 43 Iowa, 162; *Smith v. Kipp*, 49 Minn. 119, 51 N. W. 656; and *Zink v. McManus*, 121 N. Y. 299, 24 N. E. 467.

But if we treat this provision as a statute of limitation, and not as a statute making a tax deed conclusive evidence of every fact upon which its validity depends, and also that the Legislature intended it to apply to tax titles executed by a clerk without any power, a very serious question would arise as to its constitutionality, if applicable to an owner in possession of his own property. What would set the statute in motion if his possession was undisturbed and the writ of possession was based upon the order of a court having no jurisdiction, and the deed of a clerk without power under the statute to make the deed? Might he not defend and show these things? Could a tax purchaser sit still until the lapse of three years, and then summarily oust him and deny him all right to be heard because more than three years had elapsed since the date of the tax sale? The question of whether one in possession can be put to an action without violation of the requirement of due process was not decided in *People v. Turner*, 145 N. Y. 451, 40 N. E. 400, because the New York court found that the landowner was not in possession. In the same case on review by the Supreme Court of the United States it was held that this question of fact was not open to review, and the constitutionality of a short statute of limitation barring actions to invalidate tax titles maintained upon the ground that the limitation was not unreasonable, there being a

remedy open to the landowner during the entire running of the statute. Neither did the question arise in the subsequent case of *Saranac Land & Timber Company v. The Comptroller*, 177 U. S. 318, 20 Sup. Ct. 642, 44 L. Ed. 786. Statutes of this description have been held void for want of due process when they operate against a landowner in possession and deprive him of his title under a tax proceeding which was absolutely void, as for want of notice, or where the tax had been paid or tendered, or where the sale or description was defective in those fundamentals which pertain to due process. *Alexander v. Gordon*, 101 Fed. 92, 41 C. C. A. 228; *Spurlock v. Dougherty*, 81 Mo. 171; *Baldwin v. Merriam*, 16 Neb. 199, 20 N. W. 250; *Brooks v. Union T. Company*, 52 Atl. 238; In *Gardner v. Reedy*, 62 S. C. 503, 40 S. E. 947, the South Carolina court held that the statute did not start until the purchaser went into possession. See, also, the comment and opinion of Judge Cooley upon such statutes. 2 Cooley on Taxation, 1063. We forego any application of this principle to the facts of this case; the question of fact as to the continuity of actual possession by the appellant and those under whom he claims being in some doubt on the evidence, we put our judgment upon other grounds.

But there is another ground upon which we think this suit in time if we are wrong in holding that the three-years limitation does not apply when the clerk was without power to make a deed to the premises, and that is this: that the limitation did not begin to run until the clerk undertook to convey the premises to the appellee. This sale occurred July 5, 1900. The property was struck off to the State Treasurer for the use of the state. The "list" filed with the circuit court clerk, if valid, vested the title in the state. The state could not be sued in any court of the state, nor could "any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property." Shannon's Tenn. Code, § 4507. An officer of the state acting without authority may be restrained, because that would not be a suit against the state, but against one vainly pretending to act for the state under a void law. *Lynn v. Polk*, 8 Lea (Tenn.) 121. The principle is a familiar one, and is applied in the courts of the United States in suits against state officials. *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 29 L. Ed. 185; *Fitts v. McGhee*, 172 U. S. 527, 19 Sup. Ct. 269, 43 L. Ed. 535. Undoubtedly, if the State Treasurer had sued out a writ of possession, the writ might have been enjoined. If he had taken possession personally, an action of ejectment might have been brought to dispossess him, in as much as the suit would have only tried his right to possession it would not have been a suit by the state, nor conclude its claim under the tax sale and "list." *United States v. Lea*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171; *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535; *Scranton v. Wheeler*, 57 Fed. 803, 6 C. C. A. 585; *Stanley v. Schwalby*, 147 U. S. 508, 13 Sup. Ct. 418, 37 L. Ed. 259. Neither would an action of ejectment brought against an agent of the state in possession conclude the state, and would not, therefore, invalidate the state's tax title.

Neither would a bill to remove a cloud be effectual unless the state would be concluded thereby. Neither would an injunction against

an agent of the state, or against the clerk of the circuit court, conclude the state, unless the state was a party, and this it forbids by law. To restrain the clerk from making a deed to the state would be idle. The act contemplates no deed to the state, but makes the "list" operate as a conveyance vesting title in the state. But, if the clerk should prepare a deed to the state and should be enjoined, the state not being a party, the landowner would be no better off than before. Under section 4972, Shannon's Tenn. Code, an action of ejectment will lie against one in possession or one "claiming an interest." But unless the state itself should be sued in this statutory way the action would be fruitless. There was, therefore, no remedy of which the landowner could avail himself, whether in or out of possession, which would invalidate the tax sale and tax deed, so long as the equitable title was in the state, and the state would not suffer itself to be sued in such way as to conclude itself. To start the running of a statute of limitation there must be some one capable of suing, some one subject to be sued, and a tribunal open for such suits. *Thurman v. Shelton*, 10 Yerg. (Tenn.) 383; *Graham v. Nelson*, 5 Humph. (Tenn.) 605, 611; *Yancy v. Yancy*, 5 Heisk. (Tenn.) 353, 13 Am. Rep. 5; *Braun v. Sauerwein*, 10 Wall. (U. S.) 218, 19 L. Ed. 895. The state's title did not pass out of the state and into one capable of being sued until the deed of the clerk of July 10, 1902, to appellee. That was less than three years before this bill was brought. This suit to invalidate appellee's tax title was therefore not barred by the limitation relied upon.

Reverse the decree and remand, with directions to pronounce such a decree as indicated by this opinion, requiring, however, that the appellee shall be repaid the tax and interest actually paid by him for which the land was sold, and taxes since paid by him, with interest, but no penalties or costs. *Hamilton v. Brownsville Gas Company*, 115 Tenn. 150, 90 S. W. 159.

TUCKER, Internal Revenue Collector, et al. v. GRIER.

(Circuit Court of Appeals, Eighth Circuit. February 18, 1908.)

No. 2,673.

1. INTERNAL REVENUE—DEALERS IN OLEOMARGARINE—ACTION TO RECOVER TAX PAID.

The provisions of the general internal revenue legislation do not apply to Oleomargarine Act Aug. 2, 1886, c. 840, 24 Stat. 209 (U. S. Comp. St. 1901, p. 2228), except those sections expressly made applicable by section 8 thereof (24 Stat. 209 [U. S. Comp. St. 1901, p. 2229]); and one assessed with a special tax as a dealer under such law, who, before paying the tax at the suggestion of the collector, made application to the Commissioner for an abatement of the same, stating the facts, which application was refused, is not required to again appeal to the Commissioner under Rev. St. § 3226 (U. S. Comp. St. 1901, p. 2088), after he has paid under protest, before he can maintain a suit to recover his payment back as illegally imposed.

2. SAME—WHAT CONSTITUTES DEALER.

Plaintiff was a retail grocer, who, prior to the passage of Act Aug. 2, 1886, c. 840, 24 Stat. 209 (U. S. Comp. St. 1901, p. 2228), had sold oleomargarine. After that he ceased handling it; but having two or three

customers who desired it, at their request and for their accommodation he sent orders in their respective names to the manufacturer for 10-pound packages at a time, to be shipped to each customer in his care. The manufacturer shipped the same to its local branch house, addressed and billed to the customers. The branch house, which did not deliver to retail customers, left the packages at plaintiff's store, and he delivered the same, with other groceries. The customers returned the bills to him, and he remitted for the same to the manufacturer each month, charging the customers with the cash so sent. There was no fraud, nor attempt at concealment, and plaintiff made no profit whatever on the transactions. *Held*, that such transactions were not sales of the article by plaintiff, and did not render him subject to tax as a wholesale dealer.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

James K. Barnes and L. W. Gregg, for plaintiffs in error.

F. A. Youmans, for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PER CURIAM. The writ of error in this case challenges a judgment for the recovery from a collector of internal revenue of \$782.20, obtained by him from the defendant in error, against his protest, as a tax on him as a dealer in oleomargarine. A patient consideration of the evidence and of the law, in the light of the arguments presented and authorities cited by counsel, has satisfied us that the judgment below was right, and that we cannot present the facts or the true reasons for the conclusion more clearly or correctly than they have been expressed by Judge Rogers in his findings and opinion in the court below. The judgment is accordingly affirmed upon those findings and upon that opinion, which are approved by this court and which appear in 150 Fed. 658, and read in this way:

"The facts in this case, as found by the court, sitting as a jury, are these: A. & J. Grier is a firm of retail grocery merchants, doing business at Ft. Smith, Ark. Andrew Grier died about three years ago, and more than a year before the matters occurred out of which this suit grew. The business, since Andrew's death, has been conducted by James Grier, as surviving partner, under the original firm name of A. & J. Grier. Before the oleomargarine act of August 2, 1886, was enacted the firm had handled oleomargarine. When that act became a law it declined to handle oleomargarine at all. Once or twice, however, after the oleomargarine act became law, during short seasons in which butter was scarce, it paid the special tax as retail dealers in oleomargarine, and during those short periods did retail oleomargarine. This suit, however, did not grow out of anything which occurred during those periods, but grew out of transactions that occurred long after that time, and at a time when it does not claim to have paid any special tax at all. It never did pay any tax as wholesale dealer at any time. A. & J. Grier (hereafter called the plaintiff) had three customers to whom he sold groceries—I. e., James F. Read, Dr. St. Cloud Cooper, and Mr. F. C. Redmond—who used oleomargarine. The manner in which his grocery business was conducted was this: The orders were either verbal or by telephone, and the goods were sent out by delivery wagons, accompanied by slips showing the quantity and price of the goods. This slip, for the information of the purchaser, was retained by him as a check upon the account of plaintiff, and the goods so sent were charged on the books of plaintiff and paid for monthly. The three customers named used oleomargarine. Two of them, James F. Read and Dr. St. Cloud Cooper, had been using it before the oleomargarine act was passed,

and wished to continue its use. The proof is not clear when Mr. Redmond became a customer of plaintiff, and it is not material, as the transactions were the same as to all three customers. Plaintiff informed those customers that he was not dealing in oleomargarine. Thereupon the said customers requested plaintiff to order it for them in 10-pound packages. Plaintiff was a customer of Armour & Co., packers, of Kansas City, Mo., who had a branch house located and doing business at Ft. Smith, Ark., where plaintiff was in the retail grocery business. When plaintiff would receive a request from either of said three customers to order a package of oleomargarine for them, he would telephone Armour & Co., the branch house at Ft. Smith, to send a 10-pound package of oleomargarine to Judge James F. Read, Dr. St. Cloud Cooper, or F. C. Redmond, as the case might be, care of plaintiff. This order the branch house of Armour & Co. would forward to Armour & Co. at Kansas City, Mo., and that house would forward the package as ordered to its branch house at Ft. Smith, billed to James F. Read, or Dr. St. Cloud Cooper, or F. C. Redmond, as the case might be, in care of plaintiff, and a duplicate of the bill thus made out against the purchaser, which was sent to the branch house at Ft. Smith, was sent (with express charges, if it came by express) by Armour & Co., at Kansas City, Mo., through the mail, to the person to whom it was billed. On the receipt of the package by the branch house of Armour & Co. at Ft. Smith, the manager would send the package, accompanied by the duplicate bill, to the store of plaintiff, who received it and the bill for the person to whom it was billed, and on the next trip of the wagon of plaintiff to deliver other groceries to the purchaser the package of oleomargarine would be put in and delivered at the residence of the purchaser, accompanied by the duplicate copy of the bill of Armour & Co., which had been sent to plaintiff through the branch house of Armour & Co. at Ft. Smith. When the package was delivered at the home of the purchaser by plaintiff in the manner stated, the purchaser would return the bill of Armour & Co. to plaintiff. When plaintiff loaded the package into the wagon, he would charge on his books 'Cash for oleo' (stating the amount contained in the bill), but did not pay Armour & Co. until the beginning of the next month, and when plaintiff made out his bill against the customer who got the oleomargarine he carried the entry on his books 'Cash for oleo,' so much, into the customer's account as of the date it appeared on his books, and it was paid for by the customer in the same way the other groceries were paid for. James F. Read and James Grier testified that plaintiff made the order simply as an accommodation, and paid for the 'oleo' in that way at the request of the customer as a matter of convenience. Plaintiff received no profit on the goods, nor for any service rendered in regard to the 'oleo.' There was no semblance of any evidence that there was any arrangement or subterfuge between any of the parties, and the transaction was open, frank, and candid, and there was no suspicion of fraud or dissimulation attached to it, and the court, being intimately acquainted with both Grier and Read, does not believe that either could be induced to enter into any dishonest business of any character. It is also undisputed that Armour & Co. would not deliver goods to other persons than merchants, and the reason the oleomargarine packages were delivered by Armour & Co. to plaintiff was to avoid putting the customer to the trouble and expense of having to send to the packing house to get the package. The undisputed testimony also shows that the financial responsibility of James F. Read and Dr. St. Cloud Cooper is A-1, and Mr. Grier testifies that Mr. Redmond always paid his bills, but that he did not know much about him; that it was not necessary at all for him to stand good for Dr. Cooper or Mr. Read, but he does not know whether Armour & Co. would have known Mr. Redmond or not; and further, he says that he never made any arrangement to pay Armour & Co. for the oleomargarine, and there never was any understanding about the payment of it, but he always paid it at the request of the parties who purchased it, and in the manner hereinbefore stated. James F. Read testified that, after the trouble grew out of the transaction above referred to, he personally gave his orders to Armour & Co., and the goods were shipped direct to him, and paid for by him by check to Armour & Co. at Kansas City.

"The version of the revenue officers, Cox and Thomas, witnesses for the government, both of whom seemed to be entirely fair-minded and upright,

varies slightly from the facts as stated as to the conversation with James Grier at the time the discovery of these oleomargarine transactions was made by them. This was in June, 1906, about 7 months ago. But, assuming their memory is accurate and their testimony narrating the conversation between themselves and James Grier is exactly as they state it, nevertheless the undisputed facts established by Read and Grier, and the bills of the goods, a part of which were introduced in evidence, make it absolutely certain that the real facts, as I have stated them, is the exact truth. Their version of the conversation between themselves and Grier may be attributable to inaccuracy of memory, or a failure to comprehend precisely what was said, or it may be that Grier made loose statements at that time, the full purport and effect of which he himself did not intend or understand; but neither the one nor the other can affect the established facts as I have stated them, and as they appear from the proof in this case. Nor do these facts, as stated, differ from so much of the report of the revenue officers, made at the time, as was produced at the trial, and is now part of the record, and will be found quoted in the letter of F. W. Tucker, collector, under date of August 14, 1906. It may be noted, in this connection, that the letter of November 5, 1906, addressed by Collector Tucker to plaintiff, which is also in evidence, wherein the collector quotes from a letter from the Commissioner of Internal Revenue, rendering his decision upon the application of plaintiff for an abatement of the assessment and penalty, does not differ at all from the facts as reported by the collector to the Commissioner, and upon which he acted in refusing to abate the tax and penalty. In short, the facts on which the Commissioner of Internal Revenue acted in refusing to abate the tax and penalty were substantially the same as I have stated them above. There is no material difference. Any other facts essential to the determination of this case will be found in the opinion.

"Upon the above state of facts the Commissioner of Internal Revenue decided that plaintiff was a wholesale dealer in oleomargarine, and imposed a tax of \$480 upon the plaintiff, plus a penalty of 50 per cent. of the tax, amounting to \$240, and a 5 per cent. penalty, amounting to \$36, and interest, \$14.40, making a total of \$770.40. This tax the plaintiff paid under protest, and immediately sued the defendants for the recovery of the money. Before paying the tax, as the result of correspondence between the plaintiff, the internal revenue collector (Tucker) at Little Rock, and the Commissioner of Internal Revenue, forms were presented and an application was made thereon to the Commissioner of Internal Revenue to abate the assessment of the tax, which was subsequently refused. The application and the letter of refusal, and the receipt for the money (which was paid under protest), are a part of the record of this cause; and, after the payment of the tax, no application was made, under section 3220 of the Revised Statutes, to either remit, refund, or pay back either the tax, penalty, or interest, and the only action had towards compliance with that section was the application made to the Commissioner, and his decision thereon, all of which took place before the tax was paid under protest.

"Rogers, District Judge. The first question which arises on this record is whether the plaintiff, before he can maintain his suit, is required to comply with section 3226, Rev. St. (U. S. Comp. St. 1901, p. 2088), which provides as follows: 'No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein. * * * If that section applies to the oleomargarine act, and plaintiff has not complied therewith, it ends the case. *Kings County Savings Institution v. Blair*, 118 U. S. 200, 6 Sup. Ct. 353, 29 L. Ed. 657. The facts in the record show that after plaintiff was assessed, at the suggestion of the collector of internal revenue for the district, he filed his application to the Commissioner of Internal Revenue to have the assessment abated. The facts contained in the record then before

the Commissioner were, in every material respect, exactly the same as are now before the court, and the precise questions now to be decided were determined by him adversely to the plaintiff, and the collector ordered to collect the tax, penalties, and interest, which were paid. The law never requires a thing to be done which is both useless and foolish, and nothing was to be obtained by requiring the plaintiff to do the same thing after the tax was paid which he had done before the tax was paid. If, therefore, it was essential to decide whether the plaintiff was required, after he paid the tax, to make application to the Commissioner of Internal Revenue to have it rebated before instituting his suit, I should hold that section 3226, Rev. St., had been substantially complied with, and would follow the opinion of Sawyer, Circuit Judge, in *San Francisco Savings & Loan Society v. Cary*, reported in 21 Fed. Cas. 880 (No. 12,317). That case presents the precise question, and Judge Sawyer said: 'But an appeal was taken from the assessment before payment and decided against plaintiff. This I think sufficient. There could be no object in appealing a second time to the same officer in the same case upon precisely the same question. The Commissioner had already decided the identical question, and the object of the law was accomplished in the first appeal.' The precise question here presented was not before the court in 116 U. S. 200, 6 Sup. Ct. 353, 29 L. Ed. 657, and that case is readily differentiated from the one now under consideration, and therefore should not govern it; but I do not consider the question essential in the decision of this case.

"The underlying question is whether sections 3176, 3187, 3220, and 3226, Rev. St. (U. S. Comp. St. 1901, pp. 2068, 2073, 2086, 2088), not being enumerated in Act August 2, 1896, c. 840, § 3, 24 Stat. 209 (U. S. Comp. St. 1901, p. 2229), commonly known as the 'Oleomargarine Law,' and not being enumerated in Act May 9, 1902, c. 784, 32 Stat. 193 (amending the oleomargarine law), commonly known as the 'Adulterated Butter Act,' have any application at all to the collection of taxes on oleomargarine. If they do not, then the compliance by the plaintiff with sections 3220 and 3226, Rev. St. U. S., was not required, and the action of the Commissioner of Internal Revenue in assessing a penalty of 50 per cent. under section 3176, Rev. St., and a 5 per cent. penalty and interest under sections 3186 and 3187, Rev. St., upon plaintiff, was without authority of law, and the collection thereof illegal and unwarranted. The sections of the internal revenue law which are enumerated by the third section of the oleomargarine act, supra, are sections 3233 to section 3241, inclusive, and section 3243, Rev. St. U. S. (U. S. Comp. St. 1901, p. 2190). None of these sections authorize the penalty or interest in cases of a refusal or neglect in making a list or return, or in paying the tax provided for under that act, or the issuance of any distraint warrant for their collection under any circumstances. Nor is there any such provision made in Act May 9, 1902, supra.

"The contention is that the whole internal revenue legislation in existence at the time of the passage of the oleomargarine act, so far as applicable, applied to the oleomargarine law. If that were true, the question naturally arises: Why did Congress, by the third section of the oleomargarine law, select from the body of the internal revenue law 11 sections—i. e., 3232 to 3241, inclusive, and section 3243, Rev. St.—and by express provision extend them, as far as applicable, to the oleomargarine law? It is not perceived how the fourth paragraph of the third section of the oleomargarine law could be otherwise than utterly superfluous, if Congress intended that the whole internal revenue law, including those sections, should instantly become applicable as soon as the oleomargarine law went into effect. Moreover, on October 1, 1890, Congress amended the oleomargarine law (Act Oct. 1, 1890, c. 1244, 26 Stat. 621 [U. S. Comp. St. 1901, p. 2235]) as follows: 'That wholesale dealers in oleomargarine shall keep such books and render such returns in relation thereto as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require, and such books shall be open at all times to the inspection of any internal revenue officer or agent.' What explanation can be made of the object of Congress in enacting that amendment, if sections 3303, 3304, 3318, 3337, 3338, 3357, 3358, and 3375, Rev. St. (U. S. Comp. St. 1901, pp. 2155, 2156, 2164, 2185, 2186, 2198, 2207), and other sections of the internal revenue law, were already applicable to the

oleomargarine law? Surely the ingenuity of the internal revenue officers would not be taxed to find ample authority in those sections to accomplish all that is provided for in Act Oct. 1, 1890, *supra*. That amendment, also, was utterly superfluous if the internal revenue law applies to the oleomargarine law. What object could Congress have had in enacting section 19 of the oleomargarine law (Act Aug. 2, 1886, c. 840, 24 Stat. 212 [U. S. Comp. St. 1901, p. 2234]) if section 3213, Rev. St. (U. S. Comp. St. 1901, p. 2083), which is part of the general internal revenue law, applied to the oleomargarine law? Both sections would accomplish the same purpose. What object was there in enacting section 17 of the oleomargarine law (24 Stat. 212, c. 840) if section 3257, Rev. St. (U. S. Comp. St. 1901, p. 2112), a part of the internal revenue law, is applicable to the oleomargarine law? They both accomplish the same purpose. What purpose had Congress in enacting section 13 of the oleomargarine law (24 Stat. 211, c. 840 [U. S. Comp. St. 1901, p. 2232]), if section 3324, Rev. St. (U. S. Comp. St. 1901, p. 2168), a part of the internal revenue law, applied to the oleomargarine law? Both sections were intended to accomplish a like purpose. The same is true of section 9 of the oleomargarine law (24 Stat. 211, c. 840 [U. S. Comp. St. 1901, p. 2231]), and section 3298, Rev. St. (U. S. Comp. St. 1901, p. 2136), a part of the internal revenue law. If you turn to the act approved May 9, 1902 (32 Stat. 194, c. 784, § 3 [U. S. Comp. St. Supp. 1907, p. 637]), which is an act amending the oleomargarine law, it will be found that that act extends the provisions of the internal revenue law concerning coupon stamps on tobacco and snuff to the oleomargarine law as far as applicable. Why enact this provision, if all the body of the internal revenue law applies to the oleomargarine law? Why enact Act May 9, 1902, c. 784, § 6, 32 Stat. 197 (U. S. Comp. St. Supp. 1907, p. 641), and make it apply equally to oleomargarine and adulterated butter, if the internal revenue law already applied to both and made ample provision for everything that was contained in that section? It will be remembered that every argument that can be made fixing the applicability of the internal revenue law to the oleomargarine law can with equal force and propriety be made to the adulterated butter law of May 9, 1902, *supra*. It is not perceived that any one who is fair-minded can carefully examine and compare the oleomargarine act and its amendment with the existing general internal revenue legislation without being convinced that Congress intended that the oleomargarine statute and the amendments thereto, including the sections of the internal revenue law expressly extended to the oleomargarine law and its amendments, was neither supplementary of or an amendment of the existing general internal revenue legislation, but were a separate and independent act, creating a complete and comprehensive system in itself, and containing provisions for all the punishments, penalties, fines, forfeitures, and interest which the Congress intended the citizen should pay, and also complete remedies and methods, for their collection.

"This precise question has been before other courts, and was fully discussed, and without exception this same conclusion has been reached. *Schaffer v. Craft* (D. C.) 144 Fed. 907, is precisely in point, and the writer is entirely satisfied with the reasoning and conclusions of District Judge Evans in that case. *In re Kinney* (D. C.) 102 Fed. 468, bears directly on the subject, and District Judge Brown's reasoning on the point is to my mind conclusive. It follows that, if the conclusions reached are correct, the plaintiff not only was not required by law to make any claim under section 3226, Rev. St., before instituting his suit to recover the tax, penalty, and interest, but the action of the revenue officers in imposing the two penalties, one of 50 per cent. of the tax, amounting to \$240, and the other of 5 per cent., amounting to \$36, and interest, amounting to \$14.40, was unauthorized in law, illegal, and plaintiff is entitled to recover said sums paid under protest, with interest at 6 per cent. from the date of payment thereof.

"The question now remains: Was plaintiff a dealer in oleomargarine? The statute provides (Act Aug. 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2229]), that: 'Every person who sells or offers for sale oleomargarine in the original manufacturer's packages shall be deemed a wholesale dealer in oleomargarine.' Did plaintiff sell, or offer for sale, oleomargarine? On the state of facts set forth the court thinks not. Plaintiff gave the order to Armour

& Co. for the 10-pound packages of oleomargarine for his customers, and requested it shipped to his own care. The bills were made out by Armour & Co. to his customers, and it was shipped to them through its local branch house to the care of plaintiff, as directed. Armour & Co. was not even directed at the time to deliver the goods at the house of plaintiff. Armour & Co. must be held to have known to whom the goods were sold. Its branch house must be held to have known it, and to have known why it was shipped to the care of plaintiff and delivered at plaintiff's store; and the knowledge of the branch house was the knowledge of the Kansas City house of Armour & Co. *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392. Armour & Co. knew plaintiff was not buying the oleomargarine from them, and in all reason they knew he was not handling it. Shipping goods to one man to the care of another does not constitute a sale to the man to whose care they were shipped. But it is said plaintiff actually paid Armour & Co. for the goods, and entered the charge on his own books against his customers. So he did; but before he did that the 'sale' by Armour & Co. to his customers was as complete in law as it could be. The sale was complete if it never had been paid for by the customers (nor any one else, as for that), and just as complete as if it had been paid for before plaintiff made any entry upon his books. It was not the paying for the goods, or the entering upon plaintiff's books, that completed the sale. It was the segregation of the goods from the mass of Armour & Co.'s stock and the delivery to his customer, and the delivery was complete when the goods were first received by plaintiff, who was the agent of his customers for that purpose. Suppose the customer never had paid Armour & Co. for the oleomargarine in question; would that, of itself, have made plaintiff legally liable for it, in the absence of any promise, express or implied, to pay for it? Plaintiff might have felt morally liable to see that it was paid for; but did that make him legally liable therefor? Plaintiff says he never made any promise to Armour & Co. to pay for it, but that he did pay for it because his customers requested him to do so, and charged the purchase price in their accounts with him. He did this; but did that make him the purchaser? When plaintiff received the goods, it was in law a delivery to the customer. They had ordered the goods through plaintiff, delivered in that way, and therefore a delivery to plaintiff was a delivery to them. Plaintiff was simply the agent of his customers to receive the goods. Suppose, at the moment the goods were delivered to plaintiff, his house had burned, and the goods had been lost; whose loss would it have been? Plaintiff's? By no means. Why not? Because the goods were not his. He received them as agent for his customers. He afterwards paid for them in the same way, but not until the goods were delivered to him as his customers' agent, and the sale was absolute and complete. Did subsequently charging the amount of money he paid for his customers to Armour & Co. for the goods at their request alter the transaction? Not at all. Before that was done the sale was complete by delivery, and nothing was left to be done to complete it. The payment for the goods and the entry on his books and the delivery of the goods to the customer were all subsequent to the delivery by Armour & Co., and the manner and method of doing these things were simply matters of accommodation to plaintiff's customers. In truth, the real facts show plaintiff was not advancing the money to pay for the goods. He charged the cash to the customer as of the date the oleomargarine was sent out from his store; but he did not pay Armour & Co. until the 1st of the month; and at that time his customer paid him, so that in fact he advanced no money. The charge on plaintiff's books was simply to keep the matters between him and his customers correct, and that only. The proof, as before stated, shows that plaintiff made no promise to pay for the goods, although he did pay for them in the way stated. Nor did he guarantee payment. Suppose he had; did that make him a purchaser? By no means. If he did not purchase them, he did not own them; if he did not own them, he had no interest in them to sell; if he did not sell or offer to sell, he was not a dealer.

"*Hartzell v. U. S.* (D. C.) 83 Fed. 1003, is in point, in which case District Judge Allen quotes from Benjamin on Sales as follows: 'But then, in some cases, a broker, though acting as agent for a principal, makes a contract of sale and purchase in his own name. In such case he may be sued by the party

with whom he has made such contract for a nonfulfillment of it. But so, also, may his undisclosed principal; and, although the agent may be liable upon the contract, yet I apprehend nothing passes to him by the contract. The goods do not become his. He could not hold them, even if they were delivered to him, as against his principal. He could not, as it seems to me, in the absence of anything to give him a special property in them, maintain any action in which it was necessary to assert that he was the owner of the goods. The goods would be the property of his principal, and although two persons, it is said, may be liable on the same contract, yet it is impossible that two persons can each be the sole owner of the same goods. Although the agent may be held liable, as a contractor, on the contract, he still is only an agent, and has acted only as agent. He could not be sued, as it seems to me, merely because he had made the contract of purchase and sale in his own name with the vendor, even though the contract should be in a form which passes property in goods by the contract itself by a third person, as if he (the broker) were the owner of the goods, as if, for instance, the goods were a nuisance or an obstruction, or, as it were, trespassing, he would successfully answer such an action by alleging that he was not the owner of the goods, and by proving that they were the goods of his principal, till then undisclosed. If he could not be sued for any other tort merely on the ground that he had made the contract in his own name with the vendor, it seems to me that he cannot be successfully sued merely on that ground by the real owner of the goods as for a wrongful conversion of the goods to his own use.

"It thus appears that if plaintiff had been a broker and primarily liable, or equally liable with the purchaser, the result would be the same. But he was not a broker. He got no commission or compensation for anything he did. He made no promise, express or implied, to Armour & Co. to do or to be responsible for anything. His obligations were to his customers to receive and deliver the goods for them, and with that Armour & Co. had nothing whatever to do. He was under no obligation to Armour & Co. to even receive the goods from them, although by his request they were shipped to his care. He might, when they came, have said to Armour & Co.: 'I will notify my customers, and they will send for the goods.' To do so would not have been any breach of good faith, or good morals, much less of any principle of law. Armour & Co. in fact, under the evidence, had no claim upon plaintiff at any time in regard to the goods. That plaintiff received them and paid for them was a mere matter of accommodation for his customers. It is said that the fact that the orders were small, and that plaintiff received nothing for his trouble, does not alter the transaction. It does not, in one sense; but it does very materially bear upon it in another. It is conceded that a man may buy goods and sell them below cost, in large or small quantities. But the purchase and sale is no less a purchase and sale on that account. But in this case the size of the transaction and the fact that no profit was made, when considered in connection with the relations of plaintiff and his customers, and the characters of both, tend to make clear the bona fides of the transaction. As to both plaintiff and his customers it is proper to say that there is nothing in the transactions themselves which is not absolutely consistent with good faith and fair dealing, whatever suspicions the methods employed may suggest. As a matter of fact the whole transaction was fair, free from any bad motive, and resulted in no wrong to the United States.

"The exaction and collection of the tax was unauthorized and illegal, and the plaintiff is entitled to recover of defendants the same in full, with interest."

HUTTIG MFG. CO. v. EDWARDS.

EDWARDS v. HUTTIG MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. March 27, 1908.)

Nos. 2,565, 2,570.

1. BANKRUPTCY—INSOLVENCY—GUARANTIED DEBTS.

In a suit by a bankrupt's trustee to avoid a preference, a debt of a third person who was insolvent, which the bankrupt had guarantied, was properly considered as a debt of the bankrupt in determining his solvency at the time the alleged preference was given, and this though the guaranty was oral and within the Iowa statute of frauds, as such statute relates merely to the evidence required to prove the undertaking, and not to its validity.

2. SAME—CREDITORS—SURETIES OF BANKRUPT—"CREDITOR."

A surety or indorser for a bankrupt is a "creditor" within the meaning of the bankruptcy law.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1713-1726; vol. 8, pp. 7622-7623.]

3. SAME—INSOLVENCY—ESTOPPEL TO DENY.

Where defendant asserted and the bankrupt admitted the validity of defendant's demand against him at the time the bankrupt executed the mortgage to secure such demand, defendant was estopped to claim that the bankrupt was solvent because his property, all of which was covered by the mortgage, was sufficient to pay the bankrupt's other creditors.

4. SAME—KNOWLEDGE OF PREFERENCE—EVIDENCE.

In an action by a bankrupt's trustee to set aside a mortgage as an alleged preference, evidence held to sustain a finding that the mortgagee had reasonable cause to believe that a preference was intended, and that the bankrupt was insolvent at the time the mortgage was executed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 256.]

5. SAME—ADJUDICATION—COLLATERAL ATTACK.

A bankruptcy adjudication is entitled to the same verity as other judgments or decrees of courts of competent jurisdiction, and cannot be attacked collaterally in a suit by the trustee to avoid a preference on the ground that one of the three petitioners in the involuntary proceeding was not a creditor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 141-144.]

6. SAME—FUNDS OF BANKRUPTS—DEPOSIT—WITHDRAWAL.

Bankr. Act July 1, 1898, c. 541, § 61, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3446), requires courts of bankruptcy to designate banking institutions as depositories of funds of bankrupt estates and to require bonds for the safe-keeping and forthcoming thereof. Section 47a (8), 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), makes it the duty of a trustee to deposit all money received by him in one of the designated depositories, and general order 29 prescribes the method of withdrawal. Held, that such provisions are mandatory, and that in the absence of consent it was error for the District Court to direct a bankrupt's trustee to withdraw the proceeds of a sale of the bankrupt's property from such a designated depository, and deposit them in some national bank in the district, taking a time certificate of deposit bearing the highest current rate of interest.

Sanborn, C. J., dissenting.

Appeal from the District Court of the United States for the Southern District of Iowa.

W. E. Blake (Harold J. Wilson, on the brief), for Edwards, trustee.
John J. Seerley (E. M. Warner and C. C. Clark, on the brief), for
Huttig Manufacturing Company.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. The principal question on these appeals is whether the Huttig Manufacturing Company received a voidable preference when it took a mortgage on all of the property of D. Winter, bankrupt. As the mortgage was taken within the prohibited period of four months we proceed to inquire whether Winter was then insolvent, and if so, whether the manufacturing company or its agents acting therein had reasonable cause to believe a preference was intended. The trustee says he was insolvent because, first, he was a member of the firm of E. D. Winter & Co., also adjudged bankrupt, and the addition of D. Winter's debts and assets to those of the firm confessedly exhibited a condition of hopeless insolvency; and second, if D. Winter was not a member of the firm his debts exceeded the fair valuation of his property. We are of opinion the second contention is well taken, and therefore need not discuss the first. D. Winter's property consisted exclusively of real estate. His indebtedness arose from lending his credit to his son, E. D. Winter, who conducted the business of E. D. Winter & Co., and from holding himself out as a partner, though he may not have been one in fact. There are some expressions in the testimony, mostly if not wholly hearsay, that the real estate of D. Winter, including his homestead, was estimated to be worth from \$18,000 to \$20,000. The assessed value of all excepting the homestead was \$16,000, of the homestead \$1,200. The value fixed by sworn appraisers appointed in the bankruptcy proceedings was \$15,150, with \$3,000 additional for the homestead. All that the trustee could obtain for the property exclusive of the homestead was \$12,245.50. The proceeds were brought into court to abide the result of this litigation, and they were insufficient to pay the mortgage claim of the manufacturing company. When the mortgage was given D. Winter owed the manufacturing company \$13,391.73, August Carstens \$2,000, and the Merchants' National Bank of Burlington, Iowa, \$2,700, a total of \$18,091.73. He also owed the bank an additional \$5,500 on two notes, but they were dated after the mortgage in question, and it was not shown they were renewals of prior notes or when the indebtedness originated. It is contended by the manufacturing company that the \$13,391.73 for which it took the mortgage was not D. Winter's debt, and should not be considered in determining his solvency or insolvency. It was for goods sold by the manufacturing company to E. D. Winter & Co., and it is admitted D. Winter guaranteed the debt before it was incurred. The trustee says the guaranty was by a writing in which D. Winter also held himself out as a member of the firm, while the manufacturing company contends the signature of D. Winter to the writing was a forgery by E. D. Winter, his son, and that the guaranty was an oral one. In either event we think the amount of the debt directly affected D. Winter's solvency. A surety or indorser for a bankrupt has been held to be a creditor within the meaning of the bankruptcy law (*Kobusch v. Hand* [C. C. A.] 156 Fed. 660; *Swarts v. Siegel*, 54 C. C. A.

399, 117 Fed. 13); and upon the same principle a guarantor liable upon a fixed, liquidated demand as this was, is a debtor to him who holds it, and his liability is to be counted in determining his financial status. That the guaranty may have been oral and therefore within the statute of frauds of Iowa where the transaction occurred is immaterial. The Iowa statute relates merely to the evidence or proof of the undertaking, and not to its validity. *Berryhill v. Jones*, 35 Iowa, 335; *Merchant v. O'Rourke*, 111 Iowa, 351, 82 N. W. 759. In the latter case it was said:

"The statute of frauds does not prohibit an oral contract nor make such an agreement illegal because certain formalities are not complied with, but relates only to the method by which proof may be made in an attempt to enforce it."

The manufacturing company asserted and D. Winter admitted the validity of the demand against him, and the former is not in position to say the latter was solvent because his property, all of which it took under its mortgage, was sufficient to pay his other creditors. If the mortgage held, the other creditors would get nothing, and the solvency of the debtor would seem quite unsubstantial.

There is another matter affecting the financial condition of D. Winter. Some letters were received in evidence to which his name was signed, and which stated he was a member of E. D. Winter & Co. and liable for their debts. One of these letters was to a mercantile agency which made it the basis of commercial reports upon the faith of which *Welt & Reddelsheimer* sold the firm goods amounting to \$914.70. The genuineness of the signature to the letter was attacked, but there were received in evidence before the referee for purposes of comparison admitted writings of D. Winter, and his decision that D. Winter so held himself out as liable, affirmed as it was by the District Court, should not be disturbed. It is altogether probable that D. Winter owed much more, but the debts mentioned rendered him insolvent when he made the mortgage. We are also convinced he knew it. He had previously given his daughter all his household effects and jewels in order, as he said, "to avoid all trouble for her in the future." He was conscious of being deeply involved with his son who conducted the business of E. D. Winter & Co., and he included in the mortgage to the manufacturing company all of the property he had left. The necessary effect of the mortgage was to give the mortgagee a preference over other creditors.

The referee in bankruptcy and the District Court found the manufacturing company had reasonable grounds to believe a preference was intended. An attentive consideration of the evidence and the fair inferences to be drawn from the facts admitted or proved lead us to the conclusion the finding is adequately supported, and that no clear or palpable mistake of fact was made, and in so saying we lay aside all incompetent testimony appearing in the record. The known business connection between D. Winter and E. D. Winter & Co. or E. D. Winter, the latter's continued and persistent failure to meet his obligations, the steady growth of the indebtedness for 13 months, E. D. Winter's failure to pay attention to his maturing notes, the undeniable

alternative of a partnership or a forgery by E. D. Winter to uphold a desperate credit, the fact that D. Winter, if not a partner, had freely and extensively pledged his credit to various persons to assist his son, the careful abstinence of the officer and attorney of the company from making inquiries when they went to the home of D. Winter to get the mortgage, the fact that instead of taking security upon the firm property they took it upon all of the property of D. Winter not even excepting his homestead, and that the mortgage was withheld from the records, the excuse being a promise of E. D. Winter to make a payment when other proof from the same source showed that he was regarded as unreliable and his promises as worthless—all, with minor facts and circumstances, uphold the conclusion below. True, it is not enough that a creditor has merely some cause for suspicion. He must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency. But we think the representatives of the manufacturing company were in possession of such facts as required an inquiry which they consciously and intentionally avoided. *Pittsburgh Plate Glass Co. v. Edwards*, 78 C. C. A. 191, 148 Fed. 377; *Coder v. McPherson*, 82 C. C. A. 99, 152 Fed. 951.

The manufacturing company attacks the validity of the adjudication that D. Winter was a bankrupt upon the ground that one of the three petitioners in the involuntary proceeding was not a creditor, but since the attack was made in a proceeding by the trustee to annul a preference it is a collateral, not a direct, one. An adjudication of bankruptcy is entitled to the same verity and is no more to be impeached collaterally than other judgments or decrees of courts of competent jurisdiction. It cannot be assailed by the defendant in a suit by the trustee to recover or avoid a preference upon the ground that one of the petitioners was not in fact a creditor of the bankrupt. When the record shows jurisdiction the adjudication of bankruptcy is subject to impeachment only by a direct proceeding in a competent court. *Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520; *Sloan v. Lewis*, 22 Wall. 150, 22 L. Ed. 832.

The remaining matter necessary to be considered arises on the appeal of the trustee. The District Court directed him to withdraw the proceeds of the sale of D. Winter's property from the depository of funds in bankruptcy and to deposit them in some national bank in the district, taking a certificate of deposit, payable six months from date, and bearing the highest current rate of interest. The objection to this order is well made. Section 61 of the bankruptcy act (July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446]), makes it the duty of courts of bankruptcy to designate by order banking institutions as depositories of funds of bankrupt estates, and to require of them bonds for the safe-keeping and forthcoming thereof. It was from such a depository the court directed the funds to be taken. Section 47a (3) (30 Stat. 557 [U. S. Comp. St. 1901, p. 3438]) makes it the duty of a trustee to deposit all money received by him in one of the designated depositories, and general order 29 (32 C. C. A. xviii, 89 Fed. xii) prescribes the method of withdrawals. These provisions of the act and the general order are mandatory in form, and were designed to insure the safety of the funds rather than an increment by

way of interest while they were idle. The funds were those of litigants and the risk which always attends the making of profit should not be incurred unless the right is clear. Doubtless consent by all parties interested would justify a departure from the prescribed rule. Rev. St. § 5504 (U. S. Comp. St. 1901, p. 3710). But such consent was not obtained.

The decree of the District Court is reversed in respect of the direction to the trustee to withdraw the funds from the depository; in all other respects it is affirmed.

SANBORN, Circuit Judge (dissenting). I am unable to assent to the opinion and the conclusion of the majority in this case because in my opinion the competent evidence presented fails to prove that D. Winter was insolvent, or that the Huttig Manufacturing Company had reasonable cause to believe that he was insolvent when he gave the mortgage, and it seems to me that there is no substantial competent evidence that he or any other person with his knowledge or permission ever held him out to creditors who relied upon such holding as a member of the firm of E. D. Winter & Co.

JACKSON et al. v. WILKERSON et al.

(Circuit Court of Appeals, Eighth Circuit. March 27, 1908.)

No. 2,493.

1. JUDGMENT—ANNULMENT—FRAUD.

The fraud for which a suit may be maintained to annul a judgment or decree between the same parties must be extrinsic or collateral to the matter tried in the court rendering the judgment, and not one that inhered in the issues of the prior suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 836-840.]

2. SAME—RES JUDICATA.

Where a suit in the federal courts to annul a judgment of the probate court of F. county, Ark., allowing certain claims against a decedent's estate for fraud, was between the same parties as a prior suit in an Arkansas chancery court to set aside the allowance of such claims, and all the allegations of fraud charged were necessarily involved in such prior suit, in which an adverse decree was rendered, such decree was res judicata of complainant's right to a retrial of such issue in the federal court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1243-1250.]

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

George B. Webster and John R. Beasley, for appellants.

N. W. Norton (R. W. Nichols and R. J. Williams, on the brief), for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges

HOOK, Circuit Judge. This was a suit begun in 1902 by Mary E. Jackson and others, heirs of Hiram Evans, deceased, to annul on the

ground of fraud a judgment of the probate court of St. Francis county, Ark., allowing two claims of Wilkerson & Co. against the estate of the deceased. One claim was upon a note for \$3,353.33, dated January 1, 1891, signed H. Evans & Co., the other upon an account for \$1,061.67 accruing after the date of the note and prior to the death of Hiram Evans. Hiram Evans died April 13, 1891, and James, his son, was appointed administrator of his estate a few days later. Wilkerson & Co. exhibited their demands March 5, 1892, and they were allowed.

The averments of fraud and failure of complainants to discover it during the nine years or so after the allowance of the claims are substantially as follows: That the note was not executed by Hiram Evans or by any one authorized to bind him; that he never received any consideration for it, and that it was paid long before the demand thereon was exhibited in the probate court; that John Evans, a son of Hiram, having acquired title to a drug store, sold it in March, 1887, to a firm styled Davis & Co., who in operating it became indebted to Wilkerson & Co., and John Evans having been compelled to take the store back sold it to his father, Hiram, without disclosing the indebtedness from Davis & Co. to Wilkerson & Co.; that "thereafter and until the time of his death the said Hiram Evans owned and conducted the said business and that no other person or persons whomsoever had any share or beneficial interest therein"; that about March 25, 1891, Wilkerson & Co. induced John Evans to execute the note in controversy, to date it back to January 1, 1891, and to sign it H. Evans & Co. in discharge of the indebtedness of Davis & Co. to Wilkerson & Co. for which neither John Evans nor his father, Hiram, were liable; that in May, 1891, after the death of Hiram, James Evans, as administrator, John Evans, and Wilkerson & Co. entered into an agreement pursuant to which the drug store was transferred from the estate of Hiram to John Evans, and as part of the transaction Wilkerson & Co. accepted John as their debtor not only upon the note, but also upon the open account, and thereupon the estate of Hiram became forever released and discharged from liability. This latter is what is termed the novation agreement, and for brevity it will hereafter be so referred to. It was further charged that notwithstanding these facts Wilkerson & Co. subsequently conspired and confederated with James, the administrator, to procure the allowance of both note and account as claims against Hiram's estate, and having corruptly concealed the truth from the probate court their purpose was consummated and the claims were allowed; that about December 25, 1896, James, the administrator, died without having finally settled the estate, and about March 1, 1900, the heirs discovered among his effects evidence of the fraud perpetrated; that a proceeding was instituted in the probate court by the administrator de bonis non for the sale of real property of the estate to pay debts including those due Wilkerson & Co., and while it was pending on appeal in the circuit court of St. Francis county the complainants having discovered the fraud asserted it by way of cross-bill; but the Supreme Court of Arkansas finally decided that neither the probate court nor the circuit court on appeal had jurisdiction in equity, and therefore com-

plainants failed in their cross-bill, but without prejudice to an original suit in equity in a court of competent jurisdiction.

It will be recalled that the fraud charged was the corrupt concealment of two things by Wilkerson & Co. and the administrator from the probate court when the claims were allowed: first, that Hiram Evans was never liable upon the note and account, and, second, that there was a novation whereby John Evans was accepted as sole debtor. If it should be found there was no corrupt concealment, or that in fact Hiram Evans was liable and there was no novation, or that regardless of the actual facts there had been an assertion by the heirs of the same defenses in a court of competent jurisdiction followed by a valid adjudication adverse to them, their present bill of complaint to set aside the allowance was properly dismissed.

In their answer Wilkerson & Co. averred that at the time of and long prior to his death Hiram Evans as H. Evans & Co. owned the drug store, and John Evans managed the business for him; that John Evans in the course of the business signed the note in question with full authority from his father. They denied that the note was without consideration, that Davis & Co. ever had anything to do with it and that it had ever been paid. They also denied there was a novation by which John Evans was accepted as the debtor and the estate of Hiram discharged, and they set forth what they claimed the actual transaction was. They averred their claims were just claims against Hiram Evans and his estate and were lawfully allowed by the probate court without fraud or collusion of any kind. Referring to the decision of the Supreme Court of Arkansas mentioned in the bill, Wilkerson & Co. averred that the complaining heirs had brought a plenary suit in equity such as was held by the Supreme Court of Arkansas to be their appropriate remedy, in the chancery court of St. Francis county, in which they sought to annul the allowance of the claims by the probate court upon the precise grounds now urged in the present suit; but the chancery court decided against them and its decree was affirmed by the Supreme Court of Arkansas. Wilkerson & Co. therefore asserted the matters in issue in the present suit were res adjudicata. The identity of the parties and the issues and the final result of that litigation appear from copies of the pleadings and decrees in the record, and such identity and result are not denied. The following appears from the decree of the chancery court:

"The court finds that there was no fraud nor collusion between the administrator, James Evans, and the several persons having claims against the estate or any of them; that there was no novation of the debt due W. N. Wilkerson & Co. from the estate of H. Evans, deceased, and that the drug store was operated by the administrator with the consent of such of the plaintiffs as were then adults, and that W. E. Evans, then a minor, has since ratified the operation of the drug store by the administrator, by joining with the other heirs in an application to the St. Francis probate court to have the administrator account for the receipts of such store. It is therefore by the court considered, ordered, and decreed that the plaintiffs' bill of complaint be and the same is hereby dismissed for want of equity."

The parties here were parties to that suit, and the issues were the same, so if that were all it would follow that the charge of fraud in the original allowance of the claims by the probate court in 1892

was forever at rest. But on September 6, 1905, complainants filed an amendment to their original bill in the present suit in which they charged that the decree of the chancery court was itself obtained by fraud. We will proceed at once to examine the grounds of attack upon this last decree and the evidence relating to them. It is charged the decree of the chancery court was obtained by fraud because (1) a member of the firm of Wilkerson & Co. and their attorney destroyed two notes given the firm in 1892 by John Evans pursuant to the novation agreement. But this very fact was before the chancery court. The member of the firm referred to testified to the transaction. He said the notes were regarded as worthless because the contract under which Wilkerson & Co. received them from John Evans had not been carried out and they were therefore destroyed. The chancery court before which the issue of fraud was being tried was not deceived. Knowing all that is now asserted it nevertheless held there was no novation. (2) The destruction by Wilkerson & Co.'s attorney of the bill of sale of the drug store given in 1892 by James Evans, administrator, to John Evans pursuant to the novation agreement. But this fact, like the other, was before the chancery court. The attorney testified he saw the bill of sale in his office some months before, had since hunted for it, could not find it and had probably burned it up with other papers, though unintentionally. (3) The suppression and concealment by James Evans of the bill of sale whereby John Evans in May, 1892, transferred the drug store back to James as administrator. James Evans was a defendant in the suit in the chancery court but his testimony clearly showed his favor to his relatives, the complainants. He testified that John transferred the drug store back to him by bill of sale. On cross-examination he was asked by counsel for Wilkerson & Co. where the bill of sale then was, but he said he did not know. Counsel for complaining heirs did not ask him where it was, and no one asked him to hunt for it. After James died the bill of sale was found among his papers by the husband of one of the complainants, and it contained a full verification of the contention of Wilkerson & Co. that there was no novation. It showed that James, as administrator, transferred the drug store to John upon condition that the latter pay the indebtedness of the estate connected with the business, and that the title should not pass to him until all of it was paid; also that John had failed to pay and therefore the transaction was rescinded and the property transferred back to the administrator. The effect of this was to leave Wilkerson & Co. with their claims against the estate. (4) The false testimony of a member of the firm of Wilkerson & Co. in relation to the extent of the novation agreement. But what the testimony was and wherein it was false is not set out in the pleading. (5) The false testimony of counsel for Wilkerson & Co. in denying he ever heard of the bill of sale from John back to James, the administrator. It is true counsel testified in the chancery court about four years after the bill of sale was executed that he never saw any such instrument that he knew of and never heard it alluded to. When it was found some years later among the papers of the administrator it was discovered to be in the handwriting of counsel. It is fair to presume, however, that he forgot the details of the transaction, and

that the writing was his. Had the instrument been found and produced it would have supported the contention of his clients.

There is another view: To maintain this suit is to try for the third time the question whether the note and account were just demands against the estate of the deceased, and for the second time the question of fraud in procuring the allowance in the probate court. The very matters now relied on were involved in the inquiry in the chancery court. It is the rule that the fraud for which a suit may be maintained to annul a judgment or decree between the same parties must be extrinsic or collateral to the matter tried by the first court, and not one that inhered in the issues of the prior suit. In *United States v. Throckmorton*, 98 U. S. 61, 68, 25 L. Ed. 93, the court said:

"That the mischief of retrying every case in which the judgment or decree rendered on false testimony given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases."

See, also, *Ritchie v. McMullen*, 25 C. C. A. 50, 79 Fed. 522.

One other feature of the case may be noticed. In the amendment of their bill, filed more than 14 years after the death of Hiram Evans, complainants averred for the first time that he never was the owner of the drug store and had no title thereto, the inference to be drawn being that he could not have been liable to Wilkerson & Co., whose claims arose from the conduct of that business. What has already been said disposes of this contention, but we may add that it is contrary to the position taken by complainants in the original bill, in their complaint in the chancery suit, and in their various written representations to the probate court. It is also contrary to the course of the administration of the estate, the solemn acts and assertions of the administrator and of the heirs themselves. We are also of the opinion the evidence shows Hiram Evans was in fact the owner of the drug store and was liable for Wilkerson & Co.'s demands.

The decree is affirmed.

LINGLE v. SNYDER.

(Circuit Court of Appeals, Eighth Circuit. March 27, 1908.)

No. 2,594.

1. CONTRACTS—LEGALITY.

A contract to violate the law, or to do that which is immoral or contravenes the settled public policy of the state or nation, is void, and no right of action can be predicated thereon.

[Ed. Note.—For cases in point, see *Cent. Dig. vol. 11, Contracts, §§ 468-476.*]

2. SAME—PUBLIC LANDS—INCLOSURE.

Act Cong. Feb. 25, 1885, c. 149, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), prohibits inclosure of lands of the United States by persons having no claim or color of title in good faith, and no asserted right in view of entry under the general land laws, and makes violation of the act a misdemeanor. A contract for the leasing of grazing lands consisted of two writings embracing lands owned by plaintiff in fee, and lands leased by

him from the states. It recited that its purpose was to give defendant all rights and privileges that might be derived from the use of the government lands adjoining those mentioned and which were theretofore used by plaintiff, and also embraced all plaintiff's fencing in two counties, and imposed on defendant the duty to maintain and keep it in repair. In one of the repair clauses, the fencing on a tract described as the S. range was mentioned, with a provision that if the government wished it taken down, plaintiff was to attend to it, it appearing that the lands included in such range, which were a part of the leased premises, comprised a large tract of public lands unlawfully inclosed by plaintiff, which fence the contract required plaintiff to maintain. *Held*, that such instruments having been executed at the same time and as a part of the same transaction, constituted a single contract, contemplating the violation of the laws of the United States, and, being indivisible, no action for damages could be maintained for breach of the contract with reference to the lands of which plaintiff was in lawful possession at the time of the lease.

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Wyoming.

John D. Clark (Gibson Clark, on the brief), for plaintiff in error.
John W. Lacey, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. Thomas B. Snyder sued Hiram D. Lingle for damages for breach of a written contract of lease of lands and fencing in Sioux county, Neb., and Laramie county, Wyo. In defense Lingle set up another writing made by them, and averred it was a part of the transaction, and that the contract in its entirety contemplated a continuance of an enclosure of the public domain in violation of the laws of the United States, and, being a single and indivisible contract, it was wholly void; also, that after performing for a time his covenants as lessee, he abandoned the premises upon being advised of the unlawful character of the agreement. The trial court was of opinion there were two separate contracts, one lawful, the other unlawful, and therefore allowed judgment on the former. The defendant Lingle brought this writ of error.

The connection between the two written instruments was conclusively established by their recitals and the evidence. They were executed at the same time, by the same parties, and to evidence a single transaction in its completeness. The unity of a contract is not broken because all its stipulations are not found in the same repository. The rental defendant agreed to pay was a sum in gross, and it was for the use and enjoyment for a fixed period of all the properties mentioned in both writings. The rental was not apportioned and no method of apportionment was suggested by the language employed. The various stipulations describing what plaintiff leased and what defendant was to do and pay in return were mutual and dependent covenants of a single contract. They did not relate to independent, disconnected transactions, and there is no rule by which a court can distribute them and allot to each item of leased property a portion of the single rental sum. For aught that appears the right to use the large body of public land said to have been unlawfully fenced by plaintiff may have been the principal, if not the sole, inducement to

defendant to enter into the contract relation. Without it the remainder might not have served his purpose, and he might not have desired to lease it at all.

The contract of lease as shown by the two writings embraced 1,306 acres of land owned by plaintiff in fee simple, and 4,480 acres of school land leased by him from the states, and it recited that its purpose was also to give defendant all the rights and privileges that might be derived from the use of the government lands adjoining those above mentioned and which were theretofore used by the plaintiff. It also embraced all plaintiff's fencing in the two counties, and imposed on defendant the duty to maintain and keep it in repair. In one of the repair clauses the fencing on what was known as the Snyder range was specifically mentioned with a provision that if the government ordered it taken down the plaintiff was to attend to it. The writings bear evidence of careful preparation and in view of the presumption of right doing it is doubtful that they affirmatively show a purpose to violate the laws of the United States. Consequently defendant sought at the trial to prove by extrinsic evidence that the lands in the Snyder range, which were a part of the leased premises and comprised 11,200 acres, were public lands of the United States unlawfully inclosed by plaintiff, and that they were within unlawful fences also leased to defendant, and which the contract required him to maintain and keep in repair.

The trial court denied the attempts of defendant to identify the lands and fences mentioned in the contract with those actually in existence and to prove what he claimed to be the real character of the transaction. We need not follow the criticisms by plaintiff's counsel of the various questions and offers of proof that were excluded. It is sufficient to say we think some of them were properly framed and competent, and the reason of the trial court for sustaining plaintiff's objections was clearly indicated by its observation that there were two distinguishable contracts, one lawful, the other unlawful—a view in which we are unable to concur. Of course it is always competent as between the parties to show by parol evidence that a written contract, fair on its face, is in truth contrary to law, morals, or public policy.

By the act of February 25, 1885, c. 149, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), Congress declared to be unlawful the inclosure of lands of the United States by persons having no claim or color of title in good faith or no asserted right in view of entry under the general land laws. The erection and maintenance of such inclosures was "forbidden and prohibited." It was also provided that any person violating any of the provisions of the act, whether as owner, part owner or agent, or who should aid, abet, counsel, advise or assist in any violation should be deemed guilty of a misdemeanor, be fined in a sum not exceeding \$1,000 and be imprisoned not exceeding one year for each offense. If what defendant pleaded and sought to prove was true, the plaintiff, when the contract was made, was maintaining an unlawful inclosure of a large area of the public domain, and was subject to fine and imprisonment, and one of the objects of the contract sought to be enforced was that defendant should continue the offense

for their mutual profit and advantage. The contract contemplated, and its observance required, a violation of the law. It could not have been carried out, plaintiff's compensation could not have been earned, and defendant's use and enjoyment could not have been secured to the extent contracted for without subjecting both parties to the penalties of the law. The agreement of plaintiff to remove the fences on the Snyder range when ordered to do so by the government does not help matters. The operation of the act of Congress was not suspended nor the commission of the offense postponed until demand by the officers intrusted with the enforcement of the laws. The act at its passage commanded obedience and contained all requisite admonitions.

It is a familiar rule that a contract to violate the law or to do that which is immoral or contravenes the settled public policy of state or nation is void, and it has been applied to contracts having for their object the unlawful inclosure of public lands and the obtaining of revenue from a use so secured and protected. *Dupas v. Wassel*, 1 Dill. 213, 8 Fed. Cas. 107, Case No. 4,182; *Tandy v. Commission Co.*, 113 Mo. App. 409, 87 S. W. 614; *Garst v. Love*, 7 Okl. 666, 55 Pac. 19. Plaintiff's action for damages for a breach of the contract necessarily involves an assertion of its validity and binding force, and it is as much an action on the contract as if he had sued defendant for unpaid rental. Damages or compensation for the breach of an illegal contract will not be allowed. *Sir George Jessel in Sykes v. Beadon*, L. R. 11 Ch. Div. 170, 197. True, the contract before us embraced lands lawfully owned and fences lawfully maintained by plaintiff, all of which he had the right to lease, but who can say that regarding them alone the parties would ever have contracted at all, or if so upon what terms and conditions? If legal and illegal stipulations in a contract are independent and divisible the latter may be excluded and the former enforced, but when the parties have woven them together into a single agreement a court of justice will not unravel the good from the bad. This is doctrine that has come down from an early day. *Featherston v. Hutchinson*, Cro. Eliz. 199; *Baker v. Hedgecock*, 59 L. T. 361, 36 W. R. 840; *Pickering v. Railway*, L. R. 3 C. P. 235; *McNamara v. Gargett*, 68 Mich. 454, 462, 36 N. W. 218, 13 Am. St. Rep. 355; *Holt v. O'Brien*, 15 Gray (Mass.) 311; *Deering v. Chapman*, 22 Me. 488, 39 Am. Dec. 592; *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664; *Bishop v. Palmer*, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339; *Santa Clara, etc., Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211. In *Hazelton v. Sheckells*, 202 U. S. 71, 26 Sup. Ct. 567, 50 L. Ed. 939, it was said of the contract there involved:

"Every part of the consideration goes equally to the whole promise and therefore, if any part of it is contrary to public policy, the whole promise fails."

The judgment is reversed, and the cause remanded for a new trial.

SANBORN, Circuit Judge (dissenting). I am unable to concur in the reversal of the judgment in this case. In my opinion no com-

petent evidence of the invalidity of the contract evidenced by the two writings was offered, because there was no moral wrong in maintaining the fences, their maintenance was not illegal until the statute forbade it, the statute which denounced the fencing of the government land prescribed other penalties and did not prescribe the invalidity of contracts regarding that fencing as a punishment for its violation, and the courts ought not, in such a case, to affix that additional penalty. *Harris v. Runnels*, 12 How. 84, 85, 86, 13 L. Ed. 901; *Fritts v. Palmer*, 132 U. S. 282, 289, 293, 10 Sup. Ct. 93, 33 L. Ed. 317; *National Bank v. Matthews*, 98 U. S. 621, 629, 25 L. Ed. 188; *Logan County Bank v. Townsend*, 139 U. S. 67, 76, 11 Sup. Ct. 496, 35 L. Ed. 107; *Dunlop, Trustee, v. Mercer* (C. C. A.) 156 Fed. 545, 555, and cases there cited, and because in my opinion the legal part may be separated, indeed is separated from the illegal part of the agreement, for Lingle agreed to pay the same rental whether the fences around the government land were ordered and taken down or not, so that in legal effect his contract was to pay the rental specified and for which this suit is brought, for the use of the other land and to maintain the fences around the government land until they were ordered down and then to remove them for the use of that land until the fences were removed.

BURNS v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 16, 1908.)

No. 135.

1. EVIDENCE—DOCUMENTARY EVIDENCE—ANCIENT MAPS OF SURVEY.

Maps found in volumes in the possession of a historical society, purporting to be maps of a survey made more than 100 years before, both survey and maps being referred to in old deeds, are admissible in evidence as ancient documents.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1625½.]

2. SAME—PROOF OF TITLE.

Proof that there is no conveyance of record from a grantor between the time of his acquiring the title to land and the conveyance through which a party claims, which was executed prior to 1840, is sufficient, *prima facie*, to show title through such conveyance.

3. UNITED STATES—STATUTORY RESTRICTION ON PURCHASE OF LAND—CONSTRUCTION OF STATUTE.

Rev. St. § 3786 (U. S. Comp. St. 1901, p. 2507), providing that no land shall be purchased on account of the United States except under a law authorizing such purchase, should not be construed to apply to executed contracts so as to defeat the title of the United States to land it has paid for, and an act authorizing a public improvement and appropriating money therefor is sufficient authority for the purchase of land necessary or proper to such improvement.

In Error to the District Court of the United States for the Western District of New York.

Hamilton Ward, for plaintiff in error.

Lyman Bass, U. S. Atty., for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This is an action in ejectment brought by the United States to recover possession of premises occupied by the defendant, being part of a strip of land some 1,600 feet long lying on the eastern shore of Lake Erie and constituting the western edge of the peninsula between Buffalo creek and the lake. The defendant has occupied the premises for 15 years continuously and, without making any claim of title, defends by denying the title of the United States. His possession is as good as the fee until the United States has established its title. After the Revolution a dispute arose between the states of Massachusetts and New York as to the ownership of a large territory now in the state of New York. It was settled by an agreement made at Hartford, December 16, 1786, between commissioners of the respective states, whereby New York admitted title to be in Massachusetts and Massachusetts admitted sovereignty to be in New York. The United States claims to derive title to the premises in question by a chain of conveyances going back to the sovereign, the state of New York, which conveyed to the state of Massachusetts, which conveyed to Robert Morris and by various mesne conveyances to Wilhelm Willinck and others, called the Holland Land Company.

At the trial there was offered in evidence a deed of Egbert Jean Koch to Wilhelm Willinck and others, dated February 10, 1829, conveying a large tract of land, including township No. 11, range 8, excepting "so much and such part of a certain tract of land commonly called the Buffalo Creek Reservation, and designated by that name on said map as shall fall within the lines, limits, and bounds next hereinbefore defined and mentioned." The map referred to was a map of lands purchased by Robert Morris, of the commonwealth of Massachusetts, made in the year 1800 by Joseph and B. Ellicott. There was also offered in evidence deed of Wilhelm Willinck and others to the Farmers' Loan & Trust Company, date not stated in the record, recorded June 29, 1839, conveying certain lands in township No. 11, not including lots 36, 37, 38, and 39, opposite which the strip in question lies, and also "all such other lots, pieces, or parcels of land situate within the bounds of the said tracts called the 983,000 acre tract and known by the letter 'H,' and within the county of Erie and of which said parties of the first part were seised on the thirty-first day of December one thousand eight hundred and thirty-five, if any there shall be."

There was also offered in evidence quitclaim deed of the Farmers' Loan & Trust Company and others, consideration \$10, dated September 25, 1847, conveying the premises in question to the United States described as "all that certain sand strip of land formerly recorded and called Lake street in the city of Buffalo on the bank of Lake Erie bounded northeasterly by the southwesterly bounds of outer lots 36, 37, 38, and 39; southeasterly by the continuation of the division line between lots 39 and 40 extended to the waters of Lake Erie; southwesterly by the waters of Lake Erie; and northwesterly by land heretofore quitclaimed by Letitia Evans, containing more or less." The premises were entirely sand, incapable of cultivation, and had never been fenced in or occupied. It is claimed that they were covered by

the catch-all clause mentioned in the deed from Willinck and others to the trust company and others.

The defendant objected to the admission of the deeds from Koch to Willinck and others, from Willinck and others to the trust company and others, and from the trust company and others to the United States on the grounds that there was nothing to show that the premises in question were not within the Buffalo Creek Reservation or that the grantors to the trust company and others were seised of them December 31, 1835. The trial judge overruled the objection. As the United States must prevail on the strength of its own title, if at all, the burden lay upon it to show that the premises were not within the Buffalo Creek Reservation and that Willinck and others, grantors to the trust company and others, remained seised of them until December 31, 1835, which we suppose was the date of the deed to the trust company and others, though this does not appear in the record.

At the trial a volume was produced, entitled "Title Papers of Holland Land Company," which contained copies of various conveyances to and from the proprietors of the Holland Land Company covering an immense territory, some of which were certified to by the Secretary of State and so admissible in evidence. Section 246, Real Property Law (Laws 1896, p. 608, c. 547); sections 933 and 935 of the Code of Civil Procedure of New York. Reference was occasionally made in these deeds to surveys made by Joseph and B. Ellicott and also to a map made by Joseph and B. Ellicott in the year 1800. At the end of the volume there is a map which on its face professes to have been drawn from a survey by Joseph and B. Ellicott in the year 1800, of Morris's purchase, exhibiting the boundary lines of the several tracts of land purchased by the Holland Land Company, Wilhelm and John Willinck and others, proprietors. This volume came from the possession of the Buffalo Historical Society. Another map from the same source called the "Glowackie map," being the same as the former, but revised in 1829, was offered in evidence. Both were rightly admitted as ancient documents. Such maps were elaborately considered by the court for the purpose of locating premises in the case of *Bogardus v. Trinity Church*, 4 Sandf. Ch. (N. Y.) 633, 745. The first map has on it a tract of land bordering Niagara river and the eastern shore of Lake Erie marked with the letter "H" in ink and within it a tract marked "Buffalo Creek Reservation" in ink. On the Glowackie map the letter "H" and the reservation appear as part of the engraving. The reservation indicated in the tract marked "H" was made in the following words, under a treaty with the Seneca Indians, dated September 15, 1797:

"Also two hundred square miles to be laid off partly at the Buffalo and partly at the Tonnowanta creeks."

These two maps, as well as the map offered in evidence at the trial compiled by the witness Jones from Township Land and State Reservation Field Notes, on file in the Erie county clerk's office, and the plot showing the western boundary of the Buffalo Creek Reservation made by him from index to Holland Land Company's notes, on

file in the same office, show that the premises in question lay in township 11, range 8, and not in the Buffalo Creek Reservation.

The next objection to the admission of the deeds is absence of proof that the grantors to the trust company remained seised of the premises until December 31, 1835. The government proved by a title searcher that there were no conveyances thereof by them between February 10, 1829, the date they acquired title, and December 31, 1835. The usual method of parting with title to land being by conveyance, we think this proof was sufficient without further proving, as the defendant claims should have been done, that there were no conveyances by sheriffs or referees or adverse holders. The objection depends on the assumption that the grantors might have made mortgages or been subject to judgments or to adverse holdings under which their title might have been divested. The exception was properly overruled.

The deed to Koch seems to have included another exception, viz., of lands previously conveyed by prior owners. But this objection was not presented to the court below nor argued in this court, so we do not consider it.

The defendant took many other exceptions, some of which he declined to argue. Others were disposed of by the finding of the jury that there never had been any adverse possession of the premises; and all his exceptions to the refusal of the court to dismiss the complaint were waived by his going into his defense.

Some further exceptions we will now consider. The defendant excepted to the refusal of the trial court to admit testimony of declarations tending to show adverse possession, but being made by persons never in possession, the testimony was properly excluded.

There was an exception to the admission of the deed to the United States on the ground that it was void under section 3736 of the United States Revised Statutes (U. S. Comp. St. 1901, p. 2507):

"No land shall be purchased on account of the United States except under a law authorizing such purchase."

The Act of July 7, 1838, c. 171, 5 Stat. 270, appropriated:

"For continuing the works at Buffalo Harbor twenty thousand five hundred dollars; and for erecting a mound or sea wall along the peninsula which separates Lake Erie from Buffalo creek to prevent the influx of the lake over said peninsula forty-eight thousand dollars."

If this strip was necessary to or proper for the protection of the sea wall we think that the act impliedly authorized the purchase. The power to build a sea wall implies the power to do whatever is necessary to that end. At all events section 3736 should not be construed to apply to executed contracts, and so the United States be prevented from claiming that for which it has paid.

We find no reversible error in the record as it is before us, and the judgment is therefore affirmed.

HEFFNER v. GWYNNE-TREADWELL COTTON CO.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1908.)

No. 2,686.

1. COURTS—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Whether a suit in a federal court involves the necessary jurisdictional amount is not a local question controlled by the statutes of the state or the rulings of its Supreme Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 901.

Jurisdiction of Circuit Courts as dependent on the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.]

2. SAME—SEPARATE OBLIGATION.

In an action in a federal court on several notes, the jurisdictional amount in controversy is the aggregate of the judgment prayed for.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 890-897.]

3. FACTORS—CONSIGNMENT OF GOODS FOR SALE—DIRECTIONS—LIEN.

Where there is a simple consignment of goods to a factor for sale on commission, the directions of the consignor, communicated either at the time or before sale as to when or how the goods should be sold and the proceeds applied, must be respected by the consignee who holds no other interest in the property as such, but if the factor has advanced money for the purchase of the goods consigned to the extent of his advancements or liabilities incurred on account of the goods, he acquires a special interest therein in the nature of a lien for his indemnity in the absence of a special contract varying the right, in which case neither the consignor, nor any one claiming under him, can maintain an action against the factor to recover the property or its proceeds without tendering the amount due him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Factors, §§ 70, 71.]

4. SAME.

If a consignor of goods to a factor contemporaneously with an advancement by the factor and the consignment gives the factor directions respecting the time and manner of sale which are assented to by the factor's acceptance of the goods, he may not disregard such directions or condition in selling the goods for his reimbursement, provided the consignor stands ready or offers to reimburse the factor for his advances and liabilities.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Factors, §§ 23-25.]

5. SAME—SUBSEQUENT DIRECTIONS.

Where a consignment of goods to a factor for sale on which the factor has made advancements is received without directions as to the time or manner of sale or disposition of the proceeds, the factor may hold and dispose of the goods in the customary method of trade and reimburse himself out of the proceeds for his advances and liabilities and commission, the consignor being without power by any subsequent direction to the factor or conditions imposed to suspend or affect the factor's lien or right of sale to the extent necessary for his reimbursement and compensation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Factors, §§ 23-25.]

6. SAME—APPLICATION FOR PROCEEDS—SOLVENCY OF PRINCIPAL.

Where a factor without any new consideration assented to his consignor's demand that if he sold the goods on which advances had been made the proceeds should be applied on certain notes held by the factor against the consignor and not on the consignor's open account, such assent by the factor was subject to the implied condition that the consignor should keep up the required margins and continue solvent and she having

become bankrupt the factor, after notice, was entitled to sell the goods for the best market price and credit the proceeds against the open account and commissions before applying any part thereof to the notes.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Prior to August, 1905, including 1904, the copartnership firm of Stewart-Gwynne & Co. were engaged, at Memphis, Tenn., in business as commission merchants dealing in cotton. Mrs. E. E. Heffner (the wife of the plaintiff in error, hereinafter, for convenience, designated the defendant) was a feme sole trader, doing business at Carlisle and Hickory Plains, Ark. She engaged extensively in buying cotton in the region of her stores, shipping it to said Stewart-Gwynne & Co. to sell for her as a factor. As a rule, the money for the purchase of cotton by her was furnished by said Stewart-Gwynne & Co. Her habit was to give to her vendors checks on said firm for the respective purchases. As sales were made by this firm of the cotton so consigned they gave credit on the book account kept with Mrs. Heffner, sending her notices from time to time of the state of the account. On April 11, 1905, she and the defendant executed to said firm their note for \$1,000 due December 15, 1905, on account between her and this firm. In August, 1905, the defendant in error (hereinafter, for convenience, designated the plaintiff), was organized as a corporation by members of said copartnership concern, which took over the commission cotton business of the firm of Stewart-Gwynne & Co., an assignment of the said \$1,000 note, and the account between it and Mrs. Heffner, and continued the business with her as theretofore. On August 22, 1905, Mrs. Heffner and the defendant executed to the plaintiff certain other two notes each for \$1,000, one due December 15, 1905, the other January 1, 1906. These notes were given to be discounted by the plaintiff and the proceeds entered on the book account between it and Mrs. Heffner. She continued thereafter to buy and consign cotton to the plaintiff and drew drafts on it in favor of the parties from whom she bought. This business was so proceeded with until the fall of 1905 and winter of 1905 and 1906, when the aggregate of her account reached \$14,866.08, and the indebtedness of said notes of \$3,000. On November 11, 1905, the plaintiff wrote Mrs. Heffner suggesting that, from the amount of the drafts she was drawing, she must have a good lot of cotton which she had not shipped to it, and requesting that she make more shipments. Also, calling attention to the fact that the note for \$1,000 would be due December 1st, which she was expected to promptly pay. To this letter, she replied on the 13th inst., suggesting that if the plaintiff did not wish her to draw for more cotton to let her know, stating that she would get cotton enough through the Hickory Plains store to pay the notes. On the 13th of November, 1905, plaintiff acknowledged the receipt of 22 bales of cotton, stating that the open account shows a debit against her of \$11,116.96 and that it wanted the cotton from the Hickory Plains store, as the advances were made to control cotton shipments. On November 14, 1905, the plaintiff advised her that it had paid drafts for her amounting to \$1,399.86, which increased the open account of her indebtedness to \$12,516.82 against 234 bales of cotton, stating that she should send more bills of lading and less drafts; that if she wished to continue to hold the cotton, she must send good shipments without any drafts, or make cash remittance. "In other words, we must have a margin. We do not want to stop your operations but you must not ride a free horse to death." Again, on the 16th of November, the plaintiff wrote Mrs. Heffner, stating that they did not object to her drawing on it for four-fifths of the value of the cotton shipped, but that she was drawing for the full price of every bale she bought and that it expected her to carry at least one-fifth of the cost of the cotton; that her open account showed a debit of \$14,016.55 against shipments of 251 bales of cotton. "You see we are carrying more than our share, and we shall expect you now to send us papers for good shipments against which there are no drafts, and in this way increase our margin." On the 22d of the month she shipped 12 bales of cotton, and in a letter said she would forward in a few days some more marked "H" which meant from Hickory Plains, and that she desired to get enough cotton to the plaintiff by

the 1st of December to insure the payment of the note then due, and directed that the 16 bales the plaintiff then had and the next shipment marked "H," go toward the payment of the note, but not to sell it until she ordered. On November 28, 1905, the plaintiff notified her that it had refused payment of two drafts drawn by her amounting to \$241.85, and that she did not have cotton enough in its hands to justify paying out any more; that her open account showed an indebtedness of \$14,474.20, against which they held 264 bales of cotton, 22 of which were re-packs, regretting that she had not sufficient cotton on hand to protect her drafts. On the 30th of the same month, she telegraphed plaintiff, asking if it would honor drafts on receipt of bill of lading that morning, to which the plaintiff answered it would, and on the same day wrote her that the note for \$1,000 was due, and that it must insist upon her having the cotton bales in its hands promptly to cover the same. On the 19th of December, 1905, the plaintiff wrote Mrs. Heffner, again calling her attention to the state of the account; that she had shipped 270 bales of cotton against which she had drawn on open account \$16,677.22, which would not cover the amount of the open account; that the first \$1,000 note due December 1st, had not been paid, and the note of \$1,000 would be due January 1st. The letter further stated: "We have been promised cotton from Hickory Plains to meet these notes at maturity, but it has not appeared. We dislike to enter proceedings on this past due paper, but must insist on your immediate attention to both the account and the past due notes, together with the one maturing January 1st, 1906."

On the 26th of December, the plaintiff wrote that her reply was not satisfactory, and that it must insist on further margin from her immediately, or that it would put the cotton on the market and sell it. On the 28th of December it telegraphed her: "Compliance at once with our letter of the 26th is necessary." To this the defendant wrote in her name begging that the cotton be held in prospect of advancement, and that she or he would call to see them at Memphis. On the same day, in another letter, she stated to the plaintiff that the understanding between them was that the cotton or any part of it should not be sold unless ordered by her, and that if they did sell the cotton against her protest, the first money arising from the sale should be applied to the payment of the three notes held by it against her and the defendant. To this, the plaintiff replied on the 29th of December, stating that it was aware of its rights and position in the premises, directing her to refresh her memory by reference to various letters sent her, reminding her that she had promised either shipments or remittances to reduce the account, which she had not complied with; that she had done nothing toward complying with the request to take care of the past-due paper, and they hoped she would not fail to protect the one due January 1st. It consented to hold the cotton, pending the promised interview of the next week; that it would not like to forward the notes for collection, but insisted that they have prompt attention. It seems that instead of the promised visit of Mrs. Heffner, the defendant's attorneys visited the plaintiff, and, on return to their residence, at Lonoke, Ark., they wrote the plaintiff, stating that it was impossible for Mrs. Heffner to put up \$500 at that time as a margin, and that the defendant declined to execute notes suggested, and they must hold the cotton until directed to sell by her. On the 12th of January, the plaintiff replied, stating that "the compliance with our repeated requests to furnish us with additional margin have so far been refused. We now feel at perfect liberty to sell the cotton and appropriate the proceeds against the drafts drawn against such shipments. We have advices from her as stated to you that all her drafts have been drawn exclusively against these shipments. We have no intention of sacrificing the cotton, and still trust that in the near future she will comply with our requests as to the margin, and enable us to meet her views as to the further holding of the cotton." The response made to this insistence by Mrs. Heffner was her going into bankruptcy on the 8th day of March, 1906. After this, the plaintiff sold the cotton amounting to 270 bales and applied the proceeds thereof to the open account between them, which left the sum of \$207.39, which it placed as a credit on the note due December 1, 1905. The plaintiff proved up the balance due on said notes in bankruptcy against the estate of Mrs. Heffner, on which a dividend of \$113.80 was paid. This suit was instituted

in August, 1906, to recover the balance on said notes. The defendant pleaded in his answer that he signed said notes as surety for Mrs. Heffner, and that they were paid by the shipment of cotton by Mrs. Heffner; the proceeds of which were to be applied to the payment of said notes, and that the market value of the cotton shipped was greater than any debt claimed by the plaintiff against either himself or Mrs. Heffner. At the conclusion of the evidence, the only request for a declaration of law made by the defendant was as follows: "That Mrs. Heffner had the right, under the law, to apply the proceeds of the cotton to the payment of the note sued on and as she directed said proceeds to be so applied, the notes were paid, and the plaintiff cannot recover in this action." This was refused, and the defendant excepted.

Thereupon the court, at plaintiff's request, instructed the jury to return a verdict in favor of the plaintiff in the sum of \$1,793.97.

Trimble, Robinson & Trimble and J. H. Harrod, for plaintiff in error.

N. W. Norton, for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge (after stating the facts as above). Counsel for the plaintiff in error in their brief question the jurisdiction of the Circuit Court over the subject-matter of the suit. Their contention is that each of the notes sued on constitutes a separate cause of action, each of which is less than \$2,000, and the sum of them cannot be employed to make out the required excess over \$2,000. In support of this proposition decisions of the Supreme Court of Arkansas are cited on the question of the amount in each separate cause of action to give the court jurisdiction. This is not, however, a local question, controlled by the statute of the state, or the rulings of its Supreme Court. It pertains to a subject-matter of procedure exclusively within the federal jurisdiction, in which it is well settled that in the action of assumption, like that of an action on several notes, bonds and the like, the requisite jurisdictional amount is the aggregate of the judgment prayed for. *Edwards v. Bates County*, 163 U. S. 269, 273, 16 Sup. Ct. 967, 41 L. Ed. 155; *Bowden v. Burnham*, 59 Fed. 752, 755, 8 C. C. A. 248; *Chase v. Sheldon Roller-Mills Co. (C. C.)* 56 Fed. 625; *Tennent-Stribling Shoe Co. v. Roper*, 94 Fed. 739, 36 C. C. A. 455; *Bergman v. Inman, Poulsen & Co. (C. C.)* 91 Fed. 293.

The controlling question for decision on this writ of error is: Did the plaintiff below have the right to sell the cotton on hand in April, 1906, and apply the proceeds to the indebtedness of Mrs. Heffner on open account? We do not question the general rule of law that, ordinarily, where a debtor consigns goods to his creditor to be sold, he has the right to direct the time and manner of the sale and the application of the proceeds. By his acceptance of the goods, under such instructions from the consignor, the consignee takes them subject to such conditions, and may not disregard them without subjecting himself to consequent damages to the consignor.

Without taking the space to review the authorities pertinent to the question presented by this record, the correct American doctrine may be summarized, comprehensively enough, as follows: (1) Where there is a simple consignment of goods to a factor to be sold on commission,

the wishes or directions of the consignor, communicated either at the time of or subsequent to the shipment and before sale, as to when or how the goods shall be sold and the proceeds applied, must be respected by the consignee, who holds no other interest in the property as such. (2) If the factor advance the money for the purchase of the goods consigned, to the extent of his advancements or liabilities incurred on account of the goods, he acquires a special interest in the goods, in the nature of a lien, for his indemnity, in the absence of any special contract varying the right. In such case neither the consignor nor any one claiming under him can maintain action against the factor to recover the property or its proceeds without tendering what is due the factor. (3) If the consignor, contemporaneously with the advancement and consignment, give to the consignee direction respecting the holding or the time and manner of disposing of the goods, which are assented to by the factor's acceptance of them, the latter may not disregard the direction or condition in selling for his reimbursement, although he has made advancements or incurred liabilities on account of the goods, provided always, the consignor stands ready or offers to reimburse the consignee for such advancements and liabilities. (4) Where the factor has made advancements or incurred liabilities on account of the goods, and the consignment is made without any direction at the time as to the holding of the goods, or the time or manner of their disposition or of the proceeds, the intendment of law is that the factor is vested with authority to hold and dispose of the goods in the usual, customary method of the trade; and to reimburse himself out of the proceeds for such advancements and liabilities, as well as his commissions. And the consignor is without power or right by any subsequent direction to the factor or conditions imposed, to suspend or affect the lien of or right of sale by the factor, to the extent of his reimbursement and compensation. *The Frances*, 8 Cranch, 418, 419, 3 L. Ed. 609; *Brown v. McGran*, 14 Peters, 479, 10 L. Ed. 550; *Field v. Farrington*, 10 Wall. 141, 19 L. Ed. 923; *Eichel v. Sawyer* (C. C.) 44 Fed. 845, 850.

When the money was advanced and the Carlisle cotton was shipped to the plaintiff, it went under no special direction as to how or when it should be sold, or how the proceeds should be applied. But after the factor had become uneasy about the volume of Mrs. Heffner's checks, disproportioned to her shipments, and she was called upon to provide for the notes matured and maturing, and advised that she must increase her shipments or draw less, and time and again called upon to make good the margins, without compliance therewith she made demand that the cotton on hand be not sold without her order, with a further demand that if the plaintiff did sell, the proceeds should be first applied to the liquidation of the notes on which the defendant was surety. It is true that the defendant made acknowledgment of this letter, noting her request in such fashion that the law will impute to it acquiescence. Where such consent is founded upon no new consideration, the law, ever instinct with the spirit of justice, declares that it was impliedly conditioned with the understanding that "the consignor stands ready and offers to reimburse and discharge such advances and liabilities." *Brown v. McGran*, *supra*. In other words, to hold the crediting factor

to such assent, the consignor must keep up the margins and continue solvent. *Hornsby v. Fielding*, 10 Heisk. (Tenn.) 367; *Davis v. Kobe*, 36 Minn. 214, 30 N. W. 662, 1 Am. St. Rep. 663. When Mrs. Heffner, on her own petition, was declared bankrupt, she proclaimed to all the world that she could not redeem this cotton from her factor; and, after advising her of the purpose to do so, the plaintiff had the right to sell and reimburse itself for the moneys advanced and its commissions, subject only to the duty to her and her creditors of obtaining the best market price. *Parker v. Brancker*, 22 Pick. (Mass.) 40; *Frothingham v. Everton*, 12 N. H. 239; *Commercial Nat. Bank v. Heilbronner*, 108 N. Y. 439, 15 N. E. 701; *Phillips v. Scott*, 43 Mo. 86, 97 Am. Dec. 369; *Howard v. Smith*, 56 Mo. 314.

In awarding judgment in favor of the plaintiff for the sum of \$1,-793.97, the Circuit Court found from the evidence that 18 bales of the cotton marked "H," shipped from the Hickory Plains store, were not bought by drafts drawn on the plaintiff, and it was shipped to be applied to the first notes. It therefore applied the proceeds of that cotton to the notes, which, together with the amount of the dividends collected from the bankrupt estate, left the balance as adjudged by the court. This application to the open account was warranted by the fact that the balance was not greater than the advancements made on the cotton sold by the defendant.

As the plaintiff acquiesced in this, and the defendant has no legal objection thereto, the judgment of the Circuit Court must be affirmed.

PAYNE & JOUBERT v. CANAL-LOUISIANA BANK & TRUST CO. et al

(Circuit Court of Appeals, Fifth Circuit. March 31, 1908. On Rehearing, April 25, 1908.)

No. 1,684.

FIXTURES—REMOVAL—RIGHTS OF MORTGAGEE.

Where interveners had no seasonably recorded lien for the unpaid purchase price of certain pipes, hydrants, etc., sold to a corporation and used for the equipment of a fire protection plant, which at the time the intervention was filed had become an incorporated immovable part of the plant, interveners were not entitled to recover possession of the specific property nor rent for the use thereof from a receiver in proceedings to foreclose a mortgage on the plant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fixtures, §§ 44-46.]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

The decision of the court below affirming the master's report, which was opposed on behalf of claims disclosed in the Payne & Joubert intervention, is shown in the record which is quoted as follows:

"In the Matter of the Intervention of Payne & Joubert.

"This cause came on to be heard upon exceptions to the master's report on the intervention of Payne & Joubert, claiming a resolution of the sale of certain supplies furnished to the water plant on the Belle Alliance plantation under contract with the Goyer-Alliance Refining Company, and was argued by

Messrs. H. L. Lazarus for Payne & Joubert and H. Generes Dufour, contra. Whereupon, the court considering that prior to the attempted resolution of the sale the articles furnished had become so incorporated with the plantation and sugar house as to become a part of the immovable (Rev. Civ. Code, art. 467), and therefore the claimed resolution of the sale was too late (see *Swoop v. St. Martin*, 110 La. 237, 34 South. 426), it is ordered and adjudged that the exceptions to the master's report be and the same are overruled, the master's report be confirmed accordingly, and the said intervention be dismissed.

"In open court, March 23, 1907.

"[Signed] Don A. Pardee, Circuit Judge."

Henry L. Lazarus, Herman Michel, and Edward S. Lazarus, for appellant.

Wm. C. Dufour, and H. Generes Dufour, for appellees.

Before McCORMICK and SHELBY, Circuit Judges, and BOARMAN, District Judge.

PER CURIAM. Payne & Joubert filed their intervention in an equity cause pending in the court below, brought by creditors to foreclose a mortgage resting on certain lands and manufacturing plant constructed thereon belonging to the Goyer-Alliance Refining Company. At the time their intervention was filed the whole property was in the hands of a receiver, who was about to sell and did sell the same under order of the Circuit Court. The intervener had no seasonably recorded lien.

The petition of intervention shows a controversy arising out of a right asserted by Payne & Joubert against the Goyer-Alliance Refining Company to have resolved under the laws of Louisiana the contract of sale, in which contract of sale the evidence shows they sold a certain lot or supply of pipes, hydrants, etc., which were used for the equipment of a fire protection plant, which plant, at the time the intervention of Payne & Joubert was filed, had become an incorporated, immovable part of the said company's manufacturing plant. The interveners prayed for recovery and possession of the specific property which is the subject of the contract sought to be resolved. They prayed, also, for a monthly rent for the use of the pipes, hydrants, etc. The finding of facts made by the lower court is fully warranted in the evidence reported by the master, and the law is correctly stated in the decision herein quoted.

The decree of the lower court is affirmed.

On Petition for Rehearing.

An examination of the petition for rehearing in this case discovers no new ground sufficient to induce the judges who sat on the original hearing to doubt the correctness of their decision.

The petition for rehearing is denied.

MERCHANTS' BANK OF VALDOSTA v. BAIRD.

(Circuit Court of Appeals, Eighth Circuit. March 2, 1908.)

No. 2,512.

1. BANKS AND BANKING—CERTIFIED CHECKS—NATURE OF BANK'S LIABILITY.

The certification of a check by a bank, like the acceptance of a draft, creates an original, actionable liability against the bank, and implies that, when the check is certified, the drawer has sufficient funds with the bank, and that they have been set apart and will be retained for the holder whoever he may be, and whenever the check may be presented.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, §§ 419, 421.]

2. SAME—NATIONAL BANKS—GUARANTY OF CHECKS—NOTICE OF INVALID TRANSACTION.

A state bank was chargeable with notice that the credit and resources of a national bank were being unlawfully used, barring recovery against the national bank's receiver on checks on the national bank by a corporation, where the national bank's president had written the state bank obligating his bank unconditionally to pay all checks of the corporation, not aggregating more than \$5,000 weekly, and the national bank afterwards wired that it would "protect" the corporation's checks for \$5,000 weekly in excess of "present guaranty," and later that the state bank would pay checks in excess of "guaranty" drawn during the current week.

3. SAME—POWER OF NATIONAL BANKS.

A national bank may warrant the title to property it conveys, or become liable as an indorser or guarantor of obligations which it rediscounts or sells, but it cannot lend its credit to another by becoming surety, indorser, or guarantor for him, such an act being *ultra vires*, and, when its true character is known, no rights grow out of it, though it has taken on in part the garb of a lawful transaction.

4. SAME—ULTRA VIRES ACT—ESTOPPEL.

An act of a national bank, void because *ultra vires*, cannot be made good by estoppel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, §§ 991-1000.]

In Error to the Circuit Court of the United States for the District of Minnesota.

The Merchants' Bank of Valdosta sued the receiver of the First National Bank of Faribault to recover upon eight checks drawn by the Minnesota Lumber Company upon the latter bank, and cashed by the former upon the authority of a letter and two telegrams. The case was tried by the court upon the pleadings and an agreed statement of facts. The defendant had judgment, and the plaintiff prosecuted this writ of error. The facts are substantially as follows: At the time of the transactions in question the plaintiff was a bank organized under the laws of Georgia, and doing business at Valdosta, in that state. The lumber company was a corporation engaged in manufacturing lumber in Georgia. The First National Bank of Faribault, as its name indicates, was a banking association organized under the laws of the United States. It was engaged in business at Faribault, Minn., and its capital was \$50,000. For some years prior to September 6, 1904, the lumber company had an account with the National Bank, but in one form or another it was always indebted to the bank. On September 6, 1904, it owed the bank \$11,848.66 on its own notes and notes of others made for its benefit. Besides this, the bank had purchased and then held bonds of the lumber company, unsecured by mortgage or other lien, amounting to \$33,500. Prior to the date mentioned the plaintiff, the Georgia bank, had been paying checks drawn by the lumber company upon the National Bank, obtaining in each case the authority of the latter to do so, but in order to obviate the trouble and expense incident to that

course it wrote the National Bank on September 1, 1904, for general authority to pay such checks. On September 6, 1904, T. B. Clement, as president of the National Bank, replied as follows:

"Faribault, Minn., 9-6-04.

"Merchants' Bank of Valdosta, Valdosta, Ga.

"Gentlemen: In reply to your letter of the 1st regarding checks drawn by the Minnesota Lumber Company on this bank, would say that there is no reason for Mr. Trump acting for the Minnesota Lumber Company, drawing any checks that this bank would not honor, but think there should be some limit placed, and we will say that checks of the Minnesota Lumber Co.'s drawn by J. H. Trump or H. O. Clement on this bank will be paid up to the amount of \$5,000.00 in any one week. If any more than \$5,000.00 should be drawn in any one week, have them wire for permission."

On December 6, 1904, the National Bank wired the Georgia bank as follows:

"Faribault, Minn., 6 Dec. 1904.

"Merchants' Bank, Valdosta, Ga.

"We will protect checks of Minnesota Lumber Company for five thousand dollars per week in excess of present guarantee."

And on December 22, 1904, it further wired the Georgia bank as follows:

"Faribault, Minn., Dec. 22, 1904.

"Merchants' Bank, Valdosta, Ga.

"You can pay checks Minnesota Lumber Company on us this week in excess of guaranty on personal request of H. O. Clement."

T. B. Clement as president signed the name of his bank to both telegrams. H. O. Clement, mentioned in the last telegram, made the personal request therein required. He was a son of T. B. Clement. In reliance upon these communications, and upon the previous course of dealing, the Georgia bank cashed the checks of the lumber company amounting to \$125,000 between September 6, 1904, and January 1, 1905, all of which were honored and paid by the National Bank excepting the last eight for \$1,000 each, and excepting that upon one of the eight a part payment was made. The National Bank became insolvent and was closed by the Comptroller of the Currency January 2, 1905. The lumber company was also insolvent. At the close of the bank the lumber company owed the National Bank \$33,500 on unsecured bonds and \$43,500.32 on other account. The directors of the defunct bank had left the management thereof wholly to T. B. Clement, the president, and they were not aware of the transactions carried on between the two banks and the lumber company. The National Bank was not interested in the business of the lumber company excepting as a creditor. The Georgia bank knew that the proceeds of the checks were for use in the business of the lumber company. Between September 6, 1904, and the 1st of the following January, the account of the lumber company upon the books of the National Bank generally showed a credit balance, but this condition was largely due to the "kiting" of checks and drafts. When the National Bank was closed, there were outstanding and unpaid drafts and checks amounting to over \$35,000, for which the lumber company had received credit in its account, and by charging them back a large overdraft would result. It was stipulated that the Georgia bank was not aware of the condition of the lumber company's account with the National Bank, and that it believed that the latter was a bank in good standing, well managed, and that its president was a person of integrity, of good business management, and deserving of trust and credit, but it also appeared that the keeping of checks and drafts afloat, corresponding in amount with checks cashed by the Georgia bank, was known to it, for in part they were sent to that bank with remittances for checks paid by it. In other words, when the National Bank sent the Georgia bank money or drafts in payment of checks cashed by the latter, it would also send for collection a corresponding draft or check of the lumber company. Checks drawn by the lumber company on the Georgia bank were employed in the kiting process; also drafts drawn by the lumber company upon itself. The time required for transmission of the collection items from Georgia to Minnesota and back again to Georgia made

the plan feasible. The agreed statement of facts contained this clause: "When the First National Bank paid checks in cash and sent drafts therefor to its correspondent, if the drafts were paid, the said First National Bank saved the charges for exchange incident to the shipment of actual money to keep up its balance in the hands of such correspondent."

Robert Mee, for plaintiff in error.

Thomas H. Quinn, for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and PHILIPS, District Judge.

HOOK, Circuit Judge (after stating the facts as above). It was known to both the National Bank and the lumber company that the credit and resources of the former were being used to uphold and further a venture in which it could not lawfully engage. But the question remains: How did it appear to the Georgia bank? Did it have the aspect of legitimate banking business or of a guaranty for another? The letter of September 6, 1904, purported to obligate the National Bank unconditionally to pay all checks of the lumber company up to the amount of \$5,000 in any one week. No limitation was expressed in the letter that had regard either to the condition of the company's account, whether in credit or in debit, or to its future conduct or solvency. The president of the National Bank did not say he was confident the lumber company would not draw checks in excess of its rights as a customer, but that there was no reason for its drawing checks his bank would not honor. There was no pretense of a certification of checks in the customary meaning of that phrase. The certification of a check, like the acceptance of a draft, creates an original liability on the part of the bank upon which an action may be maintained, and it implies that at the time the check is certified the drawer has sufficient funds with the bank and that they have been set apart and will be retained for the holder, whoever he may be, and whenever the check may be presented. The bank undertakes that the check is good at the time it is certified, and that it shall continue so until finally paid. Though an officer may bind his bank by certifying a check in the absence of funds of the drawer Congress has made the act a misdemeanor. U. S. Comp. St. 1901, p. 3497, § 5208. In some respects a certified check is not unlike a certificate of deposit payable to the order of the depositor. The customary and proper practice is for the certifying bank to at once charge the account of the drawer with the amount of the check, and thus protect itself against loss from its assumption of liability by completing the withdrawal of the amount from his further control. *Merchants' Bank v. State Bank*, 10 Wall. 604, 648, 19 L. Ed. 1008.

But the letter of September 6 had no reference to checks then in existence. The amount of checks that would be drawn in the future within the prescribed limit was not known, nor was there any definite time limit to the duration of the undertaking evidenced by the letter. The power of the bank to put an end to its continuing promise to pay checks of the lumber company was not a safeguard against loss. Under the terms of the letter a liability would arise in Georgia before it would be known in Minnesota. Regarded most favorably, the letter

evidenced a transaction that was of doubtful regularity. Since the proper certification of a check signifies that the maker has sufficient funds with the bank an agreement to certify checks to be drawn in the future is so out of the usual banking course as to challenge attention.

The true purpose of the writer of the letter and the real relation between his bank and the lumber company was disclosed by the telegrams of the 6th and 22d of December. In the first of these the limit per week was raised to \$10,000, and in the second the limit was entirely removed. In both telegrams the obligation attempted to be assumed by the letter of September 6th was referred to as a guaranty. Neither of the telegrams authorized the inference that the checks to be drawn by the lumber company were upon its funds then with the bank, or that payment depended upon funds being placed there by it. The first one is particularly significant, in that the undertaking was to "protect" checks of the lumber company for \$5,000 per week in excess of "present guarantee." Even more significant of the true situation is the telegram of December 22d. It referred to the undertaking as a guaranty, and purported to bind the National Bank to pay all checks that might be drawn upon it within the given period without regard to the amount. This was manifestly beyond the power of the bank as it put at hazard, upon the mere act of the lumber company, the duty of the bank to the government, the interests of its shareholders, and the funds of its depositors. In this connection, it is said that the amount of the eight checks in controversy, \$8,000, was within the limit prescribed by the telegram of December 6th, but these checks were drawn between December 27th and 31st, inclusive, and at that time the Georgia bank had before it the letter and both telegrams, and was therefore advised of the character of the obligation which the National Bank was attempting to assume. The letter and telegrams taken together were sufficient to advise the Georgia bank at the time it cashed the checks in controversy that the National Bank was lending its credit to the lumber company. If the latter had the right to draw the checks, and if it was the duty of the bank on which they were drawn to pay them, it would not have agreed to "protect" them or referred to its obligation as a "guaranty." The term "guaranty" has a different signification, and ordinarily a bank does not agree to protect a check which it is its duty to pay. Both terms employed pointed quite clearly to the real relation between the National Bank and the lumber company, and, if there was otherwise any doubt, the removal of all limit to the obligation attempted to be assumed should have dispelled it.

A national bank may warrant the title to property it conveys, or become liable as an indorser or guarantor of notes or other obligations which it discounts or sells because to do so is incidental to the business it is authorized to transact, and to the disposition of property it has lawfully acquired. But it cannot lend its credit to another by becoming surety, indorser, or guarantor for him. It cannot for the accommodation of another indorse his note or guarantee the performance of obligations in which it has no interest. Such an act is an adventure beyond the confines of its charter, and, when its true character is known, no rights grow out of it, though it has taken on in part the garb of a lawful transaction. *Commercial Nat. Bank v. Pirie*, 82 Fed.

799, 27 C. C. A. 171; *Bowen v. National Bank*, 94 Fed. 925, 36 C. C. A. 553; *Id.* 87 Fed. 430. An act that is void because beyond the power of a national bank cannot be made good by estoppel. *McCormick v. Market Bank*, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817; *California Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198. It is urged that the National Bank profited by the transactions to the extent of exchange, and that it retained the benefit. It is difficult to find any profit to the bank in these transactions. If there was any, it was swallowed up in losses.

The judgment is affirmed.

DUNCAN v. MISSOURI STATE LIFE INS. CO.

(Circuit Court of Appeals, Eighth Circuit. March 27, 1908.)

No. 2,608.

1. INSURANCE—PREMIUMS—ACCEPTANCE AFTER MATURITY—WAIVER OF FORFEITURE.

The acceptance by an insurance company of payment of a premium or premium note after maturity is in general a waiver of a forfeiture of the policy caused by the prior default.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1056.

Waiver by acceptance of premiums, see note to *Life Ins. Clearing Co. v. Bullock*, 33 C. C. A. 369.]

2. SAME—CONDITIONAL ACCEPTANCE—BREACH OF CONDITION—EFFECT.

After forfeiture of a policy for nonpayment of premiums the forfeiture was waived, and the insurance company accepted a renewal note for the premium past due, providing that in case the note was not paid at maturity the full amount of the premium should be considered earned as premium during its currency, and the note should be payable without reviving the policy or any of its provisions. *Held*, that such provision was not invalid, and, though insured signed the note without reading it, he was bound thereby in the absence of duress or fraud, and on his failure to pay the note at maturity his policy was forfeited notwithstanding the insurance company thereafter collected the note through an attorney.

3. SAME—CONFLICTING PROVISIONS.

Where a note required for past due premium in order to waive a forfeiture provided that if not paid at maturity the full amount of the premium should be considered earned as premium during the currency of the note payable without revivor of the policy or any of its provisions, insured's reinstatement constituted a corporate act conclusive on the insurer to the same extent as the terms of the note were conclusive on insured, who was not entitled to claim that the same was invalid as in conflict with the policy providing that no agreement varying its terms should be valid unless in writing, made at the home office of the company by the president, vice president, and secretary.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

James F. Read (James B. McDonough and Youmans & Youmans, on the brief), for plaintiff in error.

James C. Jones (Jones, Jones, Hocker & Davis, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. This was an action by the administrator of the estate of Thomas M. Duncan, deceased, on a policy of life insurance issued by the Missouri State Life Insurance Company. The defense was that the policy was forfeited by the nonpayment when due of a note given for a part of the first premium. In response to this the plaintiff said the forfeiture was waived by the payment of the note after maturity and the acceptance of the money by the company. At the conclusion of the evidence the trial court directed a verdict for the company.

The policy was dated June 23, 1904. It contained provisions to the effect that the policy should be void upon default in the payment of any note given for a premium, also for reinstatement upon the furnishing by the insured of evidence of good health satisfactory to the company and the payment of all arrears and indebtedness under the policy. It required the payment of a term premium of \$210 which carried the policy for two years and until June 23, 1906, and thereafter of a number of annual premiums of the same amount. One half of the first or term premium belonged to the agent who solicited the insurance and he rebated it. For the other half the insured gave the company his note for \$105 due October 1, 1904. The note recited that if it was not paid when due the policy should become null and void. Payment was not made at maturity, but the policy was reinstated November 11, 1904, upon the application of the insured with a showing as to his health and the making of a renewal note for the \$105 due December 15, 1904. This renewal note made like provision for forfeiture of the policy upon default in payment and contained the following:

"In case this note is not paid at maturity the full amount of the premium shall be considered earned as premium during its currency and the note payable without reviving the policy or any of its provisions."

Default in paying this note at maturity also occurred, and after fruitless requests by the company for payment it was sent to an attorney who collected it April 10, 1905. On November 23, 1905, the insured applied for reinstatement of the policy but the application was rejected on the 12th of the following December upon medical advice as to his health. The insured died March 19, 1906, less than two years from the date of the policy.

The general rule is that the acceptance by an insurance company of the payment a premium or premium note after maturity is a waiver of a forfeiture of a policy caused by the prior default. *Phoenix Mut. Life Ins. Co. v. Raddin*, 120 U. S. 183, 196, 7 Sup. Ct. 500, 30 L. Ed. 644. But we have here a contract that notwithstanding the forfeiture arising from default in payment the full premium should be considered as having been earned and the note payable without a revivor of the policy. The terms of the agreement to this effect are clear and unambiguous, and are not contrary to any rule of law or public policy. The parties were capable of contracting, and undoubtedly they could at the beginning have agreed upon the full sum of \$210 for an insurance term expiring at the date of the second default. We see no reason for saying they could not afterwards contract to the same

effect. If the premium had been fully paid in money when the policy was issued a subsequent forfeiture for the fault of the insured in violating some condition would not have entitled him to a return of a part of it as unearned. There is no absolute right in an insured to have a policy continue in force for the entire period covered by a premium payment irrespective of the time of payment or of other conditions to which he has assented and a breach of which he has committed. Provisions like that quoted from the renewal note have been upheld by a number of the courts. *Shultz v. Ins. Co.*, 42 Iowa, 239; *Shakey v. Ins. Co.*, 44 Iowa, 540; *Blackerby v. Ins. Co.*, 83 Ky. 574; *Schimp v. Ins. Co.*, 124 Ill. 354, 16 N. E. 229; *Texas Fire Ins. Co. v. K. T. Lodge*, 32 Tex. Civ. App. 328, 74 S. W. 809; *Union Central Life Ins. Co. v. Chowning*, 8 Tex. Civ. App. 455, 28 S. W. 117; *Laughlin v. Life Ass'n*, 8 Tex. Civ. App. 448, 28 S. W. 411. See, also, *Jefferson Mut. Ins. Co. v. Murry*, 74 Ark. 507, 86 S. W. 813.

It is contended, however, that the provision in question was a variance from the original contract of insurance which the policy prohibited unless in writing made at the home office of the company by the president, vice president, and secretary thereof. Assuming without deciding that the terms of the original contract were changed it must be said the renewal note containing the provision in question was required by the company, and accepted by it as an integral part of the contract of reinstatement of the policy after its first forfeiture, and such reinstatement was a corporate act conclusively binding upon the company no more to be repudiated by it than the terms and conditions of the note could be by the insured.

Again, it is contended that the insured did not read the renewal note before he signed it and was ignorant of the provision in question. The only evidence of this was in a letter from the insured produced by the company. But, admitting the fact, it does not appear that the insured acted under constraint or deception. When he applied for and obtained the reinstatement of the policy after the first forfeiture he could have been required to pay the defaulted premium note in cash. But, having asked an extension of the time of payment he must be held to have informed himself of the terms of the writing which he signed and by which he obtained what he sought. It cannot be held, in the absence of duress or fraud of some kind, that a man is to be released from a written contract he executed because he neglected to read it.

The judgment is affirmed.

PORTAS v. GRIFFIN WHEEL CO.

(Circuit Court of Appeals, Eighth Circuit. April 1, 1908.)

No. 2,605.

MASTER AND SERVANT—INJURIES TO SERVANT—FELLOW SERVANTS—ACT OF FOREMAN.

Plaintiff, an employé in a wheel foundry, was injured while assisting in moving a car wheel to an annealing pit, by his foreman suddenly kicking or shoving the wheel forward so that the end of the iron handle of

the buggy carrying the wheel struck plaintiff and injured his spine. The foreman had full control of the men in defendant's foundry department, with authority to hire and discharge, but there was another foreman in charge of another division of the work, and a general superintendent who represented the defendant as the head of its business at the place where the foundry was located, to whom the workmen including the foreman, looked for ultimate and final directions, and who exercised constant and active supervision over all the work and all the business done there. *Held*, that the foreman was a fellow servant, and not a vice principal, for whose negligence if any defendant was not liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 486-489.

Who are servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 81 C. C. A. 280.]

In Error to the Circuit Court of the United States for the District of Minnesota.

C. D. O'Brien (R. D. O'Brien, on the brief), for plaintiff in error.

Arthur M. Keith (Charles T. Thompson, Edwin K. Fairchild, Jared How, Pierce Butler, and William D. Mitchell, on the brief), for defendant in error.

Before HOOK and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. Plaintiff, Portas, sued the defendant company for damages sustained by him while working in its foundry in St. Paul alleged to have been occasioned by negligent conduct. He charged in his complaint that one Ryan, who had supervision and control of the employes including plaintiff, was incompetent for the discharge of that duty; that he had a violent temper, and compelled employes to work with dangerous rapidity and speed; that in the performance of his duties the foreman negligently kicked a wheel which plaintiff was removing from the foundry to an annealing pit and thereby caused serious injury to plaintiff's spine. The answer was in substance a denial of the allegations of the complaint. The chief trial issue was whether Ryan was a fellow servant of plaintiff or a vice principal of defendant.

The facts disclosed by the record are substantially these: Defendant company had nine foundries or plants including that at St. Paul located in different parts of the country and used for conducting its business of manufacturing car wheels. One of the divisions of its work at St. Paul consisted of what is called the foundry department where molten metal was cast into car wheels. The wheels when cast were carried, by a running pulley suspended from an overhead rail, to annealing pits where they were covered for cooling purposes. This work of molding the wheels, removing and depositing them in the annealing pits as carried on by defendant company required the services of some forty or fifty men. Amongst them were two men whose duties were to "buggy" the wheels as it is called in the evidence, after they are raised by derricks from the molds, away to the annealing pits, which were located nearby. This process of "buggying" was performed by an employé, in this way: He caught a wheel after it had been taken from the mold and placed in the proper position, with an apparatus like ice tongs which had a shaft four or five feet long with a short

cross-bar at the end for a handle, and pulled it along behind him under the overhanging rail from which it was suspended, to its place of destination. Portas was one of these buggy men. The work of raising the hot wheel from the mold and taking it to the annealing pit required rapid action to prevent spoiling it by hasty or improper cooling and for this reason the buggy men were required to be active. Ryan was the foreman over this foundry department; and, besides having general supervision of the workmen engaged in it, a very particular and important part of his work was to see that the casting, removal, and covering of the wheels in the annealing pits were done as rapidly as possible. His duty was to exact quick action from the men, and he doubtless sometimes employed language unusual in genteel society. The evidence tends to show that in September, 1905, after Portas had attached his buggy to a wheel and had started to pull it away to the annealing pits, with his hands gripping the handle of the buggy behind his back, Ryan, in the effort to hurry on the work, suddenly kicked or shoved the wheel forward, and that the quick motion thereby given to the suspended load was imparted to the iron handle of the buggy, the end of which hit Portas in the back and injured his spine. Ryan had full control over the men in the foundry department, had authority to assign them to different branches of the work as and when necessary, and to hire and discharge them as he thought best. There was at least one other foreman who had immediate charge of another division of the work including the work done in the yard. He was called a yard foreman. Notwithstanding these facts the record conclusively shows that there was a general superintendent by the name of Maloney who represented the company as the head of its business in St. Paul. To him all the workmen including the foremen looked for ultimate and final directions, and he exercised constant and active supervision over all the work and all the business done there.

We entertain some doubt whether the allegations of the complaint sufficiently charge that the defendant company was culpably negligent in employing Ryan as a foreman or sufficiently charge that Ryan's general incompetency or ill temper was the proximate cause of plaintiff's injury; but assuming that the allegations are sufficient in both these particulars, we are of opinion that the proof utterly fails to establish the affirmative of either of them. This leaves Ryan's act of kicking or shoving the wheel which plaintiff was drawing away as the only remaining act of negligence charged against the defendant company. Whatever relation that act may have had to the injury sustained by plaintiff it appears clear that it was the act of a fellow servant for which, under well settled law, the master is not liable.

We took occasion to say in the recent case of Vilter Mfg. Co. v. Otte (C. C. A.) 157 Fed. 230, where authorities are collected, that "The fact that Wright [a foreman in charge of some work for a master] had actual control of the crew, the power to hire and discharge them and to direct their movements in that particular work did not erect that single job into a department of defendant's business and did not make him a vice principal." In that case as in this there was a general agent or superintendent who had immediate control over the foreman; and he was held to stand for the master as vice principal and the fore-

man was held to be a fellow servant only. The doctrine of that case is so conclusively warranted by the decisions of the Supreme Court as well as our court there cited that it seems unprofitable to reconsider or restate it. On their authority the action of the court below in directing a verdict for the defendant must be affirmed, and it is so ordered.

UNITED STATES v. LEERBURGER.

(Circuit Court of Appeals, Second Circuit. February 11, 1908. On Rehearing, March 3, 1908.)

No. 165 (4,133).

1. CUSTOMS DUTIES—PROTEST—AMBIGUITY.

Material dutiable at 50 cents per pound as "woven fabrics * * * in the gum," under the first clause of a tariff paragraph, were asserted in an importer's protest to be dutiable "at 60 cents per pound * * * under the first clause, * * * being woven fabrics in the piece, dyed." This rate and description ("dyed") pertained to the second clause, and not the first. *Held*, that the protest referred sufficiently to the first clause, under Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 (U. S. Comp. St. 1901, p. 1933).

2. SAME—REFERENCE TO WRONG PARAGRAPH.

Goods dutiable under one paragraph of a tariff act were asserted by an importer in his protest to be dutiable under another paragraph. But the language of the protest indicated an intention to cite the former. *Held*, that the protest should be construed as referring to the former.

3. SAME—COMPONENT MATERIALS—ASCERTAINMENT.

The test of chief value is to be applied as values may be at the time of importation. Evidence that goods are identical with some previously imported is unpersuasive that the relative value of their components remains the same.

4. APPEAL AND ERROR—EVIDENCE—ADMISSION ON ARGUMENT.

A question of fact cannot be raised on appeal, which was conceded on argument in the court below.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1066.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

The material in controversy was classified as composed chiefly of cotton and in part of silk under paragraph 311, tariff act of July 24, 1897, c. 11, § 1, Schedule I, 30 Stat. 173 (U. S. Comp. St. 1901, p. 1659). The importer contended that it should have been assessed "at 60 cents per pound (or 50 per cent ad valorem) under the first clause of paragraph 388, same act, being woven fabrics in the piece, dyed, weighing not less than 1½ ounces nor more than 8 ounces per square yard, and containing not more than 20 per cent. in weight of silk."

The board held that the mention of paragraph 388 should be construed as a reference to paragraph 387, as the language of the protest indicated that intention. The first and second clauses of paragraph 387 read as follows:

"387. [1] Woven fabrics in the piece not specially provided for in this act, weighing not less than one and one-third ounces per square yard, and not more than eight ounces per square yard, and containing not more than twenty per centum in weight of silk, if in the gum, fifty cents per pound, [2] and if dyed in the piece, sixty cents per pound."

On the authority of *Leerburger v. United States* (C. C.) 130 Fed. 1022, af-

firmed 137 Fed. 1020, relating to similar goods, the board held that the fabrics involved were dutiable under the first clause of paragraph 387, at 50 cents per pound, as being "in the gum." The board further held that the importer was not entitled to a decision in his favor, because his protest, claiming the goods to be dutiable at "60 cents per pound," as being "dyed," "failed to point out the provision of the statute which actually controls," and was therefore insufficient. Section 14, Customs Administrative Act of June 10, 1890, c. 407, 28 Stat. 137 (U. S. Comp. St. 1901, p. 1933), requires that protests shall point out "distinctly and specifically" the importer's objections to the assessment in question.

On appeal by the importer, the decision of the board was reversed by the Circuit Court (155 Fed. 146, T. D. 28,262), the protest being held sufficient.

J. Osgood Nichols, Asst. U. S. Atty.

D. Macon Webster, for importer.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The board held the protest insufficient; but the Circuit Court reached a different conclusion, in which we fully concur. It is in accord with *United States v. Salambier*, 170 U. S. 621, 18 Sup. Ct. 771, 42 L. Ed. 1167, and *Shaw v. United States*, 122 Fed. 444, 58 C. C. A. 425.

The government contends here that the goods, which are a mixture of silk and cotton, should be classified under paragraph 311 because composed in chief value of cotton. The only evidence as to relative values of the components of this particular importation is that of the government chemist, which states them as "silk 42.39 per cent., cotton 57.61 per cent."

The board disregarded this testimony, because in another case this court held of precisely similar goods, imported some months before, that, on the evidence then before it, silk was the component of chief value. This reasoning seems unpersuasive because, although the physical components were identical, their relative values may have changed in the interim. The test of "chief value" is to be applied as values may be at the time of importation. But the government cannot now rely on this contention because, on the hearing in the Circuit Court, it did not raise the point, but conceded that the collector was in error in his finding as to relative values.

The decision is affirmed.

On Rehearing.

In behalf of the government a petition was made for rehearing, based on the allegation that, contrary to the statement in the foregoing opinion, the government had not "conceded that the collector was in error in his finding as to relative values."

PER CURIAM. Inasmuch as both sides do not agree that the particular point now relied on was called to the attention of the trial judge, we shall have to be guided by the record. Petition for reargument denied.

BIDWELL v. PRESTON.

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

No. 144.

1. CUSTOMS DUTIES—REFUND—ACCEPTANCE OF PRINCIPAL—WAIVER OF INTEREST—PAYMENT ON ACCOUNT.

On the refund of duties that had been improperly exacted, interest was withheld on the ground that there was no appropriation for payment of interest; so that the sum repaid was the exact equivalent of the principal. *Held*, that the acceptance of this sum by the importer was tantamount to a waiver of the claim of interest, and could not be considered as a general payment on account, which the payee was entitled to apply, first, to the extinguishment of the interest and, next, to part payment of the principal.

2. SAME—PAYMENT BY STRANGER.

Where the government repaid duties which had been improperly exacted by its agent, a collector of customs, this did not constitute a payment by a stranger which could not inure to the benefit of the collector.

In Error to the Circuit Court of the United States for the Southern District of New York.

This case arose out of an action brought by Gustavo Preston against Geo. R. Bidwell, formerly collector of customs at the port of New York. The opinion rendered in the court below is as follows:

HOLT, District Judge. Judge Platt having decided in a precisely similar case that the plaintiff was entitled to recover interest on the duties exacted, and the judgment on his decision having been paid by the government, orderly practice, in my opinion, requires that I follow that decision. It moreover seems to me on the merits an inherently just decision. If the government exacts money from an importer without legal authority, it ought to repay it with interest; and if an importer has a just right to interest when the principal is paid, I cannot see why that right is destroyed because the government only pays the principal. But I rest my conclusion on the fact of the former judgment and its payment, without having given a careful examination to the question whether the cases cited for the government are applicable to this case.

The motions to set aside the verdict in each case are denied.

J. Osgood Nichols, Asst. U. S. Atty.

John David Lannon, for importer.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The facts in this case are very simple: On August 4, 1899, the plaintiff paid the defendant, who was the collector at the port of New York, under protest, the sum of \$1,843.32, to obtain possession of various goods brought from Porto Rico to New York. This exaction for customs duties was illegal; and in consequence of the subsequent judicial determination of that question, the government of the United States delivered to the plaintiff a draft for \$4,843.32 on September 10, 1901. On that date the defendant in error claimed that the sum of \$5,453.57 was due. This sum included interest on the amount paid from August 4, 1899, to September 10, 1901. This claim was not disputed, but the government authorities took the position that there was "no appropriation available for payment of in-

terest in cases wherein a judgment has not been rendered." Thereafter plaintiff brought this suit to recover the sum of \$610.25 as a balance still due.

Defendant relies upon the well-settled doctrine that, where interest is payable as damages, the reception of the principal without the interest after default is a conclusive waiver of the claim for interest. *Thomas v. Railway* (C. C.) 81 Fed. 911; *Stewart v. Barnes*, 153 U. S. 456, 14 Sup. Ct. 849, 38 L. Ed. 781. The plaintiff contends that this doctrine does not apply, because at the time of payment there was due to him a lump sum of \$5,453.57, and that the sum paid (\$4,843.32), although the exact amount of the claim without interest, was a general payment on account which he was entitled to apply, first, to the extinguishment of the interest and, next, to part payment of the principal. The difficulty with this contention is that it is not warranted by the facts. It appears that at the time of payment plaintiff delivered to defendant a letter containing the following statement:

"In addition to the amount set forth in my claim for duties erroneously exacted on my importation of sugar by the Julia Frances from Port Rico, amounting to \$4,843.32, I claim the interest due on the amount set forth in my claim at the same rate per annum which I reserve and do not abandon."

We are satisfied that this constituted an appropriation of the payment specifically to the claim, and find no persuasiveness in the argument that the repayment by the government of moneys improperly collected for it by its officer was a payment by a stranger which could not inure to the benefit of the debtor.

The judgment is reversed.

SLOAN v. MERCHANTS' SAVINGS & TRUST CO. OF PITTSBURG.

(Circuit Court of Appeals, Third Circuit. April 2, 1908.)

No. 64.

1. **REPLEVIN—NATURE OF ACTION—POSSESSION.**

Though the question of title to personal property may be litigated in replevin, if properly brought, the action independent of statute is a possessory one brought by complainant to recover possession of personal property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, § 1.]

2. **SAME—STATUTES—BOND.**

Acts Pa. 1901 (P. L. 88, No. 61, § 1), declaring that plaintiff in replevin shall give bond, with condition that if he fails to maintain title to goods or chattels he will pay to the party entitled their value and legal costs, etc., does not authorize the giving of such bond in any case in which plaintiff is in possession of the property, title to which he seeks to establish in replevin.

3. **SAME—PLAINTIFF IN POSSESSION.**

Plaintiff may not maintain replevin to establish title to chattels of which he is in possession at the time suit is brought either at common law or Acts Pa. 1901 (P. L. 88, No. 61), regulating procedure in such action.

In Error to the District Court of the United States for the Western District of Pennsylvania.

John C. Bane, for plaintiff in error.

A. C. Stein, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. This case is before us on a writ of error taken for the reversal of the judgment of the district court for the Western District of Pennsylvania in an action of replevin brought by the Merchants Savings and Trust Company of Pittsburg, Trustee in bankruptcy of Henry Weinstock, trading as the Grand Rapids Furniture House, against Sophia Sloan. The property mentioned in the writ of replevin and declaration consisted of furniture, carpets and other household goods, formerly belonging to the bankrupt and alleged to have been transferred by him on or about March 16, 1905, to Mrs. Sloan without adequate consideration, and for the purpose of cheating and defrauding his creditors. It appears from the record and is not disputed, but admitted, that most of the property included in the writ was at the time the action was brought in the possession of the trustee in bankruptcy; and it further appears from the record that it is at least doubtful whether the residue of the property mentioned in the writ was not at that time also in its possession. After all the evidence in the case had been adduced the counsel for Mrs. Sloan submitted a motion that the jury be directed to return a verdict for the defendant; one of the grounds on which the motion was based being as follows:

"(f) It is alleged in the declaration, filed by the plaintiff in said action, that plaintiff has made demand of defendant for the delivery of said goods and merchandise, but defendant has neglected and refused and still neglects and refuses to deliver possession thereof to the plaintiff; and it appears by the evidence introduced by the plaintiff that the plaintiff was in possession of said goods and merchandise at and before the date when said action was brought and the writ of replevin was issued therein; and it also appears by the evidence introduced by the plaintiff that, at the time said action was brought and the writ of replevin was issued therein, the defendant was not in possession of said goods and merchandise; and it further appears by the evidence introduced by the plaintiff that all of said goods and merchandise have heretofore been sold by the plaintiff."

The court overruled the motion and the case having been submitted to the jury without argument a verdict was returned in favor of the plaintiff. Notwithstanding the fact that the subject of possession was thus brought to its attention, the court did not submit to the jury any question touching the possession by the plaintiff at the time of the commencement of the action of the whole or any portion of the property mentioned in the writ and declaration, or in any manner refer to that subject. On the contrary it confined itself to the question of title, and on that point, among other things, charged the jury as follows:

"If you find the title to the goods in question at the time of the bringing of this suit was in the Merchants Savings & Trust Company, the Trustee of Henry Weinstock, it is your duty to find in favor of the plaintiff in the case."

This portion of the charge is the subject of the third assignment of error. The assumed exclusiveness of the question of title was ac-

centuated in other portions of the charge, among which are the following:

"It is an action of replevin; and, in the shape in which this action is, it resolves itself into the question of the title of the goods in question. * * * If you find the title to those goods is in Sophia Sloan, the defendant, it is your duty to find a verdict in her favor. * * * The question for you to determine under the evidence here is whether the goods, the title to the goods, remained in Henry Weinstock for the benefit of his creditors, or whether the title to those goods was vested in Sophia Sloan. * * * If you find that this purchase was in good faith for a present fair consideration, return a verdict in favor of this defendant, Sophia Sloan. If you find it was not, that the title to these goods was in the bankrupt, you will find a verdict in favor of the plaintiff in this case."

The relevancy or materiality of the question of possession was wholly ignored. We think there was reversible error in the portion of the charge quoted in the third assignment. Certainly, aside from the statute of Pennsylvania, No. 61 of the acts of the Session of 1901 (P. L. 88), replevin is a possessory action brought by the plaintiff for the recovery by him of the possession of personal property. It is true that the question of title may be litigated in the action, if properly brought, but the action cannot properly be brought by one who is already in possession of the property mentioned in the writ and declaration. Nor do we find anything in the state statute referred to which either requires or will permit an action of replevin to be brought by one who is already in possession. Section 1 provides for a replevin bond, with condition as follows:

"If the plaintiff or plaintiffs fail to maintain their title to such goods or chattels, he or they shall pay to the party thereunto entitled the value of said goods and chattels, and all legal costs, fees and damages, which the defendant or other persons, to whom such goods or chattels so replevied belong, may sustain by reason of the issuance of such writ of replevin."

Section 2 of the act provides as follows:

"If any other person than the defendant named in the writ be found in possession of the goods and chattels he shall be duly served with the writ, and his name added as a party defendant to the cause. The writ shall command the sheriff to serve the party in possession as well as the defendant named."

The statute requires the writ to be served on the party in possession, and the idea that the writ shall be served on the person who sues it out is absurd. There is nothing in the statute to countenance the notion that the action will lie for the recovery of property of which the person suing is already in possession. Hence, the question of title to the property replevied can legitimately arise in an action of replevin only when brought by one out of possession; for, if the plaintiff be in possession, the action cannot be sustained at all. It follows as a corollary from what has been said that section 1 of the state statute in providing for the execution and filing of a replevin bond does not exact, authorize or countenance the giving of such bond in any case in which the plaintiff is in possession of the property for which he mistakenly brings his action. A bond required under such circumstances is exacted without legal authority and is a nullity. The judgment below must be reversed, with costs, and a venire facias de novo awarded; and it is so ordered.

CHRISTY v. SCHWARTZCHILD & SULZBERGER CO.

(Circuit Court of Appeals, Seventh Circuit. February 7, 1908. Rehearing Denied May 6, 1908.)

No. 1,407.

APPEAL AND ERROR—REVIEW—INSUFFICIENCY OF RECORD.

To authorize the reversal of a judgment error must clearly appear, and, where, on the trial of an action by a servant against the master to recover for a personal injury, the plaintiff as a witness was permitted to "indicate" his position at the time of the injury by signs and gestures which do not appear in the record, but which may have been important or even vital upon the issue of contributory negligence, the action of the trial court in directing a verdict for the defendant cannot be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2911-2915.]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

This is an action to recover damages for an injury to plaintiff in error caused by the falling of an elevator in the packing house of defendant in error. The trial court sustained a motion to direct a verdict for defendant, and the record is brought here for review by writ of error.

The ground of liability asserted is that defendant did not provide a safe working place or safe appliances, and that the elevator operator was incompetent, and known to be so by the master, and was not properly instructed in his duties. The casualty itself was the catching of the plaintiff in the coils of the elevator cables, caused by their being suddenly straightened out by the falling of the car. Plaintiff was a rigger, working at machinery hoisting, and was the elevator cable man, the rope man, whose duty was to put cables on drums, mend cables, test and repair elevator signals, hoist machinery, etc. He was not a millwright, and had nothing to do with repairing the elevator machinery. The elevator is the Barth electric freight lift, supported by two three-quarter inch steel cables running over a drum, and two other like counter balance cables. It had been under repair two weeks. Two safety devices, known as the "guide grips" or "safety clutch" and the "slack-cable device," serve to stop the car or cut off the power when required. The safety clutch or guide grips consist of castings, eccentric in form, called "dogs," a spring and levers under the car, etc. When the device is in working order and the descent of the car is arrested by the grips, they will not let go until properly released, but at the time of the accident they held for a time and then suddenly and unexpectedly let go. The car dropped and the injury followed. The slack-cable device served to automatically disconnect the electric motor and the spool or drum on which the elevator cables were wound, and when in working order was held in proper position by the vertical cables hanging from the drum and supporting the weight of the elevator. If for any cause these cables became slack, as by stopping the elevator by the guide grips without stopping the cable drum, the slack-cable mechanism would fall to the floor, and by its weight turn an arm or lever so as to disconnect motor and drum, and thus prevent further unwinding. The elevator operator knew how to start and stop the car. His prior work was yarding cattle. Four days before the accident he was put on the elevator, spending a day, as one witness says, and three hours, as he says, learning to work it. At the time of the accident, the millwrights were trying to repair the elevator. Manhoff and Schmidl were the millwrights: They had been experimenting with the safety clutch for some time, but could not get it to work properly, and Manhoff went to the elevator shanty, above the upper floor, to examine the machinery there.

When Manhoff reached the elevator shanty, he found the slack-cable device out of order. He took it to the shop, had some bent parts straightened, brought it back, and replaced it. He did not properly tighten the set screws holding the arm which turned off the power, as every time the car stopped while descend-

ing, from the imperfect action of the safety clutch, it was necessary to take up the slack cable by having the operator turn the handle in the car. The slack-cable device does not appear to have worked at all after Manhoff replaced it, and for some reason which does not appear he did not adjust it at the time it was replaced by him. Such was the situation immediately before the accident. The elevator was not being used for work, but only for experimenting with the repairs. The safety dogs under the car were stopping it every few feet on its down trip, and then letting go. The slack-cable device was not working, and the loose cables were being taken up under Manhoff's orders by turning the wheel in the car for an upward movement.

Manhoff returned to the motor shanty, continuing his efforts to get the elevator machinery in proper condition. Seeing plaintiff coming from another part of the building, he called him to see if the cables were of the same length. Plaintiff examined them and pronounced them all right. He knew that repairs were being made, and that he was called because there was something wrong with the machinery. Finding there was nothing wrong with the cables, Manhoff ordered the elevator down, and plaintiff instead of going on about his own work, staid by. The car descended a few feet, and the same thing happened as so often before. The safety dogs gripped the guide, stopped the car, and the slack-cable device fell to the floor, but failed to disconnect the motor and drum. The drum kept turning and the cables unwound. The operator did not turn off the power with the car wheel, but allowed the cables to unwind until Manhoff shouted down to him to shut off the power, which he did. By this time the cables had unwound about 15 feet, and lay coiled and twisted on the floor in front of the drum at the side of the motor like a huge snake. As soon as the drum stopped, Manhoff threw out the switch and cut off the electric current from the motor. He and the plaintiff then started to straighten out the cables so as to rewind them on the drum. Manhoff stood at one end of the drum and plaintiff near the other end, in front of and about a foot from it, and at the side of the motor. Manhoff asked what was the matter with the clutch or brake, which is a device holding the drum fast, and preventing it from being turned back. As they were preparing to rewind the cable, it was necessary to release this device. Plaintiff stooped over towards the drum and just as he did so the safety clutch under the car let go. The elevator fell, the cables straightened out with great force, catching plaintiff by the legs, breaking both of them, and causing a permanent injury through consequent atrophy of the muscles of the right leg.

It does not appear just how the cables caught the plaintiff, or whether he was standing within their coils. He says they unwound around him, in around him and alongside of him, and that he did not change his position at any time before the accident. "Before the car fell there was no cable around me or in front of me." "It was right alongside of me, the right side as I was facing the drum." He further testified that he assisted Manhoff to straighten out the cables, so far as to get his hands on them and pull them. After he was caught in the cables he says; "My feet were in this shape [indicating] and my head was like that [indicating]. I should judge my feet were two feet or so above the floor. I was laying on my side like that [indicating]." By reason of this inexcusable fault of permitting a witness to "indicate" something which cannot possibly be preserved in the record, it is impossible to get any clear notion of just how the accident really happened. Manhoff says that plaintiff had gotten up on the base of the drum, about six inches above the floor, looking at the brakes, when the car fell, and that there was no cable where he was standing, right near him, and that he himself was standing within two inches of the cable as it lay on the floor. Plaintiff further testified that the cable was coiled up in the shape of the letter U.

The trial court directed a verdict for the defendant on the ground that plaintiff was a volunteer, that the only negligence for which the master could be charged was that of a fellow servant, and that plaintiff was guilty of contributory negligence.

Simon Kruse, for plaintiff in error.

John D. Black, for defendant in error.

Before BAKER and SEAMAN, Circuit Judges, and SANBORN, District Judge.

SANBORN, District Judge (after stating the facts as above). The work being done at the time of the accident was repairing. The elevator was not in use, except to experiment with the repairs. Plaintiff was called by the millwright to learn if the cables were properly placed on the drum. Having completed this, his duty ceased, and his staying to assist further was repair work, and made him a fellow servant with the millwright, assuming the risks of that service. *Reed v. Moore & McFerrin*, 153 Fed. 358, 82 C. C. A. 434. If the elevator operator had been incompetent for want of instructions or other cause known to the employer, and his negligence had caused the injury, plaintiff would not have assumed that risk; but he was instructed, and, so far as appears, competent to run an elevator when in repair, and his failure to prevent the unwinding of the cables was the remote cause, the proximate cause being the defective clutch in process of repair.

The condition in which the record comes to us makes it also necessary to hold the plaintiff chargeable with contributory negligence. Plaintiff was permitted to "indicate" and "illustrate" his testimony by signs and gestures which are not explained, but which were entirely intelligible to the trial court. It thus happens that important, perhaps vital, evidence is not before us. If this evidence were here, it might be clear from the way plaintiff was caught in the cables that he carelessly placed himself in a dangerous position. To authorize reversal error must clearly appear. The trial court, with all the evidence before it, directed a verdict for defendant. Some of the evidence being omitted we cannot say this was error. *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 53 N. E. 235. Although the bill of exceptions is certified to contain all the evidence offered, heard or taken at the trial, yet the omission of matters apparent on its face, which might have been controlling of the decision below, must lead to affirmance of the judgment.

The judgment is affirmed.

THE RESOLUTE.

(Circuit Court of Appeals, Second Circuit. March 10, 1906.)

No. 190.

TOWAGE—STRANDING OF TOW—LIABILITY OF TUG.

A finding affirmed that a tug was liable for damages resulting from the stranding of a barge which she was towing from anchorage in New Haven Harbor, and that the evidence did not sustain the defense that the barge struck an unknown obstruction on the anchorage grounds, but rather indicated that through an error of the master the tug and tow were outside the dredged basin used as the anchorage grounds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, §§ 11-20.]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree holding the tug liable for damages resulting from the stranding of a barge which she was towing from anchorage out of New Haven harbor.

For opinion below, see 149 Fed. 1005.

Robinson, Biddle & Benedict (W. S. Montgomery and Roderick Terry, Jr., of counsel), for appellant.

James K. Macklin and La Roy S. Gove, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. Upon the whole case, despite some strong testimony adduced by the claimant, we are inclined to affirm the District Judge. No report was made at the time of the alleged "unknown obstruction on the anchorage ground," and no effort was made to take ranges and determine the exact location, although the barge was stranded for a considerable time. These circumstances cast some measure of doubt on the testimony of those who two years subsequently undertake, from their unaided memory, to locate the stranding on the anchorage ground. The testimony as to location is conflicting, but we are inclined to take the one first marked by the witness Collier—near the south corner of the anchorage ground. If it be so taken, there is a suggestion in the evidence of the master of the tug which may sufficiently account for the stranding. The tow was anchored in the northerly part of the anchorage grounds. The tug, after she got under way, proceeded down towards the southerly end of anchorage intending to proceed thence in the main channel. The stranding occurred before she had reached this southerly end. The chart shows that the anchorage basin is not a parallelogram; it runs alongside the channel for a considerable distance with a uniform width of nearly an eighth of a mile, but to the south its inshore boundary runs at an angle, so that for a considerable distance the dredged basin grows gradually narrower till it reaches its southern end on the edge of the channel. In consequence, a vessel which is proceeding 50 or 60 feet west of the channel will find itself inshore of the boundary of the basin before it has reached the southern end. Now the master of the tug apparently did not so understand the situation. He testified that the anchorage ground was about 300 or 400 feet wide, and that so far as he knew it did not narrow, but "is supposed to be dug all the same width." He might very easily, therefore, have supposed he was on anchorage ground because he had not yet reached the buoy which marked its southerly terminus, when in fact by reason of the gradual reduction of the width both tug and tow were actually inshore of the dredged basin.

The decree is affirmed, with interest and costs.

NEWHALL v. JORDAN, Collector.

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

No. 142.

CUSTOMS DUTIES—PAYMENT WITHOUT PROTEST—PAYMENT UNDER MISTAKE OF LAW.

Importers paid an internal revenue tax on their importations under a mistake of law, without protest of any kind, written or oral. *Held*, that they were not entitled to relief.

In Error to the Circuit Court of the United States for the Eastern District of New York.

For decision below, see 149 Fed. 586.

These proceedings were brought in behalf of E. Harold Newhall, plaintiff in error and plaintiff below, against Edward B. Jordan, United States collector of internal revenue for the First district of Brooklyn, defendant in error and defendant below.

John David Lannon, for plaintiff in error.

William J. Youngs, U. S. Atty., for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The defendant, as collector of internal revenue, caused to be collected taxes upon two importations of bay rum from Porto Rico, which taxes were paid by the plaintiff without protest of any kind, written or oral.

The Circuit Court, following *Chesebrough v. United States*, 192 U. S. 253, 24 Sup. Ct. 262, 48 L. Ed. 432, held this to be a payment under a mistake of law for which no relief exists. 149 Fed. 586.

We are satisfied, after an examination of the authorities, that this conclusion is correct.

The judgment is affirmed.

GOOD FORM MFG. CO. V. WHITE.

(Circuit Court of Appeals, Second Circuit. February 11, 1908.)

No. 141.

PATENTS—VALIDITY AND INFRINGEMENT—NECKTIE.

The Davies patent, No. 605,947, for a necktie, although of narrow scope discloses invention, and is valid; also *held* infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

On appeal from a decree of the Circuit Court, entered May 14, 1907, dismissing the bill, which was filed for the infringement of letters patent No. 605,947 granted to Charles W. Davies for an improvement in neckties. The opinion below is reported in 153 Fed. 759.

Baxter Morton, for appellant.

J. E. Hindon Hyde, for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

PER CURIAM. A clear and careful description of the Davies patent and of the prior art will be found in the opinion of the Circuit Court. This need not be repeated here. The judge was in doubt upon the question of invention; but, conceding patentability, he was of the opinion that the claim should be limited to the precise structure described and shown.

The invention is one of minor importance, having for its object the improvement in appearance and fit of an article of wearing apparel. It belongs generally to that class of inventions which this court considered and sustained in *Frost Co. v. Cohn*, 119 Fed. 505, 56 C. C. A. 185, *Young v. Wolfe* (C. C.) 120 Fed. 956, and *Parramore v. Taylor*, 114 Fed. 97, 52 C. C. A. 45. The testimony convinces us that prior to the invention of Davies there was serious difficulty in keeping the necktie in place when a standing collar was used. The tie was apt to move laterally and rise on the collar, and when tied tight enough to prevent these movements the bow was unsymmetrical and presented a slovenly appearance generally. That these defects were appreciated, and that an earnest effort was made to remedy them for more than ten years prior to the patent, is shown by the record. Various expedients for anchoring on the collar before and behind were tried, but they all possessed defects from which the Davies method is free. The device shown in the patents referred to in the opinion of the Circuit Court fell far short of remedying the defects.

The patent upon which, perhaps, principal reliance is based, was granted to Jacob Hirshfeld for an outing belt. The patent describes, and the drawings show, an ordinary cloth belt provided with a two-part clasp and a sash stitched to the belt about one-third of its length by parallel lines of stitches. The belt is intended for use by women when engaged in outdoor sports; the sash being tied into a bow knot and worn at the back, as shown in the drawings. The specification states that after the bow has been formed the belt may be removed or arranged in position without disturbing the knot. Even though this structure were reduced to the size of an ordinary necktie, it is manifest that it could not be used to accomplish the results of the Davies invention, for the reason that it would not prevent either vertical or lateral movement. Though belonging to a limited field and dealing with subordinate improvements, we are of the opinion that the features added by Davies produced an advance in the art which required a higher grade of ability than can be attributed to the skill of the calling. Although it is true that the patentee encountered great difficulty in the Patent Office, his claims being rejected over and over again, yet we are unable to see that the proceedings there require a construction of the claim which will enable the defendant to escape the charge of infringement.

The defendant's tie contains every element of the claim, except that the connections are not elastic, buttonholes have been substituted for rings, and a different method of fastening the connection to the inner face of the band has been adopted. But these are changes not affecting the essence of the invention, which is found unaltered in the defendant's device. The complainant's expert, after comparing the de-

fendant's tie with the claim, reached the conclusion, in which we think he is correct, that "the claim, taken element by element and feature by feature, reads squarely upon the defendant's tie." The questions involved are not entirely free from doubt, but we think the doubt should be resolved in favor of the patent.

It follows that the decree must be reversed, with costs, and the cause remanded to the Circuit Court, with instructions to enter the usual decree for the complainant.

BELLows v. UNITED ELECTRICAL MFG. CO. et al.

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

No. 163.

PATENTS—VALIDITY AND INFRINGEMENT—TELEGRAPH KEY.

The Coffe patent, No. 812,183, for an improvement in telegraph keys, was not anticipated, and discloses invention of a meritorious character, which entitles the patentee to the benefit of the doctrine of equivalents. Claim 11 also *held* infringed. Claims 12, 13, 16, 18, 19, 21, 23, 25, 26, 27, and 28, all of which contain as an element what is known as a "finger mechanism," *held* not infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree dismissing a bill of complaint in a patent infringement suit. The patent involved is No. 812,183, issued February 13, 1906, on application filed January 11, 1904, to William O. Coffe for improvement in telegraph keys. The claims in controversy are 11, 12, 13, 16, 18, 19, 21, 23, 25, 26, 27, and 28.

For opinion below, see 153 Fed. 588.

Lyman Ward (E. L. Thurston, of counsel), for appellant.

Kerr, Page & Cooper (Parker W. Page and Thomas B. Kerr, of counsel), for appellees.

Maurice P. Davidson (Alfred Yankauer, of counsel), for creditor respondents.

Douglas & Minton, for creditors.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The devices of the patent have been obscured by a multitudinous number of claims—28 altogether—most of them wholly superfluous and the result of a long controversy with the Patent Office on matters of detail; the inventor presented himself originally with 18 claims. The main invention, however, is not difficult of comprehension, and since the entire prior art is embodied in a single patent the case is really a very simple one.

The original Morse key consisted of a pivoted lever carrying a button or finger piece at one end, and was worked solely by the hand of the operator, who, grasping the button with his fingers, oscillated the lever into and out of contact with a suitable terminal, thereby sending impulses of current over a telegraph line. The Morse code consists of what are called "dashes and dots." A dash is produced by holding

the lever in contact to close one circuit for a brief interval; dots are produced by bringing the lever rapidly in and out of contact to close another circuit. It is not necessary to set forth details. Suffice it to say that the muscles and nerves of the operator's arm were subjected to great strain during prolonged hours of work, many operators becoming victims of what is known as "telegrapher's paralysis." To remedy this, defendant Martin devised a transmitter, which would relieve the operator of at least a part of this severe strain. That device is shown in patent to Martin, No. 732,648, June 30, 1903. A finger piece is maintained in a normal position midway between two contact stops, and is movable horizontally to right and left. If moved to the left and against the contact stop on that side the line is closed, and a current allowed to flow as long as such contact continues, thus producing a "dash" as with the ordinary key. If the finger piece is moved to the right into contact with the contact stop on that side it closes the circuit of a small electro-magnet. This magnet is provided with a pivoted armature; the tip end of such pivoted armature contacts with the tip end of a pivoted pendulum, the two being normally in contact, springs and stop-pieces being so arranged as to limit movement and restore parts to place. These contacting pivoted structures are in a circuit, formed when the key piece is moved to the right, through which circuit go the "dot" impulses. By reason of the fact that as soon as this circuit is established the small electro-magnet comes into play, the armature is at once attracted to the magnet. The armature, as soon as its movement is stopped by contact with the pole face of the magnet, kicks the pendulum out of contact with itself, thereby breaking the circuit; attraction by the electro-magnet at once ceases and a spring retracts the armature. Immediately thereafter, returning under spring influence from the point to which it was kicked, the tip of the pendulum again contacts with the tip of the armature, circuit is restored and the operation is repeated. This action continues automatically so long as the finger piece is held to the right-hand contact. The result is a succession of dot impulses, produced not by the rapid and incessant movement of the operator's hand, but the single act of pushing the finger piece to the right. This ingenious little device saved an enormous amount of strain; it eliminated much more than half of the operator's hand movements. So far as the record shows, Martin's device was developed in a barren field; no work in the same direction, even unsuccessful work, by other patentees is disclosed. It is conceded on both sides that his patent discloses a highly meritorious invention.

Meritorious, however, though it was, it apparently had its defects. It was complicated, which added to its cost, and, it may be, impaired its reliability. From the above description it is evident that an electro-magnet or magnetic engine is an essential element of the instrument, and it was desirable to simplify it by eliminating that element, thus making it a motorless, nonelectrical, or, as complainant expresses it, a self-contained, instrument. The specification of the patent in suit says:

"The mechanisms heretofore used for effecting this result have comprised electro-magnets, batteries, switches, adjustable springs, and other features

making a complex and expensive apparatus and one requiring continual adjustment as the battery runs down. The object of [my] invention is to provide a mechanism to accomplish the same result while doing away with the electro-magnets and batteries, the construction being at once simple, cheap, durable, and not liable to get out of order."

We do not find it necessary to describe the details of Coffe's structure. It includes in combination: (1) A vibrator which is of such character that it has the inherent capacity for continued vibration when once its vibration is initiated, and (2) a lever capable of being controlled by an operator and having the threefold function (a) of imparting to the vibrator the energy for initiating its vibration, (b) of moving said vibrator to and holding it in an idle position in which it cannot vibrate, and (c) of releasing it so as to permit it to vibrate effectively. The vibrator of the prior Martin patent is an electro-magnetic vibrator, and is controlled electrically by the magnet. The vibrator of the Coffe patent is a mechanical vibrator, and is controlled mechanically by the lever. So far as the record shows Coffe was the first to substitute this mechanical control for the magnetic control, no work in the same direction, even unsuccessful work, by other patentees is disclosed. Coffe's is the first self-contained instrument of this class, where the vibrator is controlled mechanically without the use of an electro-magnet or other subsidiary motor. Martin has testified at great length as to his experiments and productions in the field of telegraph-key mechanism, but we find his testimony unpersuasive to any conclusion adverse to Coffe. Wherever Martin's testimony is supported by sketches, or experimental models, or the statements of other witnesses he seems to have been working along the lines of his first device with a subsidiary motor as an element—electro-magnet, clockwork or small caloric engine. In our opinion the device of the patent in suit is a meritorious invention, and the patentee is entitled to the benefit of the doctrine of equivalents.

Besides the combination of vibrator and lever above set forth the patent discloses various other parts, the details of which need not be set forth. All the claims in controversy, except No. 11, include as an element what is known as the "finger mechanism"; we find in defendant's device such a departure from that mechanism as precludes us from holding those claims to be infringed. It will be necessary therefore to discuss claim 11 only, which reads as follows:

"11. In a telegraph transmitter, in combination, a vibrator adapted to make and break an electrical circuit, a key-lever for controlling the operation of said vibrator, and an independent circuit controller carried by said lever."

The "independent circuit-controller carried by said lever" is the contact point through which circuit is closed when the finger piece is moved to effect a "dash" impulse. We do not find in the record of proceedings in the Patent Office anything which would require a construction of this claim other than such as would be put upon its very plain language read in connection with the description of invention set forth in the specifications.

It is contended by the defendants that it is so broad as to cover the device of the prior Martin patent, but we think such contention is whol-

ly unfounded. The very object of the invention was to avoid control of the vibrator by the use of electro-magnets and batteries and to substitute therefor a purely mechanical control by the lever itself. To interpret the words "a key-lever for controlling the operation of the vibrator" so broadly as to cover "an electro-magnet for controlling the operation of the vibrator," would be to strain their meaning far beyond what they were used to express. The complainant's "particular embodiment" of the invention described in the specification discloses a vibrator which consists of a pendulum hanging vertically from a standard. When released from control by the lever it swings to and fro, as pendulums do, bringing a leaf spring at its lower end into and out of engagement with a contact point. When the spring is in engagement with such point a circuit is established through which impulses are sent, and, since contact is being made and broken quickly through the swing of the pendulum, these impulses are the short ones known as "dots." When enough dots have been sent, the operator ceases to hold the finger to the right, and a spring returns the lever to normal position; that is, with its end pressed sideways against the pendulum holding the latter at rest with its contacting leaf spring engaged with a dead stop-piece opposite to the contact point with which the spring made and broke connection when in motion. The act of thus moving the pendulum to one side with its depending spring pressing against the stop-piece imparts a tendency to begin vibration (under impulse of the spring) as soon as the lever is moved out of normal position. At the finger end of the lever there is a contact point, so arranged that when the operator moves the finger piece, it engages with another contact point establishing a circuit, independent of the circuit through which "dot" impulses are sent by the oscillating pendulum. This independent circuit carries the "dash" impulses, and the contact point in the finger piece controls it. In normal position both circuits are open.

In defendant's apparatus the vibrator is hung horizontally instead of vertically. It is, mechanically speaking, a reed. The lever is cut off a short distance beyond the pivot and is prolonged with a short length of flexible blade spring, beyond which extends a rod with an adjustable weight. When the lever moving up to and against a stop-piece is suddenly stopped, the weighted rod beyond the blade spring vibrates as a pendulum does; such a reed is a well-known mechanical equivalent of the pendulum. When set in motion by the movement of the lever, the horizontal oscillations of the weighted rod bring a leaf spring at its side into and out of engagement with a contact point. When the spring is in engagement with such point a circuit is established through which impulses are sent, and, since contact is being made and broken quickly through the oscillations of the weighted rod, these impulses are the short ones known as dots. When enough of them have been sent, the operator ceases to hold the finger end of the lever to the right and a spring returns the lever to normal, which is a position so far from the contact point that the leaf spring can no longer make circuit, and the lever being at rest vibration soon ceases. It is the movement of the lever in one direction which imparts vibration through its being driven against a stop-piece, while the return of the lever puts the vi-

brator out of action. The operation of the vibrator is controlled by the key-lever and in substantially the same way as in the patent. At the finger end of the lever there is a contact point so arranged that when the operator moves the finger piece it engages with another contact point establishing a circuit independent of the circuit through which dot impulses are sent by the oscillating reed. This independent circuit carries the dash impulses, and the contact device on the finger piece controls it. There are differences in the structure of the finger end of the lever. The defendant's device includes a supplementary key-lever mounted on the main key-lever and having a very slight play; but, construing this claim as we do, we regard such differences as immaterial details. Both combinations accomplish the same results in substantially the same way and by the use of well-known mechanical equivalents. Infringement of claim 11 is proved, but since the appellant has failed as to the other claims there can be no costs of this appeal.

Decree reversed and cause remanded, with instructions to decree in conformity with this opinion, but without costs.

MARTIN v. WALL.

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

No. 162.

PATENTS—INFRINGEMENT—TELEGRAPH TRANSMITTER.

The Martin patent, No. 767,803, for a telegraph transmitter, *held* infringed as to claims 1 and 2.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree for injunction and accounting in a suit on patent 767,303 granted August 9, 1904 (application filed May 7, 1904), to Horace G. Martin for a telegraph transmitter, or key.

For opinion below, see 153 Fed. 589.

Lyman Ward (E. L. Thurston of counsel), for appellant.

Kerr, Page & Cooper (T. B. Kerr and Parker W. Page, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The parties are practically the same as in the suit of Bellows v. United Electrical Mfg. Co. and Martin (160 Fed. 663), opinion in which is filed at this session, Wall being a seller of instruments made by the Mecograph Company under which name Bellows does business.

The keys complained of are made under the Coffe patent which we sustained in the other suit, and are covered by claim 11 therein considered, but in details of structure on the finger side of the lever they differ from the mechanism shown in that patent and covered by several of its claims. They more closely resemble the device of the patent in this suit. The Coffe patent has a lever movable in one direction

only for dot impulses and a supplemental key lever for sending dashes to line. Complainants' patent in suit has a key lever itself movable in one direction for dots and in the other for dashes. The improvement is a small one, but we think exhibits patentable invention, and infringement seems to be clear. The Coffe patent, as we have found, antedates Martin's earliest date, but that circumstance is not material, since the particular improvement now under consideration is not shown in it. Complainant admitted on cross-examination that, when he "commenced to manufacture and sell his vibroplex instrument" and "when he filed his application" he was aware that instruments like those now complained of were being manufactured and sold. Defendant put in no evidence, and we do not know how long after the filing of application for Coffe's patent it was when the latter produced his instruments with the improvement not covered by that patent. On the proof as it stands (it is in that respect substantially the same in both cases), we are not satisfied that Martin antedated Coffe as to the main invention, but we are of the opinion that Martin conceived the particular instrument shown in the patent in suit, and reduced it to practice before he began to manufacture it for sale.

The opinion of the Circuit Court is affirmed as to claims 1 and 2, with costs. Claim 3 seems to have been included in the decree by inadvertence resulting from an error of printing in the official copy of the patent, the last line of claim 2 and the first line of claim 3 having been omitted. No charge of infringement of the third claim was ever pressed. Under these circumstances, costs should not be withheld.

EMPIRE CREAM SEPARATOR CO. et al. v. SEARS, ROEBUCK & CO.

No. 221.

(Circuit Court of Appeals, Second Circuit. April 4, 1908.)

PATENTS—INFRINGEMENT—CREAM SEPARATORS.

The Andersson patent, No. 555,893, for an improvement in centrifugal cream separators, which consists essentially in the use of an eccentrically pierced rotatable plug through which the cream flows after being separated from the milk, was not anticipated, and discloses invention, but is restricted by the prior art within very narrow limits. As so construed *held* infringed by one device used by defendant, but not by others.

Appeal from the Circuit Court of the United States for the Southern District of New York.

On appeal from a decree of the Circuit Court entered December 3, 1907, holding valid and infringed both claims of letters patent No. 555,893 granted March 3, 1896, to Gustaf M. Andersson for improvements in centrifugal cream separating apparatus. The opinion below is reported in 157 Fed. 238.

Frank T. Brown, Francis A. Hopkins, and Andrew Foulds, Jr., for appellant.

William Houston Kenyon, for appellees.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The Andersson patent, relates to a minor and subsidiary part of an exceedingly ingenious and useful machine, viz: an eccentrically pierced rotatable plug, through which the cream flows after being separated from the milk by the action of a centrifugal separator. The patentee states that the object of the invention is to provide a delicate adjustment of the fluid outlet from the separating drum, so as to secure thick or thin cream at the will of the operator, the thin cream being nearest the periphery of the revolving drum and the rich cream at the center.

The specifications says:

"The outlet for the lighter fluid is an adjustable plug a, rotatively mounted in an opening in the upper wall of the main separating chamber of the drum and preferably screw-threaded exteriorly. This outlet-plug is pierced eccentrically, so that when this outlet-plug is turned the orifice will be moved toward or from the axis of the separating drum. * * * The outlet-plug a is located at a distance from the axis of the drum corresponding very nearly with the radius of the inner wall of the fluid within the drum during the operation of the drum. The intense centrifugal force resulting from the rapid revolution of the drum causes the separation of the particles of the fluid and a rearrangement of the particles according to their specific gravity, the heavier particles arranging themselves near the periphery of the drum and the lighter particles arranging themselves nearest the axis of the drum. Now the position of the outlet a' for the lighter particles determines the density of the lighter fluid that passes out through such outlet a', for the reason that the outlet for the heavier fluids is fixed, and the relative positions of these two outlets determine through the equilibrium of the fluids the density of the fluid which will flow out through the outlet a'. As the fluid supplied to the separating-drum is not always of the same consistency, it becomes necessary at various times to slightly adjust the outlet a', even when the device is always used upon the same character of material, as well as to initially delicately adjust the outlet."

The claims are as follows:

"1. In a centrifugal separator, the combination with the separator-drum of an eccentrically-pierced rotatable plug fitted in the walls of a separating-chamber of said drum and so arranged that the rotation of said plug adjusts the distance from the axis of the drum to said eccentric opening, substantially as set forth.

"2. In a centrifugal separator, the combination with the separator-drum of the rotatable screw-plug a, having the eccentric orifice a' formed therein and fitted in the walls of a separating-chamber of said drum, substantially as set forth."

The only distinction between the claims from a legal point of view is that the second claim is limited to a screw-plug. In short, the entire controversy relates to a rotatable plug, but little larger in diameter than an ordinary lead pencil, with a hole through it between the axis and periphery.

The main defense relied on is that, if Andersson has made any invention at all, it must, in view of the prior art, be restricted within the exceedingly narrow limits permitted a simple improvement in a well known art.

Williams in his patent No. 500,787 of July 4, 1893, shows a centrifugal creamer with a vertical tube attached to the separator bowl and so located that it comes just where the cream wall and milk wall meet, the thickness of the cream being varied by means of a screw threaded nozzle in the end of the tube. The Williams application

was filed May 12, 1892. That such a patent may be considered, though issued after the application of the patent in controversy, is decided in *Drewson v. Hartje Co.*, 131 Fed. 734, 65 C. C. A. 548. A prior patent to Petersen and Nielsen is for the delivery of different grades of cream from the separator by means of a discharge pipe adjusted forward or back, to regulate the discharge of cream. Bergh, in 1887 (No. 14,120), provided his separating machine with one or more small pipes screwed into the neck and thus rendered adjustable therein. The Malmros machine has a concentrically pierced radial screw-plug capable of being screwed in or out to tap the thick or thin cream, respectively. This is the principle upon which the plug of the De Laval Company operates. They employ a rotatable plug with a hole through the center, located in the vertical wall of the neck of the separating-chamber, with its axis radial to the axis of the chamber so that it may be screwed to take the thick or thin cream as desired. The De Laval Company has also used a solid plug which is located as is the one last mentioned, but so arranged that its inner end projects into a vertical passage through which the cream passes, the flow being regulated by the extent of the obstruction of the passage by the plug. All of these and similar constructions, showing inconsequential changes and variations, were described in patents and publications or were in actual use prior to the Andersson's application. Though none of them anticipates, the field of invention is confined within exceedingly narrow limits.

Indeed, the persistency with which the defendant clings to the vertical rotatable plug furnishes one of the principal reasons which leads us to reject the defense of non-patentability. The problem was so simple and so many solutions were offered by the prior art that it would seem that a mechanic of very ordinary skill should have found a successful solution without adopting the eccentrically pierced rotatable plug. For instance, a series of small vertical passages with openings at the top of the neck might have been arranged with a sliding or pivoted cover having one opening therein to register with the opening of the passage which the operator desired to use, the other openings remaining closed. We see no reason, either, why the De Laval solid plug inserted radially but with an opening through it at right angles to its axis near its end, the plug crossing an oblong vertical passage to the cream wall with an opening at the top of the neck—the opening being less in width than the diameter of the plug—could not have been made available. In this way when the plug is screwed in or out the opening in the plug may be brought into a vertical position at any desired distance for discharging rich cream or otherwise. Again, a vertical plug with a concentric opening through it and a pipe at the lower end extending from the concentric opening and at right angles thereto to a point near the periphery of the plug, might have been utilized.

These suggestions are only made tentatively to illustrate some of the methods which even a layman might adopt to facilitate a result, the importance of which was known to all, viz.: a discharge opening, the intake of which could be varied slightly with reference to the position of the cream. However, we are inclined to give the benefit of

the doubt to the patent and are of the opinion that Andersson has made a sufficient improvement to entitle him to protection against one who uses that improvement.

As the first plug made by the defendant was a Chinese copy of the patented plug, the decree, so far as the "Old Style" plug is concerned, was properly granted. As to the other plugs in controversy we are of the opinion that a construction broad enough to cover them will invalidate the claims. It is unnecessary to go to the lexicographers to ascertain the meaning of the word "pierced" for we have the patentee's own definition. The drawings show an opening straight through the plug from top to bottom and there can be no doubt that he used the word to describe such an opening. He shows no other construction. Not only have the defendant's plugs "New Style" and "Latest Model," no eccentric orifice in the sense of the patent, they have no orifice of any kind. The "New Style" plug operates in connection with a fixed aperture in the bowl which is opened to a greater or less degree by turning the plug which has a deep groove or channel cut therein extending across its lower half at right angles to its axis. The "Latest Model" is simply the "New Style" with one of the walls of the channel cut away.

An elaborate and ingenious argument is presented by the complainants to prove that the defendant's groove is the eccentric piercing and eccentric orifice of the claims. Such reasoning may convince the highly trained mind of the expert but will probably fail to impress those who have nothing to rely on but plain common sense. One who gives to the words of the claims the obvious meaning intended by the patentee, will hesitate long before reaching the conclusion that a screw which has one side of its lower half cut away is eccentrically pierced, or pierced at all. If we construe the claim broadly enough to cover the defendant's plugs, they will also cover the De Laval and other structures of the prior art. The orifice through which the cream flows in defendant's machine, is not in the plug but in the neck of the bowl. The plug, revolving across the lower end of this passage-way, regulates the density of the cream by making the opening wide or narrow as the operator may desire. All of the manufacturers of cream separators have adopted devices for regulating the density of the flow. They accomplish substantially the same result in substantially the same way.

The complainant's plug is simple and efficient, and we think, has some advantages over the other devices shown. The defendant while employing, as all must do, the general features necessary to secure proper regulation, does not employ the complainants' improvement. In view of the fact that the defendant has made the identical device of the patent, and that the decree is general in character, not specifying the "New Style or Latest Model" as infringing plugs, it would seem that the decree as entered is correct, but as the controversy in this court has centered around the "New Style" and "Latest Model" plugs, there should be a modification of the decree making it clear that neither the injunction nor the accounting applies to the plugs last mentioned.

Even if complainant's counsel be correct in the assertion that the "Latest Model" is not involved in this appeal, we think it for the interest of all concerned that all doubt regarding it should now be removed. It is true that strictly speaking these questions could more properly be considered upon an appeal from a final decree, but there is every reason why the parties should not be subjected to the expense of futile litigation.

We think the best disposition to make of the matter is to remand the cause to the circuit court with instructions to amend the decree by excluding from its provisions the two plugs last mentioned.

Neither party is entitled to costs in this court.

GENERAL ELECTRIC CO. v. CORLISS et al.

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

No. 139.

PATENTS—INVENTION—ELECTRIC MOTOR.

The Eickemeyer patent, No. 677,308, for an alternating current motor, is void for anticipation and lack of invention.

Appeal from the Circuit Court of the United States for the Northern District of New York.

This cause comes here upon appeal from a decree for injunction and accounting under certain claims of United States patent No. 677,308, issued to the executors of Rudolph Eickemeyer, June 25, 1901, for an alternating current motor. The patent was granted upon division of an application filed July 6, 1894.

For opinion below, see 154 Fed. 671.

Clifton V. Edwards and T. F. Sheridan, for appellants.

Charles Neave and F. P. Fish, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The motor of the patent is an induction motor; a quotation from appellee's brief will sufficiently indicate the characteristics of that type and make the specifications, hereafter to be quoted, more intelligible:

"Induction motors are those in which the coils of the field magnets are traversed by an alternating current brought from the outside source of supply, but the rotating armature has absolutely no connection with any outside source of supply. The currents traversing the closed rings or coils on the armature and producing the armature magnets are induced there by reason of the changing volume and direction of the magnetism produced by the field coils. There are no brushes and commutators such as are used with the direct current motor, and therefore there is at hand no such definite means of causing the armature currents to flow in the direction and at the places and times necessary for producing such magnetism in the armature as will start the motor and cause continuous rotation."

As complainant's expert expresses it:

"The constructor has no way of controlling these currents except through the control of the magnetic field itself, and to determine their position, strength, and time of reversal he can depend only upon the production of a

correct physical structure. Therefore by his structure he determines his magnetic field, and by his magnetic field he determines both his armature currents and the reaction between these currents and field to produce motion."

In motors of this type the theory of rotation of the armature is this: On the field there is a succession of magnets and on the armature a like succession of them—each magnet being produced by a flow of current through a coil or ring which surrounds the iron which constitutes such magnet. When the current flows one way the magnet becomes a north pole, when it flows the other way, it becomes a south pole, and, since with an alternating current the direction of the current is constantly and rapidly changing, the polarity of the iron around which it flows (which for convenience we will call the tooth, although the tooth does not necessarily physically project) is changing polarity in like manner. Continuous movement of rotation—we refer again to complainant's brief—is produced by the arrangement of these two series of magnets. If we have a straight bar magnet pivoted at its middle point so that it may rotate, and if its north pole is brought near the south pole of a magnet, stationary as are the magnets of the field, such north pole will rotate until it comes as near as it can—that is, opposite—the south pole of the stationary magnet, and then it would stop, for it has moved as near to the attracting pole as it can. Each single tooth with its corresponding tooth on the opposite side of the axis of the armature may be considered such a pivoted straight bar magnet. When the north pole of the rotating bar magnet has come opposite the attracting south pole in the field magnet it would stop, as we have seen, but if as it drew near such south pole that pole were moved further along the north pole would pursue it, and rotation be continued. The same effect would be produced by changing in some way the pivoted north pole to a south pole after it had moved to the stationary south pole and providing another stationary north pole at a location a little further along in the arc of rotation, in which case the stationary south pole would repel the new pivoted south pole, and the succeeding stationary north pole would attract the moving south pole; and if this last-mentioned south pole were then again changed to a north pole and another stationary south pole were created a little further along in the arc of rotation, the pivoted north pole would move to it. If this were repeated all around the arc of movement, the rotation would be continuous. Although this theory may be thus simply stated it is apparently no easy matter so to arrange all parts that the changes of polarity are effected at the necessary moment of time and with the moving parts in such relation to the stationary parts that rotation may be continuous.

For simplicity of description we have spoken of the magnets of the armature as teeth of iron surrounded by a conducting coil or ring, but it is understood that each coil or ring itself when current is induced in it acts like a magnet and changes polarity with every change of direction of the induced current. In the art of effecting continuous rotation by changing polarity of the magnet through changes of current direction, a difficulty presented itself, and it is to the overcoming of such difficulty that the device of the patent is directed. Whether we speak of teeth or whether we speak of coils it will happen in a device

where all the poles grouped around the arc of rotation are symmetrical that "dead points" will be developed; momentum might keep the motor going, but they would have a locking or checking action which it is desirable to eliminate. A single tooth when exactly opposite another tooth of like polarity would be repelled, but whether that repulsion would tend to rotate it forward or backward would depend upon what were at the precise moment of time the mutual relations of all other teeth (or groups of teeth) and the field magnets opposite to which they were located. So with the armature coils. One of them having been repelled from one of the field magnets may come into the sphere of influence of the next magnet, which acts in the same way that the first magnet did and tends to repel the coil and to prevent it from moving further. In other words, it is caught between the two magnets and locked in position. It is unnecessary to go at any further length into the details of what takes place, or may take place. It is safe to assume that this opinion will not be read by any one who is not already more familiar with the obscure and invisible movements of electric and magnetic currents than this court is, despite the exhaustive and able briefs and arguments which have been submitted; it is sufficient to indicate that we understand that there is a double locking action to be overcome, and that, in motors of this type it can be overcome only by structural arrangements, not by brushes or commutators. Another excerpt from complainant's brief says:

"If we assume the field magnets are increased in number so that they fill the entire circumference, and if we assume there are mounted on the axis of the armature the same number of armature coils that there are field magnets, it will be seen that in accordance with the locking action which we have described with reference to one armature coil, all of such coils will come into locking position at the same time, each coil standing at a position intermediate between each of the nearest two field magnets."

It appears that the same effect is produced when each iron tooth of the armature is exactly opposite an iron tooth of the field. If each two of such opposed teeth are of the same polarity all would be repelled, if each were of opposite polarity, all would be attracted at the same time and the tendency would be to lock the machine. It further appears that it makes no difference whether the poles of the field are exactly equal in number to the teeth or coils of the armature; a symmetrical relation may be as readily established when there are two, or three, or more teeth or coils to be positioned relatively to each magnet pole.

Complainant thus summarizes the device of the patent:

"Mr. Eickemeyer, in order to prevent the locking action we have described, provided armature coils of such a number, and so spaced with reference to the field magnets, that not all of them could be in a locking position at the same time, so that the armature as a whole, whatever might be its position, is just as free to move as when it is in any other position."

Referring to the specifications, we find the patentee's method of avoiding or overcoming the locking tendency above described. "The armatures of the motors embody iron cores with tightly-inserted longitudinal copper conductors and copper heads and are novel in that said parts are so organized and united by soldering as to constitute a sub-

stantially integral solid structure [he means an integral copper structure imbedded in an integral iron core], and afford the desired number of closed circuits which are traversed by currents induced by the rotation of the armature through and by the alternations of the magnetic field." This solid integral armature structure is known as a "squirrel-cage" and the present controversy is in no way concerned with that feature of the patent; it is electrically and magnetically the equivalent of wire conductors wound on an armature between peripheral iron teeth. "In armatures of this type the longitudinal conductors are angularly arranged and in one or more concentric rows, so disposed in the iron core as to separate parts of it into sections divided substantially on radial lines extending from the periphery inwardly; also in having the field-poles and the longitudinal conductors unsymmetrical with relation to each other, so that no two magnet poles can ever have a magnetic circuit (through portions of the core) which is precisely the same as that of any other two poles, and also in having the plugs (or longitudinal conductors) and poles located unsymmetrically, so that no two adjacent plugs will occupy the same position with relation to their adjacent pole or poles as any other two similar plugs will occupy with relation to their adjacent pole or poles."

"The armature or induced member B contains certain novel features in its construction by which highly effective closed electric circuits are afforded, and, when considered with reference to its combination with the field described, valuable novelty is involved in the fact that the number of the closed circuits in the armature is a number which has no numerical relation to the number of field-poles or pole-faces, or, in other words, the sixteen field-coils and pole-faces are here used in combination with an armature provided with seventeen conductors. For causing the armature poles to revolve with uniformity as to speed and strength the armature conductors should be numerous, and for securing the best results, the magnetic resistance of the armature should be uniform or equal in all directions—that is, the armature must not have any well-defined pole-faces corresponding in number to those of the field. It is to be understood that this portion of the invention extends to any given number of pole-faces in the field and any number of conductors at the periphery of the armature, so long as said number of conductors is indivisible by the number of field-poles, or has no large common divisor therewith."

This suit is concerned with only that portion of Eickemeyer's device which deals with "the relation which the number of closed circuits may bear to the number of field-poles or pole-faces."

The claims declared upon are as follows:

"1. In an alternating-current motor, the combination with a set of field-poles, a closed-circuit armature having an iron core which, adjacent to its periphery, is divided into sections on substantially radial lines, said sections being always located unsymmetrically with reference to the field-poles, substantially as described, whereby at no time will any two pairs of co-operating poles have magnetic circuits which are precisely alike, in magnetic conductivity through adjacent portions of the core.

"2. In an alternating-current motor, the combination of a set of field-poles, and a set of longitudinal plugs in an armature, serving as closed-circuit conductors, said poles and plug conductors being located unsymmetrically with

reference to each other, and at no time, whether at rest or in motion, having any two adjacent plugs (on different radial lines) occupying the same position with relation to the adjacent pole or poles, as that occupied by any other two similar adjacent plugs, with relation to their adjacent pole or poles, substantially as described."

"9. An alternating-current motor having a toothed inducing member and a toothed induced member the number of teeth in the two members being so related to each other as to have no common divisor greater than one.

"10. An alternating-current motor having a toothed inducing member and a toothed induced member the number of teeth of the two members being so chosen with respect to each other that a tooth on one member bears to the nearest adjacent tooth on the other member a relation different from that between another tooth on the first member and the nearest adjacent tooth on the other member.

"11. In an alternating-current motor, the combination with the inducing member, of a squirrel-cage armature having its conductors so located about its periphery, as to present to the polar projections of the inducing member different relations respectively between the conductor, or conductors, adjacent to one polar projection and the conductor, or conductors, adjacent to the next adjacent polar projection.

"12. In an alternating-current motor, the combination of inducing and induced members, one of which is provided with polar projections and the other with conductors which form the seat of induced currents, the conductors being so arranged as to produce, with every variation in the relative position of the inducing and induced members, a relation between one polar projection and the conductor or conductors adjacent thereto which is different from the relation existing between the next adjacent polar projection and the conductor or conductors adjacent to said last-mentioned polar projection.

"13. A dynamo-electric machine having its two relatively-rotating members provided with teeth, the numbers of teeth on the two members being related to each other in such a manner as to produce substantially uniform magnetic resistance of the magnetic circuit between the two members in all the relative positions assumed by the said members during operation of the machine.

"14. In a dynamo-electric machine, the combination of an inducing member provided with exciting-coils and an induced member provided with permanently short-circuited conductors prime in number to the number of exciting-coils.

"15. In an alternating-current induction-motor, the combination of a field member having numerous pole-faces, and an armature provided with a number of conductors indivisible by the number of pole-faces of the field or having no large common divisor therewith.

"16. In an alternating-current induction-motor, the combination of a field member having numerous pole-faces and an armature having its conductors so arranged that the number of pole-faces of the armature is indivisible by the number of pole-faces of the field or has no large common divisor therewith."

Referring to claims 2, 11, 12, 14, 15, and 16, which are concerned with the relation of field-poles to closed circuits complainant says:

"Each of them constitutes a somewhat different statement, or form of statement, of the same essential element of novelty at the basis of the invention in controversy. Some of them are broader than others. For instance claims 14 and 16 are limited to a relation in which there is no common divisor of the field pole-faces and the armature conductors, while claim 15 is somewhat broader, specifying that there shall be no large common divisor, while the other claims quoted define the invention in electrical, rather than simple numerical, terms."

Referring to the other claims which deal with armature teeth, complainant says:

"There is also another point of view from which the invention may be defined with reference to the particular type of armature shown in the Eicke-

meyer patent for illustrating his invention. As shown and explained in the patent, the copper conductors of the armature are embedded in iron so that each piece of iron between every two conductors forms what may be termed a tooth. As the 'teeth' in this structure are formed by, and presupposes the presence of, conductors on each side of them, the location of the conductors may be defined with reference to the teeth. This is the point of view from which claims 1, 9, 10, and 13 are drawn."

It is apparent that, if between each two teeth there is a closed circuit, there will be just as many closed circuits as there are teeth, and as the numerical relation of the teeth to pole-faces varies so does the numerical relation of closed conductors to pole-faces.

Several defenses are relied upon. By reason of the concession that a publication by Charles E. L. Brown, April 19, 1893, and a patent to Prof. Elihu Thomson, No. 516,849, of March 20, 1894, applied for June 13, 1893, would be fatal to the patent if prior to Eickemeyer, whose application was filed July 6, 1894, it became necessary for complainant to carry back the date of the latter's invention. The evidence adduced for this purpose has been exhaustively reviewed in both briefs, and defendant forcefully presents several criticisms on its sufficiency. It would take much time to discuss this defense in detail, and for the purposes of this opinion it will be more convenient to assume that the date of Eickemeyer's invention is, as complainant contends, "at least as early as the fall of 1891"; by no possible straining of the testimony can it be brought further back than "the last half of the year 1890." If the date be taken even as the fall of 1891, nearly three years elapsed before application, and defendant contends that by delaying his application until after others had entered the field—concededly the Westinghouse Company produced a machine which had an uneven relation of field-poles to armature conductors, December 11, 1893—Eickemeyer abandoned his invention. It will not be necessary to discuss this defense.

Defendant also relies on several prior patents, of which one to Dobrowsky (No. 427,978, May 13, 1890) may be taken as a type. Without quoting from this patent it will be sufficient to say that if one skilled in the art as it then was should undertake to build an alternating-current motor of the induction type in accordance with the instructions of that patent, and, in so doing, should construct an armature of the squirrel-cage type referred to therein, and having the number of teeth and closed conductors shown in Fig. 5 of such patent, his motor when completed and used as the patentee instructed it should be used would be an infringement of the claims of Eickemeyer. Therefore it is contended that, since what would infringe if later would anticipate if earlier in the art, the Eickemeyer patent is devoid of patentable novelty. In answer to this contention complainant points out that nowhere in the Dobrowsky specifications or claims is there any reference to or any suggestion of the desirability of securing dissymmetry between pole-faces and teeth or conductors. That Fig. 5, which shows 14 teeth and 14 slots holding squirrel-cage closed conductors (the pole-faces shown in the drawings being 4 in number), is merely a chance production of the draughtsman. That it is only one figure of several showing armatures, the other figures depicting a symmetrical

number of teeth; that the draughtsman for all the patent told him and for all he might have learned from Dobrowolsky, might just as well have made the teeth and closed circuits of Figs. 5, 12, or 16, or 20; and that anticipation cannot be predicted of such an accidental structure whose relations and operation are not pointed out in the patent. There are other prior patents, some of whose figures, if followed in construction, would produce a like result, but whose specifications and claims do not refer to any dissymmetrical arrangement. This presents an interesting and somewhat novel question of patent law, but we need not decide it because there is another motor of the prior art the number of whose teeth was the result of design, not of chance.

The engineers of the Westinghouse Company, working in the development of early Tesla motors, produced in the spring or early summer of 1890 a machine contrived to overcome the locking action. There is a mass of testimony bearing on this branch of the case, but if we have rightly understood the specifications and claims of the patent in suit, the undisputed facts about this Westinghouse machine dispose of this case completely. The date is not disputed; it is prior to the earliest claimed for Eickemeyer. The engineers had constructed a motor with 8 pole-faces and an armature having 32 teeth. It therefore had 32 slots between the teeth and, since conductors were wound through all the slots, teeth and conductors alike were symmetrical with the pole-faces. A similar motor with 40 armature teeth and slots presented the same relation. A peculiar method of winding, known as the "sine and cosine winding" had been used with these machines to produce efficiency; it was a winding requiring a number of slots which was a multiple of the field-poles. It was found that in these motors, despite the ingenious and novel winding, there was, as the experimenter expresses it "a magnetic locking between the fixed poles and the rotating teeth, such as to tend to give a number of dead points equal to the number of teeth. I attributed this to the relation between the width of the pole-face and the spacing of the teeth." In order to remedy this difficulty the number of armature teeth was changed so as to have 33 in one motor and 41 in the other. "The extra tooth was inserted in order that the relation between the teeth and the several pole-faces would be at any given instant or for any given position be different, thereby obviating the tendency to definite magnetic locking. The addition of the extra tooth overcame the locking difficulty to which I have referred." So far as the patent relates to the numerical relation of armature teeth to pole-faces, we have here that precise relation, intentionally devised to accomplish a like purpose and successfully developed. Complainant, however, contends that the contribution of Eickemeyer to the art resides in the numerical relation of closed conductors to pole-faces; and that the changes in the number merely of teeth in these Westinghouse motors was directed only to overcome the locking action of iron and iron; and that 33 and 41 toothed armatures accomplished nothing in the way of overcoming locking action due to the relation of pole-faces to armature conductors.

As has been said, the sine and cosine winding required an even number of slots, and therefore, when the addition of a tooth made the number of slots uneven, the wires "could not be put in the extra

slot, but one of the coils was stretched to lap past it, and the slot was left vacant." Of course this left a symmetrical relation in number between pole-faces and conductors, and complainant contends that, therefore, these 33 and 41 tooth motors did not embody the device of the patent. We do not so understand the patent; it has much to say about numerical relations, but numerical relations are mere abstractions, the crux of the device is the dissymetric positions of the conductors. As the specification expressed it, "in having the plugs (or longitudinal conductors) and poles located unsymmetrically, so that no two adjacent plugs will occupy the same position with relation to their adjacent pole or poles as any other two similar plugs will occupy with relation to their adjacent pole or poles." An unsymmetrical number of conductors will inevitably and invariably produce an unsymmetrical location, but, if such unsymmetrical location is in fact secured, the concrete device of the patent will be secured irrespective of number. Such unsymmetrical location is secured in the prior Westinghouse motors because when the additional tooth was inserted the location of all the slots, save perhaps one, was necessarily shifted from what it was before, and such a shifting of the slots necessarily shifted the conductors which occupied those slots; they were no longer in symmetric relation with the pole-faces. There is much conflict among the experts on this branch of the case, but we are fully in accord with this statement of defendant's expert:

"If we suppose that all of the slots were filled with coils we would have forty-one coils with eight pole-faces, which would of course give an unsymmetrical relation between the pole-faces and the coils, and the removal of one coil would not change the dissymmetry of the forty coils that are left, neither would it change the action of the poles upon these forty coils."

We cannot agree with complainant that the combination embodied in these 33 and 41 tooth motors was merely accidental and incidental, and not understood or appreciated. A remedy for locking action was sought; it was found in an increase of the number of teeth which necessarily changed the locations of teeth and coils relative to the field-poles, and when found the difficulty was overcome. We are fully convinced that these motors if later in time would infringe the Eicke-meyer patent; and, since they were in fact prior in the art, that patent must be held void for lack of invention.

The decree of the Circuit Court is reversed, with instructions to dismiss the bill, with costs.

DAIMLER MFG. CO. et al. v. CONKLIN.

(Circuit Court, S. D. New York. April 30, 1908.)

PATENTS—INFRINGEMENT—USE OF ARTICLES PURCHASED IN FOREIGN COUNTRY.

A citizen of the United States, who, being in a foreign country, there purchases, solely for his personal use, an article protected in the United States by a patent granted to an assignee of the inventor, which the maker and seller in the foreign country had the right from the inventor to there make and sell, does not become an infringer of the United States patent by bringing such article home with him and using it here personally, and not for commercial purposes or profit.

In Equity. Suit to restrain alleged infringement of certain United States letters patent and for an accounting.

See 145 Fed. 955.

Taylor & Anderson (Howard Taylor and Francis H. Kinnicutt, of counsel), for complainants.

Henry M. Earle (John Ingle, Jr., of counsel), for defendant.

RAY, District Judge. Wilhelm A. Maybach, of Cannstadt, Germany, is the original and first inventor of the devices named and described in the following United States letters patent, issued, however, to the Daimler Manufacturing Company, of New York, N. Y., assignee of said Maybach for the United States, viz.: No. 686,100, dated November 5, 1901, for "lock for gear-shifting devices"; No. 688,108, dated December 3, 1901, for "brake for motor vehicles"; No. 709,416, dated September 16, 1902, for "cooling and condensing apparatus." Said Maybach is also the inventor of and patentee named in a patent for improvements in "motor vehicle," No. 703,436, dated July 1, 1902, which relates more especially to an arrangement for sucking air through the cooling apparatus for the motor. July 1, 1902, Maybach duly assigned this last patent to the complainant company. March 1, 1905, as of January 1, 1905, the complainant company and the complainant Charles Lehman-Charley entered into a license agreement which contained the following:

"Whereas, the Daimler Manufacturing Company (hereinafter called the 'American Company') is possessed of various United States patent rights covering inventions and devices which are also employed in Germany by the Daimler Motoren Gesellschaft, of Cannstadt (hereinafter called the 'German Company') in the manufacture of automobiles and launch motors, and especially in making their Mercedes automobile; and

"Whereas, Charley is in the business of selling automobiles and launch motors made by the German Company to customers who use the same in the United States and Canada, and desires to take from the Daimler Manufacturing Company a license in behalf of himself and his customers, so that the bringing of the German Company's products into the United States shall not be in defiance of, but, on the contrary, in respect of, the rights of the American Company:

"Now, therefore, it is agreed between the parties hereto as follows:

"(1) The American Company hereby licenses Charley and any and all persons to whom he may have sold or to whom he may sell automobiles, launch motors, or launches, manufactured by the German Company, to import, use, and vend the same in the United States of America and Canada without let or hindrance at any time from the American Company: Provided, however, that the evidence of the license shall be in the form of a license plate with suitable words thereon. This license plate Charley shall be privileged to place on such of the machines aforesaid as he may desire, and the license hereby granted shall only inure to the benefit of such of his customers, or their successors in interest, as he may provide with the license plate.

"(2) The American Company further agrees that, so long as the above license to Charley and his customers and for the benefit of Charley and his customers is in force, it will grant no other license to anybody either to import, or to use, or to vend automobiles, launch motors, or launches of the German Company in either the United States or Canada, or any part of the United States or Canada.

"(3) The American Company further agrees that so long as the license above mentioned is in force it will, upon demand by Charley or his attorney, authorize said attorney to institute suit or suits in its behalf, either alone or in conjunction with other complainants, against anybody who is not respect-

ing the patent rights of the American Company or the exclusive license hereby granted to Charley, but at Charley's expense.

"In consideration of the above:

"(4) Charley agrees, by way of a license fee, to make the following cash payments to the American Company for every one of the machines above mentioned sold by him and imported into the United States or Canada and arriving after the date of this agreement (no matter when the same may have been sold), to wit: One hundred dollars (\$100) for each automobile up to and including sixty (60) horse power; two dollars (\$2) per horse power for each automobile exceeding sixty (60) horse power; and two dollars (\$2) per horse power for any launch motors or launches.

"(5) The fact that the license plate is affixed to a machine shall be conclusive evidence upon its importation that a license fee is due thereon. A license fee shall also be due on such machines, when imported, not provided with a license plate, as Charley may have sold in Europe to residents of the United States or Canada, unless Charley shall at the time of the sale have given to the purchaser a receipt wherein it is stated that such car is for use only in Europe, and in case it is taken into the United States or Canada the owner or importer shall pay the license fee therefor demanded by the American Daimler Company, or be considered an infringer, and that then and in such case the said Charley shall be personally relieved from the payment of such license fee.

"(6) Statements of the license plates issued by Charley are to be rendered by him each month to the American Daimler Company. Charley pays forthwith upon the signing of this contract seven thousand dollars (\$7,000) down in advance on account of such license fees, the receipt of which the American Company hereby acknowledges. Charley agrees to make a like payment of \$7,000 in advance on account on January 1, 1906, and again on January 1, 1907, and further agrees that the American Company shall at all times be kept in funds at least \$2,000 in advance on account of such license fees. The American Company is, however, to notify Charley when the margin should be made good. The obligation to pay \$2,000 in advance on account of license fees shall not continue after the advance payment of January 1, 1907, unless Charley shall make lump sales showing that such advance payment will be used up before the end of the year in license fees.

"(7) Charley will not enter into any other license arrangements than the above respecting any patents or alleged patents covering or claimed as covering the German Company's machines sold by him or any parts thereof, and the American Company will defend Charley in any suits which may be or which may have been brought against him or any of his customers on account of his failure to take out any such other license, which he may wish to defend, such defense, however, to be at Charley's expense.

"(8) The above license and agreement on the part of the American Company is to continue so long as Charley makes the payments and renders the accounts aforesaid, which he agrees to do. The agreement is in any event to expire December 31, 1907, but upon any expiration of the agreement the license shall continue for the benefit of Charley or any of his customers or their vendees, so far as the automobiles, launch motors or launches may have been already imported into this country."

It seems that this German Company—Daimler Motorem Gesellschaft—uses these patented devices rightfully in the manufacture and sale of automobiles in Europe; all the devices being in a car and conjointly used therein. The defendant, Roland R. Conklin, a resident and citizen of the state of New York, being temporarily in Europe on a trip for travel and recreation, on or about the 1st day of July, 1905, in good faith, and for his private and personal use in travel in Europe and elsewhere, wherever he might go, purchased of the German Company, through Schrader & Co., of Paris, France, a Mercedes automobile manufactured by this German Company and containing these patented devices. There was no patent or license notice or restric-

tion on the car or connected with its purchase, and he became the sole and exclusive owner of the car. Defendant had no notice or knowledge when he purchased that the automobile contained any patented device. On the completion of his European trip and on his return to the United States he brought the car with him, and has been personally using it here in going to and from his home since. This is the alleged infringement, and these the acts complained of. After defendant's return to the United States, and on his commencing to use the car in question here, demand was made upon him for the payment of \$300 as a condition of his right to use same here. He declined to pay. It is assumed by the complainant that, if these devices were patented in Germany, the German Company had the right to make and sell there, but that the purchaser and user there of a car containing the patented devices would be protected there only, and that on bringing the car into the United States and using it here he would become an infringer of the United States letters patent. Maybach, the inventor, it is said by defendant, took out patents for his invention in Germany, and the maker of this car was making and selling by license or permission of the German patentee.

I find no evidence of a German patent; but it is evident that the German Company was making and selling automobiles containing the devices in question by permission of the inventor, Maybach. There is no evidence of any restriction on the right to make, use, and sell machines containing these devices in Germany or France. Maybach, the inventor, is a stockholder in the complainant corporation and also in the said German corporation, Daimler Motoren Gesellschaft, and until March 31, 1907, was a director in both corporations. It follows that the German Company had the right to make and sell and use, and confer the right to use, anywhere outside of the United States. The question presented is, therefore, does a citizen of the United States, who, being in a foreign country, there purchases for his personal use, solely, an article protected in the United States by a patent there granted to the assignee of the inventor, and which the maker and seller in the foreign country had the right from the inventor to make and sell, and which the purchaser had the right to purchase and use so long as he remained abroad, become an infringer of the United States letters patent, if on coming home he brings such article with him and personally uses it here? He has not gone or sent abroad and purchased it, and imported it for use, or for sale, or for profit. He is not selling or offering for sale. In no sense is he using it for commercial purposes or profit. Patents are granted for ornaments, for articles of wearing apparel, etc. If A. invents a shoe buckle, or a suspender buckle, and sells the exclusive right in the invention to B. for the United States, B. taking out a patent in the United States, A. retaining in himself the exclusive right in the invention for the rest of the world, and he makes and sells it in England and other countries, and C., an Englishman, purchases in England a pair of shoes or suspenders containing the invention and wears them into the United States, does he become an infringer of the United States patent and liable to an injunction and suit for damages? And does it make any

difference that such a purchaser is an American citizen temporarily abroad?

It seems to me that B., in so purchasing the invention for the United States and taking the United States patent, does so with the understanding and limitation that A., the inventor, retains the right to make, use, and sell in the rest of the world, and that if he exercises such right the mere purchaser abroad for personal use abroad and elsewhere may personally use the article in the United States or elsewhere, confining it to his personal use and personal convenience. Should he purchase and bring to the United States for commercial purposes, or for manufacturing purposes, or for profit, such an article, it may well be the law that he is an infringer; but it seems to me that the purchaser is not compelled to discard his clothing, personal ornaments, umbrella, or other articles of personal use, rightfully purchased abroad for such uses abroad, free from any patent right in the country where made and sold, on returning home. It is true that the patent for the United States grants the patentee the exclusive right to make, use, and sell in the United States and its territories; but it is also true that the inventor, in the case stated, retains the right to make, use, and sell in the rest of the world. If a citizen of the United States purchases here for personal use an automobile containing the patented devices, cannot he take it to Europe, and, without infringing an English patent to the same inventor of the device, personally use it there? So of other articles purchased for personal use and convenience. I think this case is covered in principle by the following cases: *Adams v. Burke*, 17 Wall. (U. S.) 453, 21 L. Ed. 700; *Hobbie v. Jennison*, 149 U. S. 355; 13 Sup. Ct. 879, 37 L. Ed. 766; *Boesch v. Graff*, 133 U. S. 697, 702, 703, 10 Sup. Ct. 378, 33 L. Ed. 787; *Birdsell v. Shaliol*, 112 U. S. 485, 487, 488, 5 Sup. Ct. 244, 28 L. Ed. 768; *Wade v. Metcalf*, 129 U. S. 202, 9 Sup. Ct. 271, 32 L. Ed. 661; *Dickerson v. Matheson*, 57 Fed. 524, 527, 6 C. C. A. 466; *Paper Bag Machine Cases*, 105 U. S. 766, 770, 771, 26 L. Ed. 959.

In *Wade v. Metcalf*, 129 U. S. 202, 9 Sup. Ct. 271, 32 L. Ed. 661, the syllabus is as follows:

"Under Rev. St. § 4899 (U. S. Comp. St. 1901, p. 3387), a specific patentable machine, constructed with the knowledge and consent of the inventor, before his application for a patent, is set free from the monopoly of the patent in the hands of every one; and therefore, if constructed with the inventor's knowledge and consent, before his application for a patent, by a partnership of which he is a member, it may be used by his copartners after the dissolution of the partnership, although the agreement of dissolution provides that nothing therein contained shall operate as an assent to such use, or shall lessen or impair any rights which they may have to such use."

Mr. Justice Gray, in giving the opinion, said:

"This section clearly defines four classes of persons who shall have the right to use, and to vend to others to be used, a specific patentable machine: First. Every person 'who purchases of the inventor' the machine before his application for a patent. Second. Every person who 'with his knowledge and consent constructs' the machine before the application. Third. Every person 'who sells' a machine 'so constructed'; that is to say, which has been constructed with the knowledge and consent of the inventor by another person. Fourth. Every person who 'uses one so constructed'; that is to say, constructed with the inventor's knowledge and consent by another person."

It is evident that, the inventor having taken part in making and selling the Mercedes machine in question, there being no evidence of a prior German or French patent, same was freed from any claim the inventor could make. It would seem equally clear that, inasmuch as the inventor and German Company had a clear right to make and sell the machines in Germany and France, the purchaser became the absolute owner and entitled to use same anywhere, unless the prior issue of the United States patent to the complainant company as assignee of the inventor acts to prohibit such purchaser and owner from bringing his machine into the United States and using it here. In *Adams v. Burke*, 17 Wall. 453, 456, 21 L. Ed. 700, the Supreme Court laid down the broad proposition or doctrine that:

"(1) Where a patentee has assigned his right to manufacture, sell, and use within a limited district an instrument, machine, or other manufactured product, a purchaser of such instrument or machine, when rightfully bought within the prescribed limits, acquires by such purchase the right to use it anywhere, without reference to other assignments of territorial rights by the same patentee. (2) The right to the use of such machines or instruments stands on a different ground from the right to make and sell them, and inheres in the nature of a contract of purchase, which carries no implied limitation of the right of use within a given locality."

This case has been frequently commented on and approved in the Supreme Court, and in no way limited.

In *Hobbie v. Jennison*, 149 U. S. 355, 360, 364, 13 Sup. Ct. 879, 37 L. Ed. 766, the court cited the cases and held:

"An assignee for Michigan of a patent for an improvement in pipes, made, sold, and delivered in Michigan pipes made according to the patent, knowing that they were to be laid in the streets of a city in Connecticut, a territory the right for which the seller did not own under the patent, and they were laid in that city. Held, under *Adams v. Burke*, 17 Wall. 453, 21 L. Ed. 700, that the seller was not liable, in an action for infringement, to the owner of the patent for Connecticut."

The court said among other things:

"But we are of opinion that the case of *Adams v. Burke* cannot be so limited, that the sale was a complete one at Bay City, and that neither the actual use of the pipes in Connecticut, nor a knowledge on the part of the defendant that they were intended to be used there, can make him liable."

Clearly the sole owner of the patent for Michigan had no right to sell in Connecticut. The sole owner of the patent for Connecticut could have enjoined any sales there by any person except his licensees or agents; but, notwithstanding his sole ownership of such patent for that state, he could not enjoin one who had rightfully purchased in Michigan, even with intent to use in Connecticut. Here the purchaser in Michigan paid tribute under the Michigan assignment of the patent to the assignee for that territory; but by the very terms of that assignment such assignee had no right to sell for either sale or use in Connecticut. That exclusive right had been granted to the assignee for the territory of Connecticut. The decision of the case rested on the broader principle enunciated in *Adams v. Burke*, supra, and restated fully and emphatically in *Boesch v. Graff*, supra, and the court said (page 361 of 149 U. S., page 880 of 13 Sup. Ct. [37 L. Ed. 766]):

"The Circuit Court further said that there was no evidence in *Adams v. Burke* that the sale was made under the belief on the part of the seller

that the article was to be used within his territory, and that the case was authority for the broad proposition that the sale of a patented article by an assignee within his territory carries the right to use it everywhere, notwithstanding the knowledge of both parties that a use outside of the territory is intended."

In *Boesch v. Graff*, 133 U. S. 697, 702, 703, 10 Sup. Ct. 378, 33 L. Ed. 787, the subject is discussed, and the court held:

"When an invention patented in a foreign country is also patented in the United States, articles containing it cannot be imported into the United States from the foreign country and sold here without the license or consent of the owner of the United States patent, although purchased in the foreign country from a person authorized to sell them."

And in the opinion it was said, quoting and approving *Bloomer v. McQuewan*, 14 How. 539, 549, 14 L. Ed. 532:

"But the purchaser of the implement or machine for the purpose of using it in the ordinary pursuits of life stands on different ground. In using it he exercises no rights created by the act of Congress, nor does he derive title to it by virtue of the franchise or exclusive privilege granted to the patentee. The inventor might lawfully sell it to him, whether he had a patent or not, if no other patentee stood in the way; and when the machine passes to the hands of the purchaser it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress. In *Adams v. Burke*, 17 Wall. 453, 21 L. Ed. 700, it was held that 'where a patentee has assigned his right to manufacture, sell, and use within a limited district an instrument, machine, or other manufactured product, a purchaser of such instrument or machine, when rightfully bought within the prescribed limits, acquires by such purchase the right to use it anywhere, without reference to other assignments of territorial rights by the same patentee,' and that 'the right to the use of such machines or instruments stands on a different ground from the right to make and sell them, and inheres in the nature of a contract of purchase, which carries no implied limitation to the right of use within a given locality.'"

It seems to me clear, and I will not quote further from the cases, that the law is settled that one who purchases a patented device or machine, or one containing patented devices, for use from the inventor or before he takes a patent in the territory where it is made and sold, or who purchases same from one having the right to sell it, such right being derived from the patentee, has the right to use it anywhere; that "the right to the use of such machines or instruments stands on a different ground from the right to make and sell them, and inheres in the nature of a contract of purchase, which carries no implied limitation to the right of use within a given locality." This was expressly stated by the court in a case where it was holding expressly that one who purchases articles abroad, made and sold under a foreign patent, has no right to bring them to the United States and sell them here as against a United States patent for the same invention. The court was expressly and intentionally drawing this distinction between the rights of the seller of such machines in the United States and those of the mere user here who has purchased abroad. When the inventor, Maybach, acting within his reserved rights, made these machines in Germany and France and sold them there, it is presumed he added such sum as would compensate him for the use of his invention by the purchaser and user of a particular machine. Such purchaser and user has paid his tribute, if exacted, to the inven-

tion, to one who had the right to exact and demand it. The purchaser of the invention and patentee for the United States understood this, and that it would be done. It seems to me clear that, within the decided cases, the complainants have failed to show infringement by defendant.

There will be a decree dismissing the bill, with costs.

EISENSTEIN v. FIBIGER.

(Circuit Court, D. New Jersey. April 13, 1908.)

PATENTS—INVENTION—METHOD OF FINISHING CANES.

The Eisenstein patent, No. 797,505, for a method of finishing canes of bamboo, tonquin, and reed, by coating them with a baking varnish paint and subjecting them to a temperature of 200 to 300 degrees as set forth in one claim and 240 to 300 degrees in the other for not less than three hours, is void, both because the limits of temperature stated are so wide apart as to be misleading and impracticable, and for lack of invention, the process being the same as that previously used in japanning articles of different material.

In Equity. On final hearing.

Raymond, Van Blarcom & Anthony, Andrew Van Blarcom, E. D. Fenwick, and L. L. Morrell, for complainant.

Fischer & Sanders, for defendant.

CROSS, District Judge. This is a patent suit in the usual form, and its determination involves the consideration of patent No. 797,505, issued to the complainant August 15, 1905, for a "method of finishing canes and the like, and articles produced thereby." The patent contains two claims as follows:

"1. The herein-described method of finishing bamboo, tonquin, and reed sticks which consists in coating the same in their natural state with a suitable baking varnish paint and subjecting the coated sticks to a temperature of from 200° to 300° of heat for not less than three hours.

"2. The herein-described method of finishing bamboo, tonquin, and reed sticks which consists in coating the same in their natural state with a suitable baking varnish paint and subjecting the coated sticks to a temperature of from 240° to 300° of heat for not less than three hours."

The defenses are invalidity and noninfringement. The claims are identical except that where the first requires the articles to be baked at a temperature of from 200° to 300° the second requires the baking to be done at a temperature of from 240° to 300°. In both cases, however, the baking process continues, in the language of the claims, for not less than three hours. A superficial glance at the claims makes it manifest that the inventor had no precise and exact idea of the method he was claiming. In effect the claims overlap and go far towards neutralizing each other. It is true that "from 200° to 300°" includes "from 240° to 300°," but the same would be true if the inventor had said from 150 degrees or 190 degrees to 325 degrees or 350 degrees, or any other numbers smaller and larger respectively, than those actually claimed. Furthermore, the testimony of the complainant shows conclusively that even the elastic and un-

certain limitations embodied in his claims are not practical, that is to say, one may keep well within the claims and yet not achieve a successful result. A few extracts from his testimony will show this. For instance, at one place he says, "if we do bake them in fully 300 degrees they cannot stand the heat; they burn up. It is not on the face of it, but the stick inside is charred so that it is not merchantable any more." Again, he says, "it requires over 200 degrees to bake them." "We found out exactly that we can't give the cane any more than 240 to 260 degrees." "Some days, in wet weather, it requires an hour or so more to keep them in the oven, and in dry weather it requires an hour less." Again, in response to the question, "Wouldn't 200 degrees of heat properly finish the cane?" he replied, "it will give them a finish but not merchantable, they will scratch off. By handling them they chip off so that I can't put them in the market." At another place he says, "we found, after experimenting, that below 200 degrees they scratch off, and over 200 degrees, that is to say, between 240 and 260 degrees would bake them successfully to be hard, not to scratch." Again, "220 degrees might do it (get a successful result), but in order to be on the safe side we always subject them to between 240 and 260 degrees." And later in his testimony the following questions and answers appear:

"Q. How would about 290 degrees do? A. It is over 290, well they might stand 290. Q. They wouldn't stand 290? A. Well, they might stand 290 for a short while, but not 300. Q. How do you know they won't stand 300? A. Because we have seen it, we convinced ourselves."

This testimony of the complainant shows conclusively that the limitations of temperature in the claims of the patent are not practicable throughout; that the exposure of the canes to 200 degrees of heat or thereabouts is insufficient, while their exposure to a temperature approximating 300 degrees charred and ruined them so that they were rendered unmerchantable. The complainant's expert has testified upon this point to the same effect; he says:

"The highest temperature I have found expedient to employ in producing marketable Japan, tonquin, and reed sticks is about 290 degrees Fahrenheit. The reason of this is not that it is impossible to procure a baking varnish which will stand this heat, but owing to the fact that the wood of bamboo, tonquin, and reed sticks is already slightly altered by the heat at 284 degrees, is already partially decomposed at 300 degrees, and at 320 degrees gives off besides methyl alcohol, acetone, and acetic acid, all of which are produced by its decomposition. I have found that it is preferable, where it is desired to bake these sticks rapidly, to not employ a temperature exceeding 275 degrees Fahrenheit, owing to the decomposition of the bamboo, tonquin, and reed sticks at any temperature much exceeding this. The fiber of the wood is not much altered in appearance at 284 degrees, but is weakened and above 300 degrees is distinctly charred."

It is manifest then that the claims are inaccurate and so vague and indefinite as to be misleading and impracticable. The claims may be followed in terms without producing a successful result. In an apparent effort to make them comprehensive, the patentee has made them so broad that they are impracticable at least without experiment. In order that claims of this character be adjudged valid, it should be possible for a person skilled in the art, keeping anywhere within their

limitations, to accomplish successfully the intended result. This however, the testimony on the part of the complainant, shows cannot be done. Notwithstanding the disclosures of the patent, the practice of the art remains almost as much a matter of experiment as it did before. The following language used by the Supreme Court in *Merrill v. Yeomans*, 94 U. S. 568, 573, 24 L. Ed. 235, is pertinent:

"The developed and improved condition of the patent law, and of the principles which govern the exclusive rights conferred by it, leave no excuse for ambiguous language or vague descriptions. The public should not be deprived of rights supposed to belong to it, without being clearly told what it is that limits these rights. The genius of the inventor, constantly making improvements, in existing patents—a process which gives to the patent system its greatest value—should not be restrained by vague and indefinite descriptions of claims in existing patents from the salutary and necessary right of improving on that which has already been invented. It seems to us that nothing can be more just and fair, both to the patentee and to the public, than that the former should understand, and correctly describe, just what he has invented, and for what he claims a patent."

Aside from what has already been said, I think the patent is likewise void for want of invention. The method was such as had been for many years prior to the application for the patent in suit, successfully and generally applied in japanning articles other than "bamboo, tonquin, and reed sticks." Indeed, one of the complainant's own witnesses, who was a practical japanner, says, that he had japanned almost everything including egg shells, clay pipes, porcelain, steel, iron, and wood, and that the temperature at which such articles were baked was from 200 to 300 degrees, and that they were baked for a period of three hours and upwards, and sometimes all night, and he then adds that there was nothing new in the process as applied to the articles he had referred to. Testimony to the same effect has been given by several other witnesses, and the complainant himself admits that, if instead of the words "bamboo, tonquin, and reed sticks" the words "steel rods" were inserted in the claims of his patent, the method then described would not contain anything new, but would simply disclose the old process of japanning steel rods. It is true that the complainant says he was experimenting upon the lines of the patent for 15 years before he obtained satisfactory results. That statement is to me only explicable, however, for the reason which he himself gives, that the temperature in the oven he experimented with could not be raised to 200 degrees. The testimony cannot be read without reaching the conclusion that all that was necessary to japan bamboo sticks was to follow the method long known and used, in japanning numerous other articles. Indeed, it appears by the testimony that, while the complainant's so-called invention was in its experimental stage, he went to two practical japanners, and they at once readily and successfully accomplished the feat, and in doing it merely proceeded as they were accustomed to proceed in japanning other articles. There was no invention, in my judgment, in applying this time-worn method to bamboo sticks. "The public cannot be deprived of an old process because some one has discovered that it is capable of producing a better result or has a wider range of use than

was before known." *Lovell Mfg. Co. v. Cary*, 147 U. S. 633, 634, 13 Sup. Ct. 472, 476, 37 L. Ed. 307.

In *Smith v. Nichols*, 21 Wall. 112, 119, 22 L. Ed. 566, it was held that "a mere carrying forward, or new or more extended application of the original thought, a change only in form, proportion, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means, with better results, is not such invention as would sustain a patent." Again, in *Rynear Co. v. Evans* (C. C.) 83 Fed. 696, it was held that there was no invention in making a well-known article, such as an artificial tooth crown, by the well-known process of striking up metals by the use of a series of male and female dies. Such processes were archaic at the date of the application for the patent. Thimbles, eyelets, buttons, cart-ridges, capsules, etc., were given as examples. So, too, in *Dodge Mfg. Co. v. Ohio Pulley Works* (C. C.) 101 Fed. 584, the court held that the application of glue to the abutting ends of segments of split wooden pulleys was but the carrying forward of old ideas and did not amount to invention. In *Pennsylvania Railway Co. v. Locomotive Truck Co.*, 110 U. S. 490, 494, 4 Sup. Ct. 220, 222, 28 L. Ed. 222, it was said "that the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated" citing many cases. So too it was held in *Miller et al. v. Foree et al.*, 116 U. S. 22, 27, 6 Sup. Ct. 204, 29 L. Ed. 552, that the application of an old process to the same material at a later or different stage is not patentable. In *Dederick v. Cassell*, 20 O. G. 1233, C. D. 1881, p. 413, the following language is used:

"The same method of ejecting substances out of presses by successive charges of material behind has been in use time out of mind. The presses for peat and brick exhibited by the defendant show it. That the substances were of hay, baled or unbaled, is not important. The method was the same. The application of it to other material would be but another use."

Brown et al. v. Piper, 91 U. S. 37, 23 L. Ed. 200, involved the consideration of a patent for preserving fish and other articles in a close chamber by means of a freezing mixture, having no contact with the atmosphere of the freezing chamber. The patent was held to be anticipated by the old process of preserving a corpse and also by the old and well-known process of freezing ice cream; and, in replying to a contention that the process had never been applied to the preservation of fish and meats, the court said at page 41:

"The answer is that this was simply the application by the patentee of an old process to a new subject, without any exercise of the inventive faculty, and without the development of any idea which can be deemed new or original in the sense of the patent law. The thing was within the circle of what was well known before, and belonged to the public. No one could lawfully appropriate it to himself, and exclude others from using it in any usual way for any purpose to which it may be desired to apply it."

Upon a careful review of the whole testimony, I think the patent cannot be sustained, for the reasons above given.

The bill of complaint will therefore be dismissed, with costs.

A. B. DICK CO. v. HENRY et al.

(Circuit Court, S. D. New York. March 23, 1908.)

PATENTS—VALIDITY—PROCESS FOR DUPLICATING TYPEWRITTEN WORK.

The Dick patent, No. 466,557, for a process of duplicating typewritten work, which consists of introducing into a typewriter a stencil sheet, coated with wax or similar material, with other sheets in front and rear of it and after the typed impressions have been made thereon, peeling off the outer sheets, and with them the adhering wax where the types have struck so that the middle sheet may be used as a stencil for duplicating the typewriting, is void in view of the patent to Fuerth who was adjudged priority over Dick as the inventor of the combination of the three sheets so used, leaving only the function or work of the typewriting machine to be covered by the Dick patent, which is not a patentable process.

In Equity.

Samuel Owen Edmonds (J. Edgar Bull, of counsel), for complainant.

A. Bell Malcolmson (Arthur von Briesen, of counsel), for defendants.

HOLT, District Judge. This suit was brought to restrain the infringement of patent No. 466,557, granted January 5, 1892, and assigned to the complainant, for a process of duplicating typewritten work. The general processes in use for duplicating typewritten work, before the invention of Brodrick, consisted in taking a closely woven paper sheet, coated on one side with hard wax, and writing on it, either by a pen carrying a small perforating wheel at its point, or by a stylus, the sheet having previously been laid upon a file-plate, or sand-paper, or other perforating surface, the result by either process being that the paper was perforated where the characters were formed, the rest of the paper remaining impervious to ink by reason of the wax. Such paper constituted a stencil, with which any number of duplicates of the writing could be made, by placing it on a sheet of paper and passing over it an ink roller. Brodrick, in 1886, conceived the idea of employing a stencil sheet made of very thin paper, so loosely woven and open that ink would pass through it, and covering the sheet with a soft wax capable of being expressed from the underlying porous fibers of the paper by the impact of the type of an ordinary typewriting machine. Such a prepared sheet was laid on a backing of tissue paper or other material, and the two sheets placed in the typewriter; when struck with the type, the wax under the type was driven through the waxed sheet, or away from the space under the type. After this process the wax sheet could be used as a stencil without the paper being perforated. The underlying idea of Brodrick's invention was ingenious and valuable. That was to make a stencil of such thin paper that ink would pass through it without the paper being perforated. But in actual practice it was found that there was some difficulty in the use of Brodrick's stencil from the fact that the face of the type, striking directly upon the waxed surface of the paper, became in

a short time somewhat clogged with wax, and then made impressions upon the wax which were blurred and indistinct. The sole substantial difference in the method of making such a stencil plate claimed under the patent in suit is that a piece of tissue paper, or other similar porous material, is placed on top of the waxed sheet, so that the combination, when put in the typewriter, consists of the top sheet, the waxed sheet and the back sheet. When such a combination is used, the face of the type, striking on the top sheet of tissue paper, does not become clogged with wax, and the result is that little plugs of wax, of the shape of the type, that become removed from each side of the waxed sheet, adhere to the top and back sheet, and, after the three sheets are taken out of the typewriter, and the top and back sheets are peeled off from the waxed sheet, the little wax plugs under the type are withdrawn from both sides of the waxed sheet and the sheet remains a stencil. It is a question whether this use of a top sheet of tissue paper amounted to invention, and whether such a top sheet was not in common use more than two years before the application for Dick's patent; but in the view I take of this case it is unnecessary to decide these questions. On October 11, 1887, Dick filed in the Patent Office an application for a patent for a process of preparing duplicating stencils, in the specifications of which he fully described the combination of the top sheet, the waxed sheet, and the back sheet. On October 20, 1890, Dick filed an application for the patent in suit, which originally contained various claims for a process. On October 27, 1890, Fuerth filed an application for a patent for an improvement in the preparation of typograph stenciling material, in which he claimed to have invented the combination of the top sheet, the waxed sheet, and the back sheet. On March 5, 1891, Dick filed an application for the same combination, in order to secure an interference with Fuerth. An interference was declared, testimony taken, and a hearing had in the Patent Office. The Examiner of Interferences decided in favor of Dick as the prior inventor of the combination; that is, the first to use the top sheet. An appeal was taken to the Examiners in Chief, who reversed the decision of the Examiner of Interferences, and decided that Fuerth was the prior inventor. An appeal was taken to the Commissioner, who affirmed the decision of the Examiners in Chief. The priority of invention was therefore finally adjudicated in the Patent Office in favor of Fuerth. Thereupon, in May, 1895, the patent for the combination was issued to Fuerth. But in January, 1892, the patent in suit was issued to Dick for the process. The complainant in this suit was the owner of the Brodrick patent, which has expired. It is the owner of the Fuerth patent for the combination, which has not expired, and of the Dick patent for the process, which has not expired. Under these circumstances the question arises whether the process patent to Dick was valid. The claims in the Fuerth patent for the combination are as follows:

"1. In combination with a stencil sheet, sheets of paper in front and rear thereof adapted to extract a portion of the coating of the stencil sheet within the lines of the extracting characters.

"2. In combination with a stencil sheet having both sides coated, an uncoated extractor sheet in front thereof and an extractor sheet of soft paper

in the rear of the stencil sheet adapted to have the characters embedded thereon.

"3. In combination with a fibrous coated sheet other sheets in the front and rear thereof, adapted to simultaneously remove, by extraction, the coating of the fibrous sheet, within the lines of the contacting characters, whereby said coating is extracted in contradistinction to being driven through the stencil sheet, thereby neither abrading nor perforating the fiber of said stencil."

The claim in the patent in suit for the process is as follows:

"I claim the process of preparing a stencil for duplicating copies, consisting in introducing into a typewriting machine a sheet of porous material coated with an ink-proof substance, a sheet of paper arranged in the rear thereof, and a sheet of tissue-paper arranged in front thereof, to both of which paper sheets the ink-proof substance will adhere, then impressing the superimposed sheets with the matter to be copied, thereby causing the ink-proof substance of the coated sheet to adhere to the surface of the other sheets on the lines of impression, and then separating the sheets, thereby removing the coating from the ink-proof sheet on the lines of the type-impression, substantially as set forth."

It is perfectly obvious that the combination claimed and described in the Fuerth patent, which the Patent Office, upon interference proceedings, decided had been invented by Fuerth and not by Dick, is the same combination which must be used to carry out the alleged process in the Dick patent in suit. The claim of the patent in suit purports to be a claim for a process, but the combination of the top sheet, the waxed sheet, and the back sheet cannot be made a part of the process, because Dick claimed to have invented that combination, and it was decided, in the proceedings for interference, that Fuerth invented it. The only step, therefore, which can be called a process, in making a stencil sheet under Dick's process patent, is that the combination held to have been patented by Fuerth, and decided to have been invented by him, is put into the ordinary typewriting machine and printed there and taken out again. That, in my opinion, is not a process, within the meaning of the patent law, but is a mere function, or work of a machine, which, under the authorities, is not patentable. *Corning v. Burden*, 15 How. 257, 14 L. Ed. 683; *Risdon Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136; *Busch v. Jones*, 184 U. S. 607, 22 Sup. Ct. 511, 46 L. Ed. 707. Whether the complainant could maintain any action upon the Fuerth patent it is unnecessary to consider in this case, but, in my opinion, the patent upon which this suit is brought is invalid on the grounds stated. It was argued by counsel that the proceeding by which the stencil plate was produced was a process because two steps were taken, first, to run the combination through the machine, and then, after it was taken out, to peel off the top and back sheets, thus withdrawing the little plugs of wax from the waxed paper; but, in my opinion, that is a mere incident to the working of a machine. It might as well be said that, after a patent had been obtained for a typewriter, a patent could be obtained for the process of making the ordinary four or five carbon copies of typewriting, because the operator has to place a sheet of carbon between each two sheets of paper,

and, after writing on the combined sheet thus made, has to remove the carbon sheets, leaving the sheets of paper with the carbon writing.

My conclusion is that the bill should be dismissed on the merits, with costs.

LEONA GARMENT CO. v. JENKS et al.

(Circuit Court, N. D. Illinois, E. D. June 5, 1907.)

No. 27,945.

PATENTS—INFRINGEMENT—LADIES' GARMENT.

The Critcher patent, No. 781,635, for a combined skirt and drawers, held valid and infringed by one style of garment made and sold by defendant, but narrowly construed as required by the prior art, not infringed by other and different styles.

In Equity. On final hearing.

Coburn & McRoberts, for complainant.

Offield, Towle & Linthicum, for defendants.

SANBORN, District Judge. Bill for injunction and account for infringement of patent No. 781,635, dated February 7, 1905, on ladies' underwear, granted to Leona J. Critcher, and by assignment owned by complainant. A preliminary injunction was granted July 23, 1906, based upon admissions both of the validity of the patent and infringement. The case was put at issue and complainant took its proofs, but defendant offered no proof of any kind. The patent being presumptive evidence of its own validity, and defendant not having met the burden of proof created by such presumption, the only question is whether the patent has been infringed by defendant. Fairbanks, Morse & Co. v. Stickney, 123 Fed. 79, 59 C. C. A. 209.

Two kinds of garments are produced as constituting infringements, the first called "Complainant's Exhibit, Defendants' Garment," and the others "Complainant's Exhibit, Defendants' Garment No. 2," and "Complainant's Exhibit, Moran Garment"; the two last being identical. There is no direct proof of the sale by defendants of the exhibit called "defendants' garment," but the answer admits infringement by making and selling under an alleged license not shown by the proofs. Complainant was unable to produce the witness who purchased "defendants' garment," but filed her affidavit of such purchase, with proof that she could not be found or her deposition obtained. The testimony also shows that this witness was sent to purchase the garment, and that she returned with it. In view of the allegations of the answer as to infringement and license enough appears to show infringement by "defendants' garment," which is substantially the same as the patented article. The sale by defendants of "defendants' garment No. 2" and the "Moran garment" is fully proved; and the question is thus presented whether they infringe. The Critcher patent is for a combined skirt and drawers, called the Leona skirt-drawers. It is simply a one-piece skirt, similar to the ordinary underskirt, and opening in front. To

the inside of the skirt, and along its front edges, are attached wings to form the drawer-legs, gored, and open from waist to crotch so that the skirt forms the outside surface of drawers. A corset cover, not covered by the patent, completes the garment. The difficulty of sustaining any patent whatever upon an article of clothing is obvious. Upon this record, however, the patent must be held valid, and infringed by "defendants' garment." But counsel for defendants state that this garment is no longer made or sold, the Ideal garment, or three-piece combination suit, being the only one now manufactured; and it is insisted that the Ideal suit, being the same as "defendants' garment No. 2," and the "Moran garment," is not an infringement.

The one claim of the patent in suit is as follows:

"The herein-described combined skirt and drawers comprising a skirt and wings secured to the inner face thereof extending from top to bottom of the skirt and forming portions of the drawers-legs, each drawers-leg consisting of one wing and the adjacent side edge portion of the skirt, each wing being gored at the top to form an opening from the waist to the crotch and united to the extreme side edge of the skirt from the crotch to the skirt bottom, the forward edges of the drawers forming the front of the skirt and being adapted to overlap each other."

The extreme narrow scope of the patent appears by comparison of this claim with that of the prior Chittenden patent No. 765,556, issued about six months before the Critcher patent, which follows:

"The herein-described combined skirt and drawers, the same comprising a skirt having secured thereto, upon its inner face upon each of the opposite sides thereof, a drawers-leg, consisting of two wing portions extending from the upper edge of the skirt to the bottom thereof at a suitable distance apart, each wing being gored at the top to form an opening from the waist to the crotch and joined together from the crotch to the bottom of the skirt, whereby the drawers-leg, upon each side of the skirt comprises for its outer wall that portion of the skirt extending between the two wings making up the remainder thereof, as set forth."

The two garments claimed to be infringements, being defendants' garment No. 2 and the Moran garment, are different in their pattern and construction from both the Critcher and Chittenden garments. The corset cover and drawers-legs are complete in themselves, and the garment is finished by sewing a triangular skirt-piece or tail-piece to the inside of the drawers-legs. On the other hand, in the patented garment, the skirt is in one piece, encircling the body of the wearer; the drawers-legs being attached to the front of the inside of the skirt, and the corset cover sewed to the top of the skirt. This difference in construction makes the bias parts and straight parts of the cloth come in different portions of the garment from the bias and straight parts of the Leona suit, resulting in a different hang and setting, stretching or sagging in different parts, and preventing stretching in different parts from the Leona or patented garment. It is claimed by defendants that these differences make a better garment; and they refer to the evidence of Mrs. Morton, buyer for the muslin underwear department of the Marshall Field Company. She testified that the Leona garments are unsatisfactory in workmanship, material, and fit, and are not satisfactory to the trade, while the Ideal suits are satisfactory both to the trade

and the company. Be this as it may, I am satisfied that the defendants' garment No. 2 and the Moran garment, by reason of their different pattern and construction, and different disposition of the bias portions of the cloth, do not infringe the Leona patent, narrowed so closely by the prior art.

It is a specific patent, limited to the exact construction specified. The defendants' construction is different, resulting also in a different disposition of the goods. These differences are sufficient to prevent infringement.

A decree will be entered sustaining the validity of the complainant's patent, with injunction and account against "Complainant's Exhibit, Defendants' Garment," and like garments, but declaring that defendants' three-piece garments, constructed as herein stated, as shown by "Complainant's Exhibit, Defendants' Garment No. 2," and "Complainant's Exhibit, Moran Garment," and constructions substantially the same, are not infringements. Neither of the parties should have costs.

WEED et al. v. GAY et al.

(Circuit Court, D. Connecticut. May 4, 1908.)

No. 1,259.

PATENTS—SUIT FOR INFRINGEMENT—PLEADING.

A bill for infringement of a patent and for unfair competition in trade construed, and *held* good on demurrer, and not multifarious.

In Equity. On demurrer to bill.

Paragraph 8 of bill of complaint is as follows:

"(8) And your orators further show on information and belief that the defendants now have on hand, ready for sale in the city of Hartford, state of Connecticut, in said district of Connecticut, and is now advertising and soliciting sales, and is offering and exposing for sale, large numbers of antiskidding devices embodying the inventions, discoveries, and improvements set forth and claimed in said letters patent, and which antiskidding devices and all necessary parts thereof the defendants threaten to sell, and actually have sold a large number of such antiskidding devices in the city of Hartford, state of Connecticut, and elsewhere in the district of Connecticut, in violation of your orators' rights under said letters patent No. 587,245, and your orators further allege that William F. Ledger, George A. Gay, and Harry B. Strong are guilty of unfair competition in trade, in that they have copied, and are still continuing to copy, the circulars of the complainant, Weed Chain Tire Grip Company, thereby leading the trade and customers of the Weed Chain Tire Grip Company to believe that the chains sold by the defendants are of the same quality as the chains manufactured and sold by your orator, Weed Chain Tire Grip Company."

To the bill defendants filed a demurrer as follows:

"These defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true in such manner and form as the same are therein set forth and alleged, demur thereto, and for cause of demurrer show that it appears by said bill that the same is exhibited against these defendants for distinct and unconnected matters and causes and is altogether multifarious."

"Wherefore, and for divers other good causes of demurrer appearing in said bill, these defendants jointly and severally demur thereto, and humbly demand the judgment of this court whether they shall be compelled to make any other or further answer to said bill, and pray to be hence dismissed with their costs and charges, in this behalf most wrongfully sustained.

Howard P. Denison, for complainants.

Daniel A. Rollins, for defendants.

PLATT, District Judge. I think that paragraph 8 of the bill may fairly be construed as alleging that the defendants are selling devices which infringe the patent, and are copying complainant's circulars about the patented device for an unfair purpose.

The proofs must conform to such construction, and to make assurance doubly sure, let the words "under said letters patent" be placed as an ending to paragraph 8. This may be done without costs to either party.

The demurrer being disposed of let the pleadings go forward in the regular way.

UNITED STATES v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. March 17, 1908.)

1. RAILROADS—SAFETY APPLIANCE ACT—CONSTRUCTION.

The safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), requiring common carriers engaged in interstate commerce to equip their cars with automatic couplers so that they will couple by impact when it comes in contact with another car and which may be uncoupled from the side without the necessity of a man going between the ends of the two cars, requires that each car taken separately shall be completely equipped, and that the couplers at both ends shall be in good order and in operative condition.

2. SAME—DEFECTS—NEGLIGENCE.

Where a car engaged in interstate commerce had been at rest for more than an hour in the carrier's yard so that an opportunity for inspection and for the discovery of defects in its automatic couplers was afforded, the carrier was bound at its peril to discover and repair the defect before again moving the car, or incur a liability for the penalty imposed by the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) for moving a car engaged in interstate commerce without having the same equipped with couplers coupling automatically by impact, without reference to whether the defect could have been discovered by the exercise of reasonable care.

[Ed. Note.—Duty of railroads to furnish safe appliances, see note to *Felton v. Bullard*, 37 C. C. A. 8.]

3. SAME—ACTION FOR PENALTY—NATURE OF PROCEEDING—BURDEN OF PROOF.

An action by the United States against an interstate carrier to recover a penalty for violation of the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) is a civil proceeding, in which the burden is on the government to make out a case by clear and satisfactory evidence, but not beyond a reasonable doubt.

At Law.

This was an action brought by the United States to recover three penalties of \$100 each alleged to have been incurred by the defendant in hauling on November 12, 1906, Lehigh Valley car No. 83,759, November 13, 1906, Lehigh

Valley car No. 69,609, and on September 26, 1906, its own No. 49,786, from Allentown, Pa., with the coupling and uncoupling apparatus on one end of each car in a defective condition, in that the lock pin or lock block was disconnected from the uncoupling lever. Two government inspectors of safety appliances found these cars in the defendant's yard at Allentown, and after at least half an hour's interval the defendant hauled the cars in the defective condition. The defendant offered evidence that in the ordinary course of its business it had inspectors whose duty it was to inspect cars moved by it, and if any defects were found such defects were noted in an inspection book kept for that purpose; that it had examined these books, and found no entry of any defect having been found or repaired.

J. Whitaker Thompson, U. S. Atty., John C. Swartley, Asst. U. S. Atty., and Luther M. Walter, Special Asst. U. S. Atty.
James F. Campbell, for defendant.

J. B. McPHERSON, District Judge (charging jury). This is an action brought by the United States, as no doubt you understand, to recover the sum of \$300, being a penalty of \$100 for the use by the defendant company of each of three cars, which it is said were defectively equipped in violation of the act of Congress which is ordinarily known as the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]). There is only one portion of it to which your attention need be directed, and that is the second section of the act, which provides, in substance, that no common carrier may haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars. The meaning of that section is clear enough. The direction of Congress is that any common carrier, such as a railroad, must equip its cars so that there shall be at both ends a coupler which will couple automatically by impact when it comes in contact with another car, and which may be uncoupled also from the side without the necessity of a man going between the ends of the two cars in order to perform that operation. That requires that each car taken separately shall be complete—completely equipped; that is to say, it requires that the couplers at both ends shall be in good order.

It is not sufficient, under this act of Congress, that one coupler should be in good order and the other should be defective, although it appears from the testimony in the case that under certain circumstances even if one of the couplers is defective the process of coupling may nevertheless take place, provided the coupler upon the car with which the defective car comes in contact is in good order. If the two ends that come together were both out of order, then the coupling could not take place automatically, but if one of them is in good order while the other is not, then, under certain circumstances, the coupling may take place automatically just the same as though both cars were thoroughly equipped. But, however that may be, the act of Congress does not permit such a situation to exist. It requires that each car taken by itself shall have the couplers at both ends in good order, so that at each end the coupler may perform its service in the manner directed by this statute—that is to say, automatically by the impact of the two cars. And it also requires that the couplers shall be in such

order that the cars may be uncoupled without the necessity of somebody going between the cars; that is done by the use of levers. In some instances the lever comes entirely across the ends of the car, so that at whichever side the brakeman or employé happens to be standing he may perform whatever operation is necessary for the purpose of uncoupling. On some of the cars, perhaps the most of them, as the testimony would seem to indicate, I believe it is only upon one side, and then, of course, they can only be used from that side, but nevertheless they can be so used. That is the provision of the statute.

Of course, you will see at once—perhaps you have seen already, if you have been thinking at all about the case—that some difficult questions might arise as to when common carriers might be liable, and it is very easy to conceive of situations in which it would be hard to hold them liable under the strict letter of the law. For example, suppose a car started from the point of shipment in perfectly good order, and then through no fault of the carrier something happened to the coupler while the journey was in progress. Of course, under the strict letter of the law every minute the car was in use after that time there would be a violation of the law; but, I say, that would present a hard case, and if the carrier, under the proper construction of this statute, is liable under such circumstances, of course, there is a certain hardship about the situation. But we have nothing to do with a case of that kind. That may safely be left to be dealt with when the time comes. I give you that as an illustration, and others might be easily thought of. We are dealing with the particular situation disclosed by the evidence, and the jury must confine itself to that, as I intend to do in what I have to say to you.

Here is a case where a certain number of cars, constituting a train used in interstate traffic—and about that matter there is no controversy—are at rest for a certain length of time; in all cases for more than an hour, in some cases for, I think, several hours; but, at all events, in all of these three cases at rest for more than an hour, and therefore affording an opportunity for inspection for the discovery of defects in these automatic couplers. In a case like that I instruct you that it is the carrier's duty to find any defects that may exist, and if the carrier fails to find them, then the carrier is liable for the penalty imposed by the statute; because if the train is used afterwards with the coupler out of order, then, of course, under the precise letter of the statute, the carrier is using a coupler that cannot be coupled automatically by impact or cannot be uncoupled without somebody going between the cars, or perhaps neither operation can be performed as the statute contemplates. In other words, the question of diligence or carefulness on the part of the carrier in inspecting the cars has nothing at all to do with the matter now before you. The obligation is laid upon the carrier by the statute to find, in effect, any defect that may exist, when it has, as it had under these circumstances, the opportunity to discover it; and if its inspectors do not discover it, then the carrier is liable for those defects and for the penalty that is imposed for the use of the car having such defects.

That leaves, therefore, for your consideration, in each of these three cases the question of fact whether these cars, or either of them, were defective. You have heard the two inspectors in the service of the Interstate Commerce Commission upon that point, and there is other testimony offered by the defendant carrier which would tend to show that they were mistaken, and you will have to determine what is the fact. They may, perhaps, have mistaken some other car for the one that is spoken of here, or they may not have discovered the things that they said they did discover; instead of the couplers being out of order, they may have been in order; and those are questions of fact which I submit to the jury for their determination.

There are three separate charges here, and it is in the power of the jury, as they may find the evidence to indicate, to find either that the carrier should pay a penalty of \$300 or of \$200 or of \$100, or that it should pay nothing, according as they may find that one or more of these cars were defective or as they may find that they were all in the order contemplated by the statute.

There is this further to be said: This is what is called a penal statute; that is to say, it is a statute that imposes a penalty. It is not a statute that makes a criminal prosecution or requires a criminal prosecution, or permits, indeed, a criminal prosecution for the violation of its provisions, but it imposes a money penalty. The rules that apply, therefore, in the criminal court do not apply here. It is not necessary that the United States should prove its case beyond reasonable doubt. As you very well understand, that is the measure of proof that is required in a criminal case. It does not apply here. The United States has the burden of proof upon it in order to make out its case. It has the burden of proof from the beginning to the end of it. It never shifts. It is bound to make out its case, and it is bound to make it out by evidence that is clear and satisfactory to the jury. That is the obligation that is laid upon it. Not by evidence which is of that high degree which we describe when we say evidence beyond reasonable doubt, but it is bound to make it out by such evidence as is clear and satisfactory, and by that degree of proof to make out all the elements which go to constitute the charge. If the United States has failed to come up to that standard, then it has failed in this case as to one or more or all of these particular charges, because that obligation rests upon it.

That, I believe, constitutes all the instructions that I need give you with regard to this case. They cover, so far as I can see, all the points upon which I have been asked to give you specific instructions, and I therefore need not confuse you by reading them over and answering them specially.

The jury rendered a verdict in favor of the United States for \$300.

UNITED STATES v. MUSGRAVE.

(District Court, E. D. Arkansas, E. D. April 1, 1908.)

No. 493.

1. POST OFFICE—MAILS—POWER OF CONGRESS.

U. S. Const. art. 1, § 8, authorizing Congress to establish post offices and post roads, authorizes all measures necessary to secure the safe and speedy transmission of the mails and a prompt delivery of their contents, and also grants power to prescribe what shall be carried and what shall be excluded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Post Office, § 1.]

2. WORDS AND PHRASES—"PUBLIC POLICY."

The "public policy" of the government is not limited to such matters as are universally considered as injurious to the public interests, but any acts reasonably tending to have that effect may be prohibited by statute, and thereupon they are against public policy.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5813-5814; vol. 8, p. 7773.]

3. STATUTES—UNAMBIGUOUS STATUTES—JUDICIAL DUTY.

Where a statute is clear and unambiguous, a court is bound to enforce it as it is.

4. POST OFFICE—MAILS—OBSCENE MATTER—STATUTE CONSTRUED.

Rev. St. § 3893, as amended by Act Sept. 26, 1888, c. 1039, § 2, 25 Stat. 496 (U. S. Comp. St. 1901, p. 2658), forbidding the mailing of obscene, lewd, or lascivious books, etc., prohibits the use of the mails to all persons for the transmission of matters which are lewd, lascivious, or indecent, regardless of the relationship between sender and addressee—e. g., husband and wife—and regardless of the effect of the receipt of the article sent may have on the mind of the particular addressee. If it is of such nature that the reading would, in the opinion of reasonable persons, or the jurors selected to try one charged with violating the section, tend to deprave or corrupt the morals of reasonable persons, and would suggest to the minds of either sex thoughts of an impure or libidinous character, it is within the prohibition of the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Post Office, § 50.

Nonmailable matter, see note to Timmons v. United States, 30 C. C. A. 79.]

Powell Clayton, Asst. U. S. Atty.

U. S. Bratton, for defendant.

TRIEBER, District Judge. The defendant is charged in the indictment with violation of section 3893, Rev. St., as amended by the act of September 26, 1888, c. 1039, § 2, 25 Stat. 496 (U. S. Comp. St. 1901, p. 2658), for sending through the mails an obscene, lewd, and lascivious letter which was addressed to his wife. The demurrer raises the question whether such a letter sent by a man to his wife constitutes a violation of this statute. The contention on behalf of the defendant is that in view of the construction placed upon this statute by the Supreme Court in Swearingen v. United States, 161 U. S. 446, 451, 16 Sup. Ct. 562, 40 L. Ed. 765, where the court held that "the offense aimed at in that portion of the statute we are now considering was the use of the mails to circulate or deliver matter to corrupt the morals of the people. The words 'obscene,' 'lewd,' and 'lascivious,' as used

in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel," Congress could not have intended to include husband and wife, as at common law they were one; and for the further reason that no action or criminal prosecution would lie for a libel of the wife by the husband. There is high authority for the latter proposition. *Regina v. Lord Mayor*, 16 Q. B. D. 772; *State v. Edens*, 95 N. C. 693, 59 Am. Rep. 294. But does the language used in the Swearingen Case apply to the entire act, or was it intended to apply only to the one part of the act then under consideration, which was to ascertain the intent of Congress in the use of the words "every obscene, lewd, and lascivious book * * * or other publication of an indecent character"? A careful reading of the opinion will show that the only question before the court was the latter, as appears from the quotation above. This also applies to numerous other cases in which the same conclusions were reached (*Dunlop v. United States*, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799; *United States v. Clarke* [D. C.] 38 Fed. 732; *United States v. Harmon* [D. C.] 45 Fed. 414; *United States v. Martin* [D. C.] 50 Fed. 918; *United States v. Moore* [D. C.] 129 Fed. 159; *Burton v. United States*, 142 Fed. 57, 73 C. C. A. 243), in none of which was there any other question involved than what constitutes such literature as is prohibited by the statute. For this reason these cases are not authorities on the issue involved herein.

In the case at bar it is necessary to construe the entire act in order to determine the question raised by the demurrer. It is well settled that the power vested in Congress to establish post offices and post roads authorizes all measures necessary to secure the safe and speedy transmission of the mails and a prompt delivery of its contents, as well as the power to prescribe what should be carried and what should be excluded. *Ex parte Jackson*, 96 U. S. 727, 732, 24 L. Ed. 877; *In re Rapier*, 143 U. S. 110, 134, 12 Sup. Ct. 374, 36 L. Ed. 93. In the last-cited case the court said:

"When the power to establish post offices and post roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the states in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality. The argument that there is a distinction between *mala prohibita* and *mala in se*, and that Congress might forbid the use of the mails in promotion of such acts as are universally regarded as *mala in se*, including all such crimes as murder, arson, burglary, etc., and the offense of circulating obscene books and papers, but cannot do so in respect of other matters which it might regard as criminal or immoral, but which it has no power itself to prohibit, involves a concession which is fatal to the contention of the petitioners, since it would be for Congress to determine what are within and what without the rule; but we think there is no room for such a distinction here, and that it must be left to Congress in the exercise of a sound discretion, to determine in what manner it will exercise the power it undoubtedly possesses."

To the same effect are *Enterprise Savings Association v. Zumstein*, 67 Fed. 1000, 15 C. C. A. 153, and *Weeber v. United States* (C. C.)

62 Fed. 740, decided by Mr. Justice Brewer and concurred in by Circuit Judges Caldwell and Sanborn. These authorities conclusively determine that Congress in enacting legislation of this sort, is not attempting to act under any pretended police power, but under the powers granted by section 8 of article 1 of the Constitution "to establish post offices and post roads." If the use of the mails is a privilege which may be granted or withheld by Congress, Congress has the power to determine what shall be carried and what excluded. In the exercise of that power it has excluded explosives, liquids of various kinds, insect pests, except for scientific purposes, packages weighing over four pounds and many other articles. In determining that question Congress does not act for the protection of the rights of individuals merely; this has been wisely left to the states by the national Constitution. But under the powers to regulate the mails, it has seen proper to declare that they shall not be used for any purposes which are detrimental to the morals of the people or against public policy, and, by enacting that the sending of obscene matter through the mails shall not be permissible, it has determined such acts to be against public policy. The public policy of the government is not limited to such matters as are universally considered as injurious to the public interests, but any acts reasonably calculated to have that effect may be prohibited by statute, and thereupon they are against public policy. *United States v. Freight Association*, 166 U. S. 290, 340, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Logan & Bryan v. Postal Tel. Co.* (C. C.) 157 Fed. 570, 587.

In the *Freight Association Case* the court, speaking by Mr. Justice Peckham, said on that subject:

"The public policy of the government is to be found in its statutes, or when they have not yet spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts."

The authorities as to what was the intent of Congress in enacting this legislation are quite numerous and practically uniform. In *Ex parte Jackson*, supra, it was held:

"In excluding various articles from the mails, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse the facilities for the distribution of matter deemed injurious to the public morals. * * * All that Congress meant by this act was that the mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose shall be punished. The same inhibition has been extended to circulars concerning lotteries—institutions which are supposed to have a demoralizing influence upon the people."

In *United States v. Chase*, 135 U. S. 255, 261, 10 Sup. Ct. 756, 758, 34 L. Ed. 117, the court, in stating the intent of Congress in enacting this statute, said:

"We think that its purpose was to purge the mails of obscene and indecent matter as far as was consistent with the rights reserved to the people, and with a due regard to the security of private correspondence from examination."

In *Timmons v. United States*, 85 Fed. 204, 30 C. C. A. 74, the court said:

"Having regard to the evil to be suppressed, and looking to the whole of the section, the intention was to render nonmailable every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character as being similar to those specifically named, and like those in being obscene, lewd, or lascivious in character. Such we think is the proper construction."

In *De Gignac v. United States*, 113 Fed. 197, 52 C. C. A. 71, it was contended that the indictment drawn under this statute was subject to the rule of pleading applicable to indictments for slander, libel, etc.; that it is strictly analogous to an indictment for criminal libel. But in overruling this contention the court held that:

"The primary object of this statute is to protect the mails from corrupt communications. The incidental purpose of the law is to protect the public morals."

A petition for certiorari to review this case was denied by the Supreme Court. 186 U. S. 482, 22 Sup. Ct. 941, 46 L. Ed. 1266. In *United States v. Bebout* (D. C.) 28 Fed. 522, 524, it was held:

"The statute does not make the publication of obscene and indecent matter an offense. It consists in using the United States mail for its circulation."

In *United States v. Smith* (D. C.) 45 Fed. 476, Judge Jenkins said:

"The purpose of the statute was to purge the mails. Congress, possessing the power of exclusion, declines to permit the mail to become a vehicle for transmission or circulation of mental filth."

That the letter charged in the indictment to have been transmitted by the defendant through the mail is within the prohibition of the statute is not denied. As originally enacted, the act did not include letters. Act June 8, 1872, c. 335, § 148, 17 Stat. 302, and Act March 3, 1873, c. 258, § 2, 17 Stat. 599. Nor did the amendment of July 12, 1876, include them. Act July 12, 1876, c. 186, 19 Stat. 90; section 3893, Rev. St. (2d Ed.) 1878 (U. S. Comp. St. 1901, p. 2658). It is the amendatory act of September 26, 1888, c. 1039, § 2, 25 Stat. 496 (U. S. Comp. St. 1901, p. 2658), which first included letters. The language of the statute is clear and free from ambiguities; it makes no exceptions in favor of any persons. The language used is "any person who shall knowingly deposit," etc. There is no exception in favor of husband and wife. In construing statutes, the well-established rule is, where the language of the statute is clear and free from ambiguity, the duty of the court is to enforce it as it is, as there is nothing to construe. *Thornley v. United States*, 113 U. S. 310, 5 Sup. Ct. 491, 28 L. Ed. 499; *Scotts v. Reid*, 10 Pet. 524, 527, 9 L. Ed. 519; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 15 Sup. Ct. 508, 39 L. Ed. 601.

In *Hamilton v. Rathbone*, 175 U. S. 414, 419, 20 Sup. Ct. 157, 44 L. Ed. 221, it was held:

"The rule is perfectly well settled that where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court must look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances and the

purposes intended to be accomplished by it to determine its proper construction. But where the act is clear upon its face, and when, standing alone, it is fairly susceptible of but one construction, that construction must be given to it."

In *Collins v. New Hampshire*, 171 U. S. 30, 34, 18 Sup. Ct. 768, 34 L. Ed. 60, the court said:

"In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect."

In *Scotts v. Reid* the court said:

"Where the language of the act is explicit there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the Legislature. * * * It is not for the court to say that where the language of the statute is clear that it should be so construed as to embrace cases, because no good reason can be assigned why they are excluded from the provisions."

In *United States v. Chase*, supra, the court in construing this statute before it was amended by the act of September 26, 1888, said:

"Another argument on which indictments of this character have been sustained by some of the circuit courts is that a reasonable construction must be given the statute, and, it being evident that Congress intended to exclude anything of an obscene character from the mails, it is immaterial whether the thing prohibited is inside or outside of an envelope, and therefore unreasonable to hold that Congress intended not to allow a decent writing in an obscene envelope, but at the same time to allow obscene writing in a proper envelope. We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress."

To sustain the contention of defendant would necessarily require the court to insert in the act an exception which Congress has failed to make. It would necessitate in almost every case a determination of the moral or mental condition of the addressee of every obscene matter sent through the mails, and, as stated by the assistant district attorney, "the jury would have to determine in every case whether the mind of the receiver of the letter could be corrupted, and an acquittal would result if the addressee were a woman of the town, were insane, were so high minded as not to be influenced by letters of this character, were of such immature years as not to understand the import of the words, were so depraved that he could sink no lower." A prostitute's mind, or that of a degenerate, may not be open to any immoral influences, and the receipt of a lascivious or lewd letter, book or picture may not corrupt their minds because they are beyond such influences. Would that fact be a defense to a prosecution under this statute? Would the fact that a person, while away from home, purchases a lascivious book or picture, and sends it through the mails addressed to himself at his home, exempt him from prosecution under the statute? Clearly not. Or if publishers of such literature should use the mails for the purpose of sending it to retail dealers, who may have no intention of reading it, and whose minds for this reason could

not be corrupted, but merely sell it, could it be successfully claimed that such acts would not be violative of the statute? Congress has prohibited the sending of lottery tickets through the mails. Can a husband send such a ticket to his wife through the mails and still not be amenable to the law, or send to his wife an article intended for the purpose of preventing conception or procuring an abortion, which is prohibited by the same act? In the opinion of this court the language used clearly and convincingly shows that the intent of Congress was to prevent the abuse of a great privilege granted by a magnanimous government for the purpose of promoting the welfare and intelligence of its people, and not permit it to become a "vehicle for the transmission or circulation of mental filth."

It is true the language used in some of the cases cited, if read without reference to the issues before the court, would justify the conclusion that the sole question to be determined under this statute is the effect the matter sent through the mail would have on the mind of the addressee. Thus Judge Thayer, in his charge to the jury in *United States v. Clarke* (D. C.) 38 Fed. 733, used the following language:

"I desire to say that I have no doubt that under the statute under which this indictment is framed, standard medical works (and by that I mean works that are studied and consulted by physicians and are kept in medical and public libraries) may lawfully be sent through the mail to persons who buy or call for them for the purpose of seeking information on the subjects of which they treat. * * * Furthermore, gentlemen, I have no doubt that persons may lawfully communicate through the mails with their physicians by describing symptoms of their physical ailments, habits and practices, and asking professional advice in relation thereto; and I have no doubt that in response to such inquiries a physician may lawfully advise a patient through the mails with respect to the subject-matter of such communications."

But by reference to the very beginning of the charge it will be seen that the learned judge stated that "the sole question that remains for you to consider and determine is whether the pamphlet and papers are obscene, lewd, and lascivious." It thus clearly appears that what was intended by the courts in the cases cited by counsel for the defendant was merely the definition of the words "obscene, lewd, and lascivious, or publications of an indecent character" and not the construction of the entire act, or the question now before the court.

That it was the intention of Congress to prohibit the use of the mails to all lewd and lascivious matters relating to the sexes is also shown by the fact that the same act prohibits the use of the mails to "notice of any kind giving information, directly or indirectly, where or how, or of whom, or by what means any of the hereinbefore mentioned matters, articles, or things may be obtained or made," etc. Such information alone cannot corrupt the mind of any one, still as it may lead to the purchase of the prohibited articles, Congress, in its wisdom, has prohibited the use of the mails for such communications. That the sole object of the act was not for the purpose of preventing the corruption of the minds of those to whom the letters or papers are sent and who are susceptible to such corruption is fully shown by the fact that it has been the uniform rule of the courts that communications of that nature addressed to government officials who, suspecting that the defendants are engaged in sending obscene literature through the mails,

sought information from them under assumed names, by the use of what is commonly called "decoy letters" are violations of this statute. *Grimm v. United States*, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550; *Goode v. United States*, 159 U. S. 663, 16 Sup. Ct. 136, 40 L. Ed. 297; *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *Andrews v. United States*, 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023; and *Shepard v. United States*, 160 Fed. 584. It was urged in those cases that the letters having been mailed to fictitious persons in response to decoy letters there could be no offense, but these contentions were overruled, although it could hardly be claimed that the effect of such information, or even the obscene books or pictures, would have had any effect on the mind of the recipient, the government official, or arouse thoughts of an impure or libidinous character. Judge Thayer, who presided at the trial in the District Court in the *Grimm Case* (D. C.) 50 Fed. 528, 530, which was affirmed in *Grimm v. United States*, *supra*, in passing upon that question said:

"The next inquiry is whether the act complained of—that is to say, the deposit of nonmailable letters in the mail—loses its criminal character because the letters were sent to a person in the service of the post office department in response to an inquiry made by that person under an assumed name, and for the purpose of detecting the defendant in the commission of a crime. This question must be decided in the light of authority, and without reference to the other question that has sometimes been discussed, whether a person is ever justified in resorting to artifice or deception for the purpose of discovering crime. In view of what seems to be the weight of authority at the present time, the court is compelled to decide the question last stated in the negative. If a letter gives information where obscene books or pictures can be obtained, it is an offense to deposit such a letter in the mail with intent to give such information, and thereby to aid in the sale and distribution of such books and pictures, even though the party addressed happens to be an official in the service of the government. And, if such act is done voluntarily and intentionally—that is to say, if the nonmailable letter is deposited in the mail by the accused without solicitation on the part of the officer that the mail be used to convey such intelligence—the weight of judicial opinion seems to be that the act does not lose its criminal character, though the offense may have been committed in responding to an inquiry from a person in the government service which was made under an assumed name for the purpose of concealing his identity."

Applying these rules, it clearly appears that the object of Congress in enacting the statute was to absolutely prohibit the use of the mails to all persons for the transmission of matters which are lewd, lascivious, or indecent. It matters not what the relationship between sender and sendee is, or what the effect of the receipt of the article sent may have on the mind of the particular person to whom it is sent. If it is of such a nature that the reading would, in the opinion of reasonable persons, or the jurors selected to try the case, have a tendency to deprave or corrupt the minds of reasonable persons and would suggest to the minds of either sex thoughts of an impure or libidinous character, it is within the prohibition of the statute. In the language of Judge Phillips in *United States v. Harmon* (D. C.) 45 Fed. 417:

"Laws of this character are made for society in the aggregate and not in particular. So, while there may be individuals and societies of men and women of peculiar notions or idiosyncrasies, whose moral sense would neither be depraved nor offended by the publication now under consideration, yet the exceptional sensibility, or want of sensibility, of such cannot be allowed as

a standard by which its obscenity or indecency is to be tested. Rather is the test, what is the judgment of the aggregate sense of the community reached by it?"

If a man desires to provide his wife with such literature he must use other means than the mails to transmit it. The millions spent by the government annually on the post office establishment, in excess of the revenue derived therefrom, are not intended for the promotion of immorality or the gratification of depraved tastes, and he who thus uses the mails is, under the statute, guilty of an offense.

In *United States v. Wroblenski* (D. C.) 118 Fed. 495, it was said that a distinction may be drawn between letters sent to a young person or a stranger, and to a member of the family, upon the ground that the same test is not applicable to publications and sealed private letters. But who is to draw that distinction? In the opinion of this court it is for Congress to do it and not the courts. As long as there is nothing in the act itself justifying this distinction, courts have no right to supply it. For this reason, I am unable to follow that case.

The demurrer to the indictment is overruled.

VANCE v. PULLMAN CO.

(Circuit Court, N. D. West Virginia. April 1, 1908.)

1. CORPORATIONS—FOREIGN CORPORATIONS—SERVICE—STATUTES—CONSTRUCTION.

Code W. Va. 1906, § 2322, permits foreign corporations to do business in West Virginia on equal terms with domestic and nonresident corporations on complying with certain conditions, and obtaining and recording a certificate from the Secretary of State. Section 3805 declares that the State Auditor shall be attorney in fact for and on behalf of every foreign corporation doing business within the state, which by power of attorney shall appoint such Auditor attorney in fact to accept service for it, and section 3810 declares that any corporation failing to comply with the act, so far as relates to the appointment of the Auditor as statutory attorney, shall forfeit \$100 for such failure, and, on failure to pay the penalty, its charter shall be forfeited. *Held*, that section 3805 did not constitute the Auditor the attorney in fact for every foreign corporation doing business in the state, but only such as in the first instance determined for themselves that they were doing business within the state, and hence service of process against a foreign corporation who had never complied with such act nor with section 2322, and claimed that it was not doing business within the state, was insufficient to confer jurisdiction over it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2619.

Service on foreign corporations, see notes to *Eldred v. American Palace Car Co. of New Jersey*, 45 C. C. A. 3; *Cella Commission Co. v. Bohlinger*, 78 C. C. A. 473.]

2. SAME.

If such corporation were doing business in the state illegally, the State Auditor was nevertheless not authorized to accept service for it until he had been constituted its attorney by power executed by such corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2619.]

3. SAME—JURISDICTION—FOREIGN ATTACHMENT.

Where a foreign corporation had not complied with West Virginia laws, authorizing foreign corporations to do business within the state, and claimed that it was not doing business there, the courts of such state could not acquire jurisdiction over it except in rem by foreign attachment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2570.

Jurisdiction over corporations, see note to *St. Louis, I. M. & S. Ry. Co. v. Newcom*, 6 C. C. A. 174.]

On Motion to Quash Summons, and Return of Service Thereon.

Plaintiff instituted this suit to recover damages for personal injuries alleged to have been sustained by her at the hands of defendant's employes while she was a passenger on one of its cars between Maricopa, Ariz., and St. Louis, Mo. She alleges herself to be a citizen of Mineral county, W. Va., and the defendant to be a corporation under the laws of the state of Illinois. On January 31, 1907, the summons in the case was issued returnable to the first Monday in March following, and on February 13, 1907, the marshal made the following return of service thereon: "Served the within summons on the within named the Pullman Company by delivering a true copy thereof to Arnold C. Scherr, Auditor of the state of West Virginia, and attorney in fact for said company, in the city of Charleston, Kanawha county, West Virginia, on the 13th day of February, 1907, that being the county of the residence of said Scherr, the said company not having any place of business in said state of West Virginia, and there not being in the state any president, cashier, treasurer, chief officer, or other officer or director, trustee or agent, or secretary of said company, or any member of its board of trustees, directors or visitors, or any person, other than said Auditor, appointed by law to accept service of process." On May 14, 1907, defendant's attorneys appearing specially, and only as amicus curie, moved to quash the summons and return thereon indorsed, and the court having doubt as to the sufficiency of such return and of its jurisdiction over the cause of action in the premises directed an investigation of fact to be made at the bar of the court as to such jurisdiction. The result of such investigation was set forth in an order entered October 15, 1907, wherein the facts shown are stated to be as follows: First. The said Pullman Company regularly and daily runs its pullman cars upon and attached to all regular through Baltimore & Ohio Railroad Company passenger trains running in and through said state. Second. That a citizen of West Virginia, or any person desiring to secure passage and transportation upon one of the defendant's said cars, may upon payment of the regular fare, and in advance of the arrival of said car, publicly purchase at two, or possibly more, railroad stations and ticket offices of said Baltimore & Ohio Railroad Company within the state of West Virginia, a ticket known as a Pullman car ticket entitling the purchaser and holder thereof to a seat and sleeping berth in said car, which ticket is printed or filled in so as to show the date of purchase; the name of the car and the points between which the ticket entitles the purchaser to the seat and berth so purchased. Third. It was further proven that persons desiring to purchase a ticket entitling them to transportation and use of a seat and berth on a car of the defendant company may do so by applying to the regular station agent of the Baltimore & Ohio Railroad Company at stations and offices of said company within said state, which agent will, at the request of the purchaser, telegraph ahead to a necessary and convenient point or station, in or without the state of West Virginia, which may also be done by any individual desiring to secure accommodations, to the conductor of the defendant's car on any desired regular train, and secure by means of telegraphing therefor a seat, berth, and transportation in one of defendant's cars for the person making the application and who pays the fare therefor to the conductor, as fully and to the same extent and effect as the applicant could do if on board such car and in person making the purchase, and all telegraphic messages sent as aforesaid by a ticket agent are sent without any charge or expense to the applicant. Fourth. It is further proven that persons desiring to travel along the lines of the railroads upon

which said cars of the defendant are run, either within said state, or from places within said state to places without said state, are publicly permitted to and may enter and ride in and upon defendant's cars upon payment of the regular Pullman charge and fare then and there paid to the conductor of said car, and receive Pullman transportation from place to place within the state, or from places within it to places beyond its borders. Fifth. It is further proven that the board of public works of the state of West Virginia annually assesses and values the property of the defendant company within said state for the purpose of taxation, which property so valued and assessed consists of defendant's said cars, and that for the year 1906 the valuation of the defendant's said property, so assessed by the board of public works in said state, was \$273,000.06, and that for the year 1907 the assessed valuation thereof is also \$273,000, and that the said defendant is charged with and has paid taxes on said valuation to the state of West Virginia, and to the counties of said state through which its said cars are run as apportioned by the board of public works. Sixth. It is further proven that annually the defendant company, as required by the laws of the state of West Virginia, gives into the said board of public works, for assessment and valuation, property owned and used by it within the state of West Virginia.

And at the instance of S. W. Walker, who has appeared specially, *amicus curiae*, it is further proven and shown that, in consideration for the said payment made by the persons to the Pullman Company or its agents, said company furnishes seats for such persons to sit upon, berths in which to sleep, compartments in which to smoke, water-closets, washing facilities, and upon some cars dining facilities. It was further proven at the bar of the court that the process in this case was served as per the following signed statement of A. C. Scherr, Auditor:

"On the 13th day of February, 1907, a deputy marshal from the office of F. H. Tyree, United States marshal, served the within process on me as the attorney in fact for the Pullman Company. The deputy was informed that I was not the attorney in fact for the Pullman Company under the provisions of chapter 39, p. 401, Acts of 1905. Of this fact the United States marshal was officially advised on the 13th inst. He returned the process with the request that the same be forwarded to Messrs. Faulkner, Walker & Woods, attorneys at Martinsburg. This was done on this 20th day of February, 1907.

"[Signed]

A. C. Scherr, Auditor."

H. B. Gilkeson and Wm. McDonald, for plaintiff.
Faulkner, Walker & Woods, for defendant.

DAYTON, District Judge (after stating the facts as above). Under the facts set forth as above, two novel and perplexing questions have been raised by counsel, neither of which has been heretofore determined by either federal or state court. These questions are: First. Under the statutory laws of West Virginia, is the Auditor of State constituted an attorney in fact for this Pullman Company, upon whom service of process can be legally made and jurisdiction over it thereby obtained? Second. Is the defendant "doing business" within the state of West Virginia, within the meaning of chapter 39 of its Acts of 1905 (Code 1906, §§ 3805-3810)?

Under section 1046 of the Code of 1906 corporations in this state are classified into domestic, nonresident domestic, and foreign ones. Domestic ones are those chartered under the laws of the state, and having their principal place of business within the state. Nonresident domestic ones include those chartered under the laws of the state, but having their principal place of business outside of the state. All others are classed as foreign corporations. Under section 2322 of the Code foreign corporations are permitted to do business in the state upon

equal terms with domestic and nonresident domestic ones upon complying with certain conditions set forth, a certificate of which compliance must be issued by the Secretary of State and recorded. This statute provides, however, that nothing in it contained "shall be construed to lessen the liability of any corporation, which may not have complied with the requirements of this section, upon any contract or for any wrong."

The Legislature of the state, by Act Feb. 22, 1905, p. 401, c. 39, embodied in sections 3805 to 3810, inclusive, of the Code of 1906, provided:

"Section 1. The Auditor of this state shall be, and he is hereby constituted, the attorney in fact for and on behalf of every foreign corporation doing business in this state, and of every nonresident domestic corporation. Every such corporation shall, by power of attorney, duly executed, acknowledged and filed in the Auditor's office of this state, appoint said Auditor, and his successors in office, attorney in fact to accept service of process and notice in this state for such corporations, and by the same instrument it shall declare its consent that service of any process or notice in this state on said attorney in fact, or his acceptance thereof indorsed thereon, shall be equivalent for all purposes to, and shall be and constitute, due and legal service upon said corporation.

"Sec. 2. Provides that such corporations shall pay the Auditor an annual fee of ten dollars for acting as such attorney in fact, such fees to be turned into the state treasury by him.

"Sec. 3. The postoffice address of such corporation shall be filed with the power of attorney, and there shall be filed with the Auditor from time to time statements of any changes of address of said corporation. Immediately after being served with, or accepting, any such process or notice, the Auditor shall make and file with said power of attorney a copy of such process or notice with a note thereon indorsed of the time of service, or acceptance, as the case may be, and transmit such process or notice by registered mail to such corporation at the address last furnished as aforesaid. But no such process or notice shall be served on the Auditor or accepted by him less than ten days before the return thereof.

"Sec. 4. In addition to the Auditor, any such company may designate any other person in this state as its attorney in fact, upon whom service of process or notice may be made or who may accept such service. And, when such local attorney is appointed, process in any suit or proceeding may be served on him to the same effect as if the same were served on the Auditor.

"Sec. 5. Failure to pay the attorney's fee as hereinbefore required shall have all the force and effect, and subject such corporation to the same penalties and forfeitures, as are or may be prescribed by law for failure to pay the license tax required to be paid by such corporation.

"Sec. 6. Any corporation failing to comply with the provisions of this act in so far as it relates to the appointment of the Auditor as its statutory attorney, within ninety days from its incorporation shall forfeit one hundred dollars as for such failure, and upon a failure to pay such penalty the charter of such corporation shall thereby be forfeited and be void."

To test the constitutionality of the provisions of this act the St. Mary's Franco American Petroleum Company refused to comply with its requirements, and thereupon the state sued out a writ of mandamus from the Supreme Court of Appeals to require it to do so. This writ was sustained, and the constitutionality of the act upheld. *State v. Petroleum Co.*, 58 W. Va. 108, 51 S. E. 869, 1 L. R. A. (N. S.) 558, 112 Am. St. Rep. 951. From this decision a writ of error was sued out to the Supreme Court of the United States where the state court's decision was affirmed. 203 U. S. 183, 27 Sup. Ct. 132,

51 L. Ed. 144. It is admitted here that the defendant Pullman Company has never complied with the requirements of either this act or those of section 2322 of the Code imposing conditions precedent to its doing business in the state. In fact, it is earnestly insisted that it is not doing business in the state within the meaning and contemplation of either of these acts and is not subject to the exactions of either.

Under these circumstances was the service of this process upon the Auditor legal and sufficient to obtain personal jurisdiction over this company? It is earnestly insisted by plaintiff's counsel that the first section of the act of 1905, without qualification and in express terms, constitutes the Auditor attorney in fact for and on behalf of every foreign corporation doing business in the state, and that therefore the inherent power as well as the legal obligation vested and was imposed upon such Auditor to act as such attorney. The very serious fallacy with this contention, it seems to me is that, if it were true, the act would not only clothe the Auditor with ministerial duties, but with judicial powers of the highest character. It would then be his prerogative without due process of law to determine whether any or many foreign corporations were or were not "doing business in the state." The ascertainment of this, it must be conceded, under given circumstances, would be a mixed question of law and fact which a judicial tribunal alone would have right to decide. To say that the Legislature could thus constitute one of its ministerial officers the sole arbiter of this question, it seems to me, would unquestionably transgress constitutional limitations. On the other hand, it seems clear that under the terms of section 2322 every foreign corporation has the right to determine for itself, in the first instance, whether it will "do business in the state," and therefore, necessarily, what acts of its will, and what ones will not, constitute such "doing business" on its part. It makes this decision at its peril, subject to the state's right to prosecute, and by due process of law punish it in case its acts be judicially determined to have been a doing of business in the state. This seems to me to have been clearly understood by the Legislature in framing the act of 1905, as shown by its subsequent provisions.

All these provisions must be read and construed together. The state had full control over its Auditor, and had full power to impose upon him any new ministerial duties it might see fit to so impose. By this first section it does impose upon him the new duty of acting as attorney in fact for all these foreign corporations doing business in the state. But when it comes to the corporation itself, recognizing its right to determine whether or not it will do business in the state, it simply says to it, if you do, you shall accept, and by power of attorney duly executed, acknowledged, and filed appoint such Auditor your attorney in fact, clothing him with power to act in manner, to the extent and under the conditions set forth in the act. It seems to me very clear, after careful consideration of the matter, that this was as far as the Legislature could go. It is noted that Judge Sanders in his dissenting opinion in *State v. Petroleum Co.*, supra, thought it could not go this far. It seems to me Judge Brannon very clearly

points out that the law in effect inserts or reads the obligation to comply with these provisions into either the charter or the certificate authorizing the corporation to do business in the state, and as he well says:

"If the corporation do not see proper to conform to it, it must discontinue business, as the Legislature cannot force it to do business under the change."

In short, under the freedom of contract guaranteed by constitutional provisions a corporation cannot be compelled by law to appoint and constitute any particular person as agent, or any agent at all, to perform this duty of accepting process, but it can be prevented from doing business in the state unless it does appoint such agent upon the principles so well settled in *Bank v. Earle*, 13 Pet. 519, 10 L. Ed. 274, that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. Its right to do business in a state other than its own depends solely upon the permission of the latter state, and such permission may be upon such terms, conditions, and restrictions as it may prescribe. It is therefore clear to me that this foreign corporation defendant, not having complied with the requirements of these statutes, is not allowed to do business in the state, and has no legal existence in the state such as would authorize the courts of the state or this court to take jurisdiction over it in any way except in rem by foreign attachment. But even if it were doing business in the state illegally, I am clearly of opinion that the Auditor cannot, under this statute, undertake to act as its agent to accept service of process until he shall have been constituted by power of attorney executed by such company such agent. Having reached this conclusion, it is unnecessary to consider the second question presented as to whether or not the defendant is in fact doing business in the state. If it is it is subjecting itself to the criminal penalty, and with this we can have no concern. It is sufficient for us to find that it is not entitled to do business in the state because it has not constituted the Auditor its attorney in fact, and until it shall so appoint such Auditor its agent he cannot act as such, and service upon him could have no more valid legal effect than such service would have if made upon any other stranger to the defendant company and its management.

The motion to quash the return of service upon the summons will be sustained.

UNITED STATES v. MONONGAHELA BRIDGE CO.

(District Court, W. D. Pennsylvania. January 7, 1908.)

1. CRIMINAL LAW—TRIAL—INSTRUCTIONS AS TO REASONABLE DOUBT.

In a prosecution by the United States for a misdemeanor, the failure to charge the jury as to the right of the defendant to the benefit of a reasonable doubt is not ground for a new trial, where such instruction was not requested, nor any exception taken to the omission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1906.]

2. NAVIGABLE WATERS—OBSTRUCTION BY BRIDGES—POWER OF CONGRESS TO CONTROL AND REGULATE DELEGATION TO SECRETARY OF WAR OF AUTHORITY TO PASS ON OBSTRUCTION AND ORDER REMOVAL.

The authority given to the Secretary of War by Act March 3, 1899, c. 425, § 18, 30 Stat. p. 1153 (U. S. Comp. St. 1901, p. 3545), to order the alteration or removal of a bridge found to be an unreasonable obstruction to the navigation of any of the navigable waterways of the United States, is within the constitutional powers of Congress, and the determination of the Secretary in the due exercise of such authority that a bridge is such an obstruction is conclusive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, § 2.]

3. EMINENT DOMAIN—BRIDGES OVER NAVIGABLE WATERS—TAKING OF PRIVATE PROPERTY—CONSTITUTIONAL LAW—RIGHT TO COMPENSATION.

A bridge over a naturally navigable stream, which has not been authorized or sanctioned by Congress, may be required to be changed so that it will not be an unreasonable obstruction to navigation without compensation first being made therefor, even though the changes required will result in a virtual destruction of the bridge, amounting to an appropriation of it within the provisions of the Constitution, which forbid the taking of private property for public use without just compensation being first made.

4. SAME—STREAM ARTIFICIALLY NAVIGABLE—REASONABLE GROUND TO APPREHEND IMPROVEMENT OF—NOTICE.

The same is true where the stream, even though not naturally navigable at the time the bridge was built, has been made navigable artificially by means of locks and dams, if from conditions existing at the time the improvement of it in this way was to be reasonably apprehended.

5. SAME—PROPERTY AFFECTED WITH A PUBLIC SERVITUDE.

In every such instance property in the bridge is subject to a servitude in favor of the public, which may be asserted by the general government, acting for the common good; and, being affected with an inherent infirmity of this kind, it cannot be said to have any value which calls for compensation when so lawfully appropriated.

6. NAVIGABLE WATERS—PROSECUTION FOR FAILURE TO ALTER BRIDGE—SUFFICIENCY OF EVIDENCE.

A verdict of guilty against a bridge company in a prosecution under Act March 3, 1899, c. 425, § 18, 30 Stat. p. 1153 (U. S. Comp. St. 1901, p. 3545), for failure to comply with an order of the Secretary of War requiring defendant to alter a bridge over the Monongahela river at Brownsville, 50 miles above Pittsburgh, *held* sustained by the evidence, where it appeared that, prior to the time the bridge was built in 1832, the river had been declared a navigable stream by the Legislatures of both Pennsylvania and Virginia, and was to a small extent then navigated at that point; that surveys looking to its improved navigation as it has since been improved had been made by both the state and federal governments, and that defendant's charter granted by the state of Pennsylvania expressly provided that the bridge to be erected should not obstruct the navigation of the river.

7. SAME—DEFENSES—AUTHORIZATION OF STRUCTURE.

It is not a defense in such a prosecution that the bridge was adopted and recognized by the executive department of the government as an integral part of the national pike and post route over which the mails were carried.

On Rule for New Trial.

This was a criminal information under section 18 of the rivers and harbors act of March 3, 1899, c. 425, 30 Stat. 1153 (U. S. Comp. St. 1901, p. 3545), preferred by the United States Attorney for the Western District of Pennsylvania against the Monongahela Bridge Company for failure to make the changes

ordered by the Secretary of War in the bridge of the said company across the Monongahela river at Brownsville, Pa., on the ground that it was an unreasonable obstruction to navigation.

The court charged the jury as follows: "Gentlemen of the Jury: This is an important case, and the duties that you are called upon to perform in connection with it are certainly somewhat out of the ordinary. On the one hand is the general government, claiming that the defendants, in refusing to comply with the order of the Secretary of War and make the changes called for in their bridge, have brought themselves within the law, and have committed an offense against it, making them liable to punishment therefor. On the other hand, the defendant company sets up as a justification for its refusal the protection of the Constitution of the United States, claiming that the order will unjustly deprive them of their property, and that they are entitled to have compensation provided before it shall be done. The charge, as it is presented here, assumes the form of a criminal charge. It is the same as though the bridge company were under indictment, and your verdict will be guilty or not guilty. The authority of the Secretary of War to act as he has done in the premises cannot be questioned. Congress, by the Constitution of the United States, is given general authority over foreign and interstate commerce, and in that connection, has control over such waterways of the nation as may be drawn into interstate commerce, or may be used for that purpose. Provision, therefore, has been made, that when, in the judgment of the Secretary of War, there is an obstruction to such navigable waters, after giving notice to the parties and affording them an opportunity to be heard, he may make an order requiring the removal or the change of such obstruction, specifying what changes shall be made and within what time it shall be done. All this has been pursued in this case, and the regularity of what has been done by the Secretary of War is not now open to question. It must be accepted and complied with, unless a sufficient reason has been given in the position taken by the defendants for not complying with it.

"By the slack water improvement of the Monongahela river extending above and below this bridge, it is now located on what has been adopted as a part of the navigable waters of the nation devoted to interstate commerce, and the bridge having been pronounced in this way, by due authority, to be an obstruction, that is the end of that matter. The law evidently intends that a failure to comply with any such order shall be punished in such a way that it will be for the interest of the parties to comply. A maximum fine of \$5,000 is directed to be imposed; and every month that the parties may fail to meet such order constitutes a new offense. So that you would have offense upon offense and fine upon fine to such an extent that the parties would hardly be able to hold out against it. So there is no question in this case for you to decide as to whether or not this bridge is an obstruction, or whether or not the changes shall be made by which the obstruction that it now presents shall be removed. The only question which is before you is whether or not the defendants are entitled to ask that the expense of this, instead of falling upon themselves, shall be borne by the general government. And upon that, upon their right to make that demand, depends the question whether or not they are to be pronounced guilty or not guilty of this charge. The Constitution says that private property shall not be taken without just compensation, and that no one shall be deprived of his property except by due process of law.

"Let us look, then, in the consideration of this case, at the question, what would be the effect of a compliance by the bridge company with this order? There can be little doubt as to that in your minds, as it seems to me, under the evidence that has been given. By that which has been required to be done, this bridge must practically be torn down, according to the evidence of Mr. Morse, whose testimony does not seem to be controverted. The present clearance of the bridge, I believe, is about forty feet, and the requirement is that it shall be made twelve feet higher. Also that the channel span shall be about four hundred feet. Mr. Morse testifies that he has made plans and estimates, and that, according to them, the present structure would have to go—there can be no doubt about that—and a new one put up. As the matter stands, this bridge represents, according to the testimony of Capt. Lenhart,

an investment of about \$65,000 or \$70,000, on which they are getting a net return of some \$9,000 or \$10,000 a year. The old bridge has an apparent life of some twenty years yet. To make a new bridge, a steel structure, which would probably be the one adopted, according to the testimony of Mr. Morse, would cost some \$112,000, including the expense of removing the old and making the changes in the abutments, and also allowing a salvage in the demolition of the old one for the timber that is in it. Now, does that amount to a taking, within the provision of the Constitution? It seems to me that if it causes a substantial or serious destruction of the property which the defendants now hold and enjoy, it does come within this provision of the Constitution. The defendants have apparently got to see \$65,000 wiped out and \$112,000 more put in, out of their pockets, if they are to maintain this structure as a toll bridge. It is true that the franchise which they have for taking toll would not be interfered with. They may still put up another bridge, in other words, and get toll from it. And they must, in the end, some day put up such a structure, no doubt, when this one wears out. The new bridge, also, would be up to date and would have that advantage, with all the new life that was in it. But, at the same time, taking all this, taking the net result, and especially the immediate result to these parties, if this would be a substantial loss to them, it amounts, in my judgment, to a taking within the provisions of the Constitution for which, under ordinary circumstances, compensation must be made.

"The question, then comes down to this: Whether the bridge has a right to be there, under all the circumstances that are found in the case. I have already said to you that Congress has complete control over the navigable waters of the United States. This, as it now stands and according to the improvements which have been made, is one of the navigable waters. This bridge has been found to be an obstruction, and may be ordered to be removed. All these are fundamental facts that must be accepted. And the question is, why, then, must not the defendants comply? It seems to me that I can illustrate what I desire to present to you upon this point by taking extreme cases. There can be no question, in my mind, if a person undertook to locate on what was clearly a navigable water of the United States, by putting up, for instance, a bridge which spanned it, that, unless the assent of Congress were first secured, he would do this subject to the right of Congress to come in and say that it should be removed. If this were done on a tide water creek along our sea coast, no controversy as to the right of Congress to come in in this way could arise; nor, if a bridge were located across any of our important rivers, such as the Ohio, or such as the lower reaches of the Delaware and the Susquehanna, in the eastern part of this state, or such, for instance, as the Allegheny and Monongahela right here at their confluence, now, after the improvements in navigation, which exist, have been made. On the other hand, suppose a party located a bridge upon some stream quite a way in the interior, across some inconsiderable creek or stream, with no suggestion at all about it of any possibility of a use of that stream, either in its natural condition or under any probable improvement of it—there, it seems to me, we would have the opposite case; and a party could not then be charged with intruding on a navigable water, or such as in any likelihood would ever come under the authority of Congress as a navigable waterway; and that he would be protected, if he had due authority from the state, or under any circumstances; and that he could invoke this provision of the United States Constitution for his protection. But this case, unfortunately, is not so clear as all that. It occupies a middle position. It is nearer the line. One distinguishing feature of it is, however, that the navigation of this stream, as it is now conducted, is not natural, but artificial—that is to say, in its present proportions. Congress, taking up the work that was begun under the state law, has improved the Monongahela river by the location of locks and dams, carrying slack water away into the interior of the country; extending up not only through Pennsylvania, but into the neighboring state of West Virginia. We have, therefore, here an interstate navigable stream, as it stands, and on this is this bridge which, under these conditions, has become an obstruction, according to the judgment of the Secretary of War. But Congress, by direct action, has made these conditions

—as they now exist, at least; and that gives the case a different feature from the ordinary. Can that be done on the part of Congress; either by an adoption of what had already been done under the state law, or by carrying the same improvements forward? Can that be done in that way and this property taken, in order that the work may be complete and meet all the requirements, without the parties whose property is so taken being entitled to invoke the protection of the Constitution? It seems to me, then (and I have so ruled in the course of this case), that we have got to consider what were the natural conditions of this stream, and what was reasonably to be apprehended therefrom at the time this bridge was constructed.

"Was this by nature a navigable water? Now, we have, the Legislatures of both Pennsylvania and Virginia in the early days declaring that this stream was a navigable stream. That bears somewhat on the question; but, at the same time, we must have something more than a mere legislative declaration, in my judgment. And this, as you will note, was merely with regard, apparently, to matters within each of these respective states, not necessarily extending to interstate navigation, where alone Congress comes in. You have heard the testimony of these witnesses; and old historical matters have been referred to, bearing on the question as the character of the use of this stream. On the one hand, it is contended that boats and rafts passed up and down; and while it is conceded at certain seasons of the year, perhaps in very low and dry times, this may not have been done, yet, nevertheless, it is claimed that during the major part of the time this was made use of, and actually was a navigable water. On the other hand, it is contended, and testimony has been given to the effect, that this stream through a large portion of the year consisted merely—at least, near this bridge, as well as up and beyond it—of pools with intermediate riffles; that the boats that went down the river only got back by pushing, or poling, or in some cases by putting out lines and drawing up the boats by means of a windlass. Poling and pulling in this way hardly seems to me to constitute navigation. It is in one sense such; but looking at it in the broader sense, and having regard to the fact that the right of Congress to act depends upon the stream being navigable for the purposes of interstate commerce, was that such as existed here? If you find, however, that, taking these legislative declarations that have been shown to have been made with regard to this stream, this actually was what might be regarded as navigable water over which Congress, in the exercise of its authority, would have proper jurisdiction, then when the parties set up their bridge, they took subject to that condition, and they cannot complain now that it is enforced against them.

"I am prepared to go one step further, and testimony has been received upon the theory, and that is, that if, when this bridge was erected, the parties who built it had reason to apprehend that there would be such character of improvements as have actually now come about, they would also be affected with notice of that, and bound by it. Now, upon that question, we have several things upon the one side and the other. It is true that, not until 1836, was the Monongahela Navigation Company chartered, and this was some three years after this bridge had been built. Nor were there any locks and dams on the river at all until 1840 and 1841, when dams Nos. 1 and 2 were built, and not until 1844 were dams 3 and 4 constructed, by which the slack water was brought up to Brownsville. So that up to the time of and several years past the time when this bridge was erected there was nothing but the stream in its natural condition, with these impediments in it such as have been described here, if you believe that testimony. At the same time, we have evidence that, even at that early day and before it, slack-water improvement of this river had been contemplated, and that, too, not only by the state government, but by the national government. United States engineers had, previous to this time, according to maps which were here produced and put in evidence, made a survey of this stream, looking to just such improvements as are now found upon it. We have also the fact that the lower reaches of the Monongahela river, as it approaches here to the confluence with the Allegheny and Ohio, by that very fact was brought in touch with the general navigation of the country. I do not know, at that early date, just how far up the stream

there was navigation, but I imagine that, from the very earliest here about Pittsburg and down the Ohio, there was such use of the river, and there were such river craft plying up and down and about here that the Monongahela at this lower part of it was already devoted to interstate navigation. And this bridge was only about fifty miles off. Was it then to be reasonably apprehended, under all these circumstances, that this stream, by such improvements as were so suggested, might become a highway such as it has now become? If you should find that it was actually a navigable stream, which could be put to the purposes of interstate navigation, or, further than that, if that was to be reasonably apprehended by the existing conditions, then the parties who built this bridge, when they erected it where they did, took with notice and subject to such conditions and to the control that would ultimately result therefrom by Congress, under its power to control the interstate waterways of the country.

"This case then, really comes practically down to that—to the disposition of those two questions. The first, of course, being the question whether the changes that are required upon this bridge would amount to a taking. But, if you dispose of that question in favor of the defendants, then the case depends upon this other question—whether this was a navigable stream or waterway, or whether these parties had reason, from the conditions existing there at the time or of which they were bound to take notice, to believe that it might be devoted to such a purpose as it now has been. Parties who act with notice act with their eyes open. They cannot complain if the risk that they take turns against them. And it does not matter, and we cannot be turned aside by the fact, that the loss to them may be serious. We may hesitate to so declare it, or to take such action as will put them in that position. But still, if the facts compel that result, neither you nor I must hesitate to do our duty in the premises. If these parties erected their bridge upon a navigable water, or that which they had reason to believe might ultimately become such, then they took subject to the control of the general government to declare, as the Secretary of War in this case has done, that the use is an obstruction to the improvement that is contemplated and desired for the benefit of the people of the United States. And, under those circumstances, the defendants cannot say that somebody else shall bear the brunt of it. Whatever the loss to themselves, they must comply with this order, if this condition be true, and you must pronounce them guilty on this charge. On the other hand, if you are not satisfied upon that point, if you believe that the stream was not naturally navigable for the purposes of interstate commerce, or that the artificial conditions which now exist by which this action of the Secretary of War is made necessary could not have been reasonably contemplated by anything that was apparent there or that had been going on, either on the part of the state or the general government, and that the bridge company, acting on the situation as it was presented to them, had no reasonable ground to apprehend any such result, then they would not be answerable at this time and cannot be required to obey it until just compensation has been made, if obedience would result in the destruction of their property and the serious loss to them which has been testified to. They must obey eventually. Mind you, that question is not open. That they do not, or at least they cannot, pretend to set up. This bridge must be changed, if this law stands, and I see no reason why it should not. The only question is, whether it must be at their expense. If you consider that the defense which they have made, as I have endeavored to explain it to you, is not made out, then you will pronounce them guilty. But, on the other hand, if you are not satisfied upon that point, even though the result of your verdict may apparently block the general government, you will find them not guilty. It is not often that a question of such administrative concern gets into a jury box to be passed upon. But the law has made you the arbiters of that question, and you alone can pass upon it.

"The parties have asked me to instruct you upon certain points of law. I do not find myself able to affirm any of the positions taken in the defendants' points, and therefore will refuse them without reading. I have covered some of the points on the part of the government in what I have already said to you. But, out of extra precaution, I will read those which I can affirm.

"First. By section 18 of the act of March 3, 1899, c. 425, 30 Stat. p. 1158 (U. S. Comp. St. 1901, p. 3545), Congress placed on the Secretary of War the duty of determining whether or not bridges over natural waterways of the United States were obstructions to the navigation of such waterways. In case he complied with the requirements of the law in regard to a hearing, and fixed a reasonable time for the completion of the prescribed alterations, his notice to alter the Monongahela Bridge, set forth in the information filed at above number and term, was a lawful notice, and the failure to alter said bridge in accordance with said order, or to move the said structure, if continued during the month of September, 1905, constituted the misdemeanor charged in the information; and though the defendant originally built said Monongahela Bridge under color of authority of an act of Assembly of the state of Pennsylvania, and even though the requirements of that act of Assembly were strictly observed by said bridge company in constructing said bridge, such act of Assembly would not constitute a valid defense to the information.' Ans. 'That is a correct statement of the law.'

"The second point I refuse without reading.

"Third. Section 18 of the act of March 3, 1899, directs the Secretary of War to give the parties interested, to wit, the bridge owners, a reasonably opportunity to be heard, prior to issuing final notice to said bridge owners, to make the alterations deemed necessary by him in order to render the bridge under consideration not an obstruction to the free navigation of the river spanned by it. Such hearing need not be held by the Secretary of War in person; and it is sufficient under the provisions of the act if the Secretary of War had given said owners an opportunity to be heard relative to the proposed alterations before one or more of his agents or subordinates, and the testimony or statements made at said hearing have been submitted to and considered by said Secretary of War.' Ans. 'That is a correct statement of the law.'

"I will refuse the fourth point without reading it. There is a part of that I could affirm, but I am not called upon to separate one from the other.

"The fifth and sixth points I refuse.

"Gentlemen, with these instructions, I submit the case into your hands. As I have said to you, it is merely whether the defendants are guilty or not guilty."

The defendants' points which were refused by the court were as follows:

First. That the authority conferred upon the Secretary of War by section 18 of the act of March 3, 1899, to require any bridge constructed across any navigable water of the United States, which is an unreasonable obstruction to navigation to be so altered as to render navigation reasonably free, easy, and unobstructed, applies only to bridges constructed under the authority of acts of Congress which reserved such power to Congress.

Second. The question whether the bridge was so constructed as unreasonably to interfere with the navigation of the river was to be determined by the requirements of navigation at the time when the bridge was erected, and was not made dependent upon the interest of future navigation, and Congress could not compel the alteration of such bridge then properly constructed, at the expense of the bridge owner, and without compensation, merely because it might, under the views of the Secretary of War, in the future be an unreasonable obstruction to some new and improved method of navigation.

Third. The Monongahela Bridge having been erected under a statute of the state of Pennsylvania, granting the bridge company such power, and with the acquiescence and assent of the United States government, and prior to the Congress of the United States having assumed jurisdiction over said river, it became a lawful structure, and the lawful property of the Monongahela Bridge Company, and the United States cannot deprive the bridge company of that property without due process of law, including compensation for the loss of the bridge company.

Fourth. The requirement by the Secretary of War in his order for the reconstruction of the Monongahela Bridge, which compels the removal by the Monongahela Bridge Company of the present structure and the erection of a new one, is a virtual taking of the property of the bridge by the Unit-

ed States without due process of law, and therefore in violation of the federal Constitution.

Fifth. The requirement of the Secretary of War in his order compelling the reconstruction of the bridge at the expense of the bridge company, and without compensation to the bridge company, is a virtual taking of the property for public use without just compensation, and is therefore in violation of the federal Constitution.

Sixth. From the evidence in the case the jury may find that the United States, both by its executive and legislative departments, invited, acquiesced in, and approved of the erection of the Monongahela Bridge as it now stands, and if they so find and also find that the government made it a part of the national highway, and it was used as such, the defendant cannot be compelled by the order of the Secretary of War to change the said bridge and alter the same at its own expense as is provided in said order, because that would be the taking of the private property of the defendant without due process of law, and without compensation.

Seventh. This information being based upon a noncompliance by the Monongahela Bridge Company with the order of the Secretary of War, which order it is alleged was made under the provisions of the act of Congress approved March 3, 1899, cannot be maintained, because in respect to these proceedings the provisions of said act are null and void, for the following reasons: (a) It attempts to take and destroy the private property of the Monongahela Bridge Company without due process of law, contrary to the provisions of the Constitution. (b) It undertakes to authorize the taking and the destruction of private property for public use without just compensation, contrary to the provisions of the Constitution. (c) It undertakes to unlawfully delegate to the Secretary of War of the United States Army both legislative and judicial powers, and this in contravention of the Constitution of the United States.

Elighth. The said act of Congress makes it the duty of the Secretary of War to first give the party reasonable opportunity to be heard, and to give notice to the persons or corporation owning or controlling such bridge (in this case the Monongahela Bridge Company) so to alter the same as to render navigation through or under it reasonably free and unobstructed, and in giving such notice the act requires him to specify the changes recommended by the Chief of Engineers that are required to be made, and the Secretary of War shall prescribe in each case a reasonable time in which to make such changes. Under this act the Secretary of War was required affirmatively to give to the Monongahela Bridge Company, the owner of the bridge in controversy, an opportunity to be heard by him, the Secretary of War, on the questions whether the bridge was an unreasonable obstruction to navigation, and what alterations shall be made, before he was authorized or lawfully empowered to give the notice and make the order he did to the Monongahela Bridge Company, requiring the alteration of said bridge, and it appearing affirmatively that the Secretary of War, in making the order set forth in the information, never at any time gave the Monongahela Bridge Company reasonable opportunity to be heard before him, or any hearing whatsoever, therefore the said order is not a lawful one, and this prosecution must fail.

Ninth. That under the evidence in the case it is for the jury to determine whether the Monongahela Bridge is an unreasonable obstruction to navigation of the Monongahela river.

Tenth. Conceding that Congress might by direct act declare the Monongahela Bridge an unreasonable obstruction to navigation, the United States has failed to show that Congress ever has taken any such action, or has ever disapproved of the bridge as constructed.

Eleventh. The evidence showing that Capt. Sibert, without affording the Monongahela Bridge Company an opportunity to be heard, first examined and then reported that the bridge was an unreasonable obstruction to navigation, and that the matter was then referred back to Capt. Sibert to grant the Monongahela Bridge Company a hearing, does not show such a hearing as the act of Congress provides for, and the fact that the bridge company appeared before him will not alter the case as it is not shown that the bridge company knew the fact of his previous examination and report.

Twelfth. Under all the evidence in the case the verdict must be for the defendant.

The defendants excepted to the charge of the court as follows: (1) To the refusal of the defendants' several points. (2) To the affirmance of the first and third points submitted by the government. (3) To that part of the charge in which the court instructed the jury that the validity of the act of Congress of March 3, 1890, and the authority of the Secretary of War thereunder to make the order in question, and the regularity of the proceedings in making said order, could not be questioned in this case, and that the order and notice of the Secretary of War were conclusive. (4) To that part of the charge in which the court instructed the jury that, if the jury found that at the time of the construction of defendants' bridge, the stream was actually a navigable stream for interstate purposes, or the defendants had reason to presume that it might be devoted to such purposes as it has been, then the bridge company would not be entitled to compensation, and the verdict should be guilty.

The jury having returned a verdict of guilty, the defendant moved for a new trial.

D. T. Watson and James H. Beal, for the rule.
John W. Dunkle, U. S. Atty., opposed.

ARCHBALD, District Judge* (after stating the facts as above). This is an information, under the act of Congress of March 3, 1890, § 18, 30 Stat. 1153 (U. S. Comp. St. 1901, p. 3545), against the defendant company for a refusal to make the changes ordered by the Secretary of War in its bridge across the Monongahela river at Brownsville, Pa., 50 miles above the city of Pittsburg. This bridge was built in 1832, under a charter from the state of Pennsylvania, and is located on the line of the Old National Pike, laid out by the federal government in 1807, to give better access to the then distant parts of what is now the Middle West. It closes the gap in the road made by the river, the necessities of travel before that being met by a ferry, and after its construction the ends of the road leading to the ferry were relocated, so as to connect with the approaches to the bridge, which was thus adopted and made an integral part of the thoroughfare. It was built at a cost of from \$65,000 to \$75,000 and is still in good preservation, and if undisturbed would probably last for 20 years more. It is a toll bridge and the net returns amount to about \$10,000 a year, but the changes which have been ordered by the Secretary of War will compel the tearing down of the whole structure, with the loss of all that it represents, and the building of a new bridge (if the franchise is to be preserved) at an estimated additional expenditure of \$112,000. There is a large and increasing use of the Monongahela by reason of the mineral and other developments on its upper reaches, but it is effected artificially, by means of slack-water navigation, secured by locks and dams, through which it is connected with the Ohio at Pittsburg and so brought in touch with the general interior system of waterways of the Ohio and Mississippi basins. At the time the bridge was built, while the river had been declared to be a navigable stream by the Legislatures of both of the states through which it runs, except for flat bottom boats and rafts, and in times of high water, the navigation of it was very limited, and in dry times, according to the weight of the evidence, practically none at all. Not

*Specially assigned.

until 1836, some four years after the bridge was built and in use, was the Monongahela Navigation Company incorporated, for the purpose of improving the river by the artificial means now employed, and not until 1840 or 1841 were the first dams actually built, slack water being extended up as far as Brownsville, on the lower side of the bridge, in 1844. At the same time, even before the bridge was erected, the improvement of the Monongahela by slack-water navigation was undoubtedly in contemplation, surveys to that end having been independently made by engineers of the state and of the national government. Upon this showing the jury were instructed that the right of the Secretary of War, acting under the authority conferred upon him by Congress to require the changes which had been ordered in the bridge, even though it necessitated its entire demolition, was not open to question; but that, in view of the serious results to the company, amounting to a deprivation of it of its property, it was protected by the constitutional provision that private property shall not be taken without just compensation being first made, which the company could demand before being required to comply, and should therefore be acquitted, unless the stream at the time the bridge was located upon it was in fact navigable, or the artificial improvement of it which has since been prosecuted, by which the changes in the structure of the bridge were made necessary, was reasonably to be apprehended; in either of which cases the company could not ask for compensation and should be found guilty. The jury having found a verdict in favor of the government, the question is as to the propriety of the instructions which were so given.

Preliminary to that, however, two points are raised which require brief consideration: (1) That the verdict as rendered is defective in form and inconclusive; and (2) that nothing was said to the jury as to the right of the defendant to the benefit of a reasonable doubt, to which it was entitled, the case being a criminal one. The first of these seems to have been suggested by the recent case of *Pressed Steel Car Co. v. Steel Car Forge Co.*, 149 Fed. 182, 79 C. C. A. 130. But the two cases are very different. The difficulty there was that the jury failed to declare whether they found for the plaintiff or the defendant, simply stating that they sustained the validity of the contract sued upon and fixed the damages at a sum named. But here they say, in so many words, that they "find a verdict of guilty"; as to which it is not easy to see how anything could be more positive or certain. Nor is the other matter more serious. The obvious answer to it is that not only was there no request for an instruction as to the effect of a reasonable doubt, but that no exception was taken to the failure to give it. Had there been, it would have enabled the court to at once make the necessary correction as would have undoubtedly been done, and without that, the case being a misdemeanor, the omission must be regarded as immaterial. By the neglect to except at the time, the defendants virtually gave the court to understand that to this extent at least the charge was satisfactory, suggesting that the stress laid upon it, now that the case has gone against them, is an afterthought, if not indeed a catching at straws.

The important questions in the case are those which were first addressed.
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verted to; that is to say, whether the judgment of the Secretary of War, that the bridge in its present condition is an unreasonable obstruction to the free navigation of the river, is conclusive; and whether the bridge may be condemned and the company be required to change it, in the way specified, even to its entire destruction, without compensation for the property loss so sustained, simply because it is located upon a stream, not navigable as it is claimed, at the time the bridge was built, but having become so by artificial slack-water improvements, to meet the material progress of the country. But the first of these questions cannot be regarded as an open one, being foreclosed by the decision in the *Union Bridge Case*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523. It is true, that there was no offer there, as there is here, to show that the bridge was not in fact an obstruction, but the principles upon which the case proceeds are inconsistent with the reception of any such evidence. The authority of Congress over bridges upon navigable waters, as it is there shown, is derived from the power given to it by the Constitution over interstate and foreign commerce, and this of necessity includes the right to determine what shall or shall not be considered unreasonably obstructive to free navigation, and to require a removal or alteration of that which is, to the extent that it is found to be so. The determination of this, as to any particular structure, might be made by direct investigation and action, as was done with regard to the bridge over the Ohio at Wheeling, which was sanctioned by Congress and made a post road (*State v. Wheeling & Belmont Bridge Co.*, 18 How. 421, 15 L. Ed. 435), after it had been decided to be an impediment to navigation and ordered to be changed, in a suit expressly brought to determine that question. *State v. Wheeling & Belmont Bridge Co.*, 13 How. 518, 14 L. Ed. 294. But instead of acting itself, Congress, as it is manifest, may prescribe by statute the conditions under which a bridge shall be regarded as obstructive, and commit the determination of specific cases, either to the courts, in accordance with established legal methods, or to officers of the general government, by administrative action. The latter is the course taken in the statute under discussion, in which, as it is held, Congress has not exceeded its constitutional powers. "Beyond question, if it had so elected," says Mr. Justice Harlan, in the *Union Bridge Case*, *supra*, "Congress, in some effective mode, and without previous investigation through executive officers, could have determined for itself primarily the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case, separately, would be impracticable in view of the vast and varied interests which require national legislation from time to time. By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a gen-

eral rule, and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not in any true sense exert legislative or judicial power." The statute being thus vindicated, the action of the Secretary of War in conformity with its provisions is necessarily conclusive and binding, the same as that of Congress, for which it is a mere substitute or alternative. And the course of procedure which is there prescribed having been followed in the present instance, the right of the defendant to question or contest it cannot be countenanced. The same as in the Union Bridge Case, the subject was investigated by officers of the War Department to whom it was referred for the purpose, and after notice to the defendant, and a due hearing of all parties, a report was made to the Secretary of War, stating the facts, and recommending that certain specified changes in the bridge were necessary and should be required. This report was adopted by the Secretary, not perhaps in so many words, but equally effectually by the issuance of an order in conformity with its recommendations. It is true that this was done without any further hearing than that which had already been had before the officer charged with the investigation, who was to a certain extent committed to the necessity for the changes which were recommended. But while the Secretary of War might have heard the parties further, and no doubt would have accorded them that privilege if it had been asked for, he was not bound to do so in order to comply with the statute and make his action legal, nor can it be assumed that he did not give the matter independent consideration, because he did not. In the Union Bridge Case, it was applied for and refused, the obstruction to navigation caused by the bridge being apparently too plain for controversy. And yet the proceedings were sustained.

It is said, however, that Congress having provided for a trial by jury upon a criminal information duly preferred, the question of whether the bridge was in fact an unreasonable obstruction cannot be withdrawn from their consideration or concluded by executive action, the right to a hearing being essential, according to the form of proceedings adopted, in order to comply with the requirement for due process of law. No doubt it would have been competent for Congress to so provide, leaving it to a jury of the district, upon a trial according to the forms of the common law, to say whether, in any given case, the situation was such as to make the bridge an obstruction, but there is nothing in the act to suggest that it was ever so intended. Should Congress undertake to investigate and decide for itself whether a particular bridge was an unreasonable obstruction, it would hardly be contended, after it had passed upon the question, that it was still open, simply because the enforcement of its decision by a criminal prosecution, for a refusal to comply, was provided for. But, as pointed out above, the method given by the statute under consideration is merely an alternative. By a general enactment, Congress has delegated to the Secretary of War the duty of investigating and determining the cases in which the conditions exist that call for action, and his

decision is therefore to be treated as equally binding. A prosecution, by information, and a trial by jury, are merely the means provided for enforcing his orders, it being simply left for the jury to say, whether the statute has been followed in making them, and whether there has been a willful failure or refusal to comply, after notice, constituting the offense made punishable by the statute. Nor is it of any significance in this connection that the lawful orders of the Secretary are spoken of, this being true of them, if they keep within the authority delegated to him, and are made after a reasonable opportunity to the parties interested to be heard in opposition thereto; nor that, in order to make out the offense, the refusal to comply must be willful, which means no more than that it is without just cause or excuse, as it must be after due notice and opportunity to do so. If, in addition to this, it is left to the jury to review the action of the Secretary, and to say by their verdict whether or not he was justified in his conclusions, his orders become merely persuasive or advisory, which the parties may safely disregard upon the chance of inducing a jury to believe that they are not well grounded. If that was the intention of Congress it is, of course, to be recognized, but it is not to be reached by any doubtful construction, and a careful reading of the statute leaves no place for it. As is there in terms enacted, the Secretary is to investigate and decide with regard to any bridge, constructed over a navigable waterway of the country, first giving the parties a reasonable opportunity to be heard, whether it is unreasonably obstructive to free navigation, on account of insufficient height, width of span, or otherwise, or whether there is difficulty in passing the draw opening or the draw span of the bridge, by rafts, steamboats, or other water craft, and thereupon, if it is, to give notice to the persons or corporation, owning or controlling such bridge, so to alter the same as to render navigation under it reasonably free, easy, and unobstructed, specifying the changes recommended by the chief of engineers that are required to be made, and prescribing a reasonable time in which to make them. All this has been observed in the case in hand, and the only alternative given by the statute is obedience, neglect or failure to comply being punishable by fine, and each month's delay being made a new offense to be similarly dealt with. There is no room to be found in any of these provisions for a re-examination by the jury of the question of the obstructive character of the bridge, which must therefore be held to have been conclusively determined thereby.

But it is said that the changes which are required to be made will virtually destroy the bridge, and thus deprive the defendant of its property, which cannot be done without at least making just compensation. Conceding that, if located upon waters which were naturally navigable, the rights of the owners would be subject to a servitude in favor of the public which would justify such action without this (*Gibson v. United States*, 166 U. S. 269, 17 Sup. Ct. 578, 41 L. Ed. 996; *Scranton v. Wheeler*, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126; *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523), it is contended that the present structure was built at a day when the stream was not navigable, the changes which

are proposed to be now introduced being made necessary solely because of the artificial character of the improvements, which is a different matter. There is evidence, contravening this, that the Monongahela, without regard to the slack-water improvements which have been undertaken, was a navigable water within the meaning of the law (*The Montello*, 20 Wall. 430, 22 L. Ed. 391), and that flowing through West Virginia and Pennsylvania as it did, and connecting at Pittsburg with the vast system of waterways of the Ohio and Mississippi basins, it obviously came within the class of waters over which Congress had authority. The river was also declared navigable by the Legislatures of the two states having immediate jurisdiction over it; and, in the charter granted to the bridge company by the state of Pennsylvania, it was expressly provided that the erection of the bridge should not obstruct the navigation of the river so as to interfere with the passage of rafts, steamboats, or other river craft, which of itself, as pointed out in the *Union Bridge Case*, where a similar provision appeared, was a warning to the company that the bridge must not obstruct navigation as it then was or subsequently might be. This was sufficient to justify the finding of the jury, and take the case out of the constitutional provision requiring compensation to be made, assuming that the verdict was based upon it. But the jury were also instructed that, even if not in fact navigable at the time, if the company had reasonable grounds to believe that it might become so, in the way it has, the incorporators would take equally subordinate to the right of public improvement which has been exercised; or, in other words, would be subject to the same servitude as if the stream were in fact then and there navigable. There is evidence from which this could have been found, not only in the circumstances which have been alluded to, but also in the surveys which were made before the bridge was built by the engineers of both the state and the national governments, looking to the slack-water improvements which have since been carried through. And as the verdict, under the charge of the court, may have been predicated upon this view, it becomes necessary to consider how far the company was affected by this character of notice.

It will not of course be denied that, in every enterprise, a party is charged with notice, not only of that which is immediately in view, but of that also, which according to outward and obvious indications, is to be reasonably apprehended. This is elementary law, and there is no good reason why it should not apply in a case of this kind the same as any other. It amounts to no more than that every one is bound to observe the situation as it is, and take subject to the consequences reasonably to be expected from that which is thus brought home to him. As already stated, where a bridge or other structure is located upon waters which are naturally navigable, except as it has been sanctioned by Congress, it is affected with all the infirmities incident to or consequent upon that position. This is not confined to conditions as they are at the time, or else Congress would not be able to provide for the future needs of the country, and would be cut down in the use of such waters, unless compensation was provided, to the condition in which nature left them or in which they happened to be

at the time any improvement was undertaken. This of course is not the law, the capacities having always to be considered, and any one locating on such waters takes subject to them. But the same reason applies, with equal force, to those waterways like the one here which, while not immediately or fully equipped for navigation, are so connected with others which are, that by improvement or otherwise they will in all likelihood be drawn into the common system, as they have been. This is not to say that the government could run a canal through a man's farm or overflow it with water and not pay for it. *United States v. Lynch*, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539. This, besides being an actual physical invasion, would be altogether too remote an improvement to be ever anticipated, and so is not analogous. But where, as here, there is merely an extension or enlargement of natural means, which according to the evidence was to be reasonably looked for, it operates as no hardship and works no wrong to hold that the parties took subject to the servitude in favor of the public, which is now asserted, in the same way and to the same extent as if the stream were openly and notoriously navigable.

Nor is it of any consequence that the navigation by which the changes required in the bridge are made necessary is in part artificial. In *Chicago, Burlington & Quincy R. R. v. Drainage Commissioners*, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, the creek which was utilized to drain and reclaim the farm land there involved was artificially enlarged; and yet it was held that the railroad company, at its own expense and without any provision for its reimbursement, could be required to remove from the creek the bridge and culvert which it had placed there, although it was sufficient, according to the depth and width of the channel at the time, and (unless it abandoned the crossing) to erect and maintain a new bridge which would conform to the regulations established by the drainage commissioners. Here was an entirely new, distinct, and artificial use, the only thing to be said in defense of it being that it was a related one, and yet the structure was required to be removed without compensation having been provided for it. Nor is it of any consequence that the case arose under the state and not the federal law, there being no difference in principle. Similarly also, although not so closely in point, in *West Chicago Street Railway v. Chicago*, 201 U. S. 506, 26 Sup. Ct. 518, 50 L. Ed. 845, a street railway which had lawfully constructed a tunnel under the Chicago river was required at its own cost and expense to lower the tunnel so as to provide a new and additional depth in the river which had been ascertained by competent local and federal authority to be necessary to meet the increased demands of navigation. In every such instance, as pointed out above, the structure involved of necessity, from its character and location, is subject to a servitude in favor of the public which may be asserted by the proper governmental authority acting for the common good. Property so conditioned, and affected with such an inherent infirmity, has no value which can claim or call for compensation when thus lawfully appropriated.

But it is further urged that the bridge was adopted by the government as an integral part of the national pike, the ferry crossing the

river being given up and the two ends of the road relocated so as to connect with the approaches to it. By this, as it is contended, the bridge was recognized as a lawful structure, the mails being also carried over it as a regularly established post route. But the sanction that was so given, if any, proceeded not from Congress which alone had authority to legalize it, but from the executive branch of the government which had no such power. Conceding, then, that if Congress had acted in the premises the right to maintain the bridge could not be withdrawn without first providing compensation, there is no such result where the only adoption of the bridge was of the character thus shown.

Finding no occasion, then, for disturbing the verdict, the rule for a new trial must be discharged, and, thereupon proceeding to impose the penalty prescribed by law, the sentence of the court is that the Monongahela Bridge Company, defendant, pay a fine of \$1,000 to the government of the United States, and pay the costs of prosecution, and that execution issue against the property of the said company to collect such fine and costs unless the same be paid within 10 days.

PEOPLE'S UNITED STATES BANK v. GOODWIN et al.

(Circuit Court, E. D. Missouri, E. D. April 23, 1908.)

No. 5,529.

1. REMOVAL OF CAUSES—FEDERAL QUESTION—HOW FACT MUST APPEAR.

It is settled law that ordinarily to warrant the removal of a cause into a federal court on the ground that it is one arising under the Constitution or laws of the United States that fact must appear from the plaintiff's petition or pleading, and that the case must be one which could have been originally brought in the Circuit Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 58, 59.]

2. COURTS—JURISDICTION OF FEDERAL COURTS—ALLEGATIONS OF PLEADINGS.

Jurisdiction of a federal court cannot be invoked by averments in plaintiff's pleadings anticipatory of the defense and allegations that such defense is based on the Constitution or laws of the United States.

3. REMOVAL OF CAUSES—FEDERAL QUESTIONS—DEFENSE BASED ON LAWS OF UNITED STATES.

An action for libel against individuals is not removable upon averments in the petition for removal that the action complained of was taken by defendants as officers of the United States, and that such fact was fraudulently omitted from plaintiff's petition for the purpose of preventing a removal, since such fact if it had been pleaded would not have conferred original jurisdiction on the federal court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 58, 59.]

4. SAME—CAUSE IMPROPERLY REMOVED—REMAND.

A cause improperly removed under the removal act cannot be retained by the federal court on the ground that it is an action against revenue officers of the United States which might have been brought into that court by certiorari under Rev. St. § 643 (U. S. Comp. St. 1901, p. 521).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 218.]

On Motion to Remand to State Court.

This is an action for libel instituted in a state court, removed on the petition of the defendants to this court, and plaintiff now moves to remand it upon the ground that the petition for removal is founded solely upon the fact that there is a federal question involved, and the original petition of plaintiff fails to show that fact. The petition charges the defendants with malicious libel in publishing and circulating certain statements concerning the plaintiff which are in the petition set out. There is nothing in the petition to show that the defendants are officers of the United States or that they were acting in an official capacity in the publication of the libel. The petition for removal sets up the fact that the defendant Goodwin was, at the time complained of, the Assistant Attorney General for the Post Office Department of the United States and the defendant Fulton Inspector in charge of the office of Post Office Inspectors of the United States; that the acts concerning plaintiff, charged in the petition, were dictated and composed by them in their official capacity, under and by virtue of the laws of the United States, and more especially the laws relating to the Post Office Department; that these facts, although well known to plaintiff, were designedly and fraudulently omitted from his petition for the purpose of preventing the removal of this cause from the state to this court.

Barclay & Fountelroy and Carter, Collins & Jones, for plaintiff.

Harry W. Blodgett, U. S. Atty., and T. P. Young, Asst. U. S. Atty., for defendants.

TRIEBER, District Judge (after stating the facts as above). There can be no longer any doubt in view of what has been determined by the Supreme Court in *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 13 L. Ed. 511; *Postal Telegraph Co. v. Alabama*, 155 U. S. 482, 15 Sup. Ct. 192, 39 L. Ed. 231; *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34, 39 L. Ed. 85; *Milling Co. v. McFadden*, 180 U. S. 533, 21 Sup. Ct. 488, 45 L. Ed. 656; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870, that ordinarily, in order to justify a removal of a cause from a state to a national court on the ground that the case is one arising under the Constitution or laws of the United States, that fact must appear from the plaintiff's petition in the case. It is equally well settled that no suit can, under the present judiciary act, be removed unless it be one that plaintiff could have originally instituted in the Circuit Court. *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264. Learned counsel for the defendants, while admitting these principles of law, contend that if the suit is one against an officer of the United States for acts done in the discharge of his official duties, they do not apply, and it is sufficient if that fact is set up in the petition for removal. Other reasons are also advanced why the cause should not be remanded which will be stated later in this opinion. Counsel have been very diligent in their search for authorities to sustain this position, but a careful examination of the authorities cited shows that they are either distinguishable from the case at bar or have been reversed by the Supreme Court or overruled by the court which originally decided them.

Taking up the cases cited from the Supreme Court first, we find the following: *Feibleman v. Packard*, 109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984, and *Bock v. Perkins*, 139 U. S. 628, 11 Sup. Ct. 677, 35

L. Ed. 314, are clearly distinguishable. The Feibleman Case was originally instituted in the national court and was an action on the bond of the United States marshal for trespass. *Bock v. Perkins* was an action of trespass instituted in a state court against the marshal and his deputies for seizing some property of the plaintiff on an attachment issued against the property of another person, and was removed by the marshal to the national court. But both of these cases arose under the Act of March 3, 1875, c. 137, 18 Stat. 470, before it was amended by the Act of March 3, 1887, c. 373, 24 Stat. 552 (U. S. Comp. St. 1901, p. 508). The distinction between these acts is fully shown in *Tennessee v. Union & Planters' Bank*, *supra*, where the court, in referring to the amendatory act of 1887, said:

"Congress, in making this change, may well have had in mind the reasons which so eminent a judge as Mr. Justice Miller invoked in support of his dissent from the original decision that an offense under the Constitution, laws, or treaties of the United States was sufficient to justify a removal by the defendant under the act of 1875. 'Looking,' said the court, 'to the reasons which may have influenced Congress, it may well be supposed that while that body intended to allow the removal of a suit where the very foundation and support thereof was a law of the United States, it did not intend to authorize a removal where the cause of action depended solely on the law of the state, and when the act of Congress only came in question incidentally as part of the defendant's plea in avoidance. In support of this view, it may be added, that he in such case is not without remedy in a federal court; for if he has pleaded and relied on such defense in the state court, and that court has decided against him in regard to it, he can remove the case into this court by writ of error, and have the question he has thus raised decided here.' The acts of 1887 and 1888, indeed, contain special provisions as to particular kinds of cases arising under the Constitution or laws of the United States. * * * But those provisions have no application to the cases now before us, and contain, to say the least, nothing tending to show that it was intended that such a case as any of these might be removed into the circuit court of the United States for trial." 152 U. S. 462, 14 Sup. Ct. 657, 13 L. Ed. 511.

For the same distinction between the acts of 1875 and 1887 *Texas & Pacific Ry. Co. v. Cody*, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132, may also be consulted. In *Bankers' Casualty Co. v. M., St. P. & Ste. M. Ry. Co.*, 192 U. S. 371, 24 Sup. Ct. 325, 48 L. Ed. 484, it was said that "cases against United States officers, as such, or on bonds given under acts of Congress, or involving interference with federal process, or the due faith and credit to be accorded judgments, are not in point." But all that was meant by the court, as shown by the opinion, was that if the petition, on its face, showed that the action is against the defendant as such officer, or on a bond executed under and in pursuance of an act of Congress, there is jurisdiction of the cause in a national court. In the case at bar there is nothing in plaintiff's petition showing that defendants acted as officers of the government, and the only manner in which it could have invoked the original jurisdiction of the court in this cause would have been to anticipate defendant's defense, that they claimed to have acted in the publication of the alleged libel as officers of the government. That this cannot be done is well settled by numerous decisions of the courts. *Tennessee v. Union & Planters' Bank*, *supra*; *Arkansas v. Coal Company*, 183 U. S. 185, 22 Sup. Ct. 47, 46 L. Ed. 144; *Filhiol v. Maurice*, 185 U. S.

108, 22 Sup. Ct. 560, 46 L. Ed. 827; *Filhiol v. Torney*, 194 U. S. 356, 24 Sup. Ct. 698, 48 L. Ed. 1014, affirming *Id.* (C. C.) 119 Fed. 974; *Joy v. St. Louis*, 201 U. S. 332, 26 Sup. Ct. 478, 50 L. Ed. 776, affirming *Id.* (C. C.) 122 Fed. 524; *Fergus Falls v. Fergus Falls Water Co.*, 72 Fed. 873, 19 C. C. A. 212.

In the last cited case Judge Caldwell, who delivered the opinion of the court, said:

"At law the plaintiff is never expected to state matters which should come more properly from the other side. It is sufficient for each party to make out his own case. It is sufficient for the plaintiff to state his own cause of action, and he should not anticipate his adversary's defense, for the reason that the latter may never make the defense sought to guarded against. * * * And it is equally well settled that a suggestion in a complaint in any action at law that a defendant may or will set up a defense based upon a state statute or repugnant to the Constitution, does not make the suit one arising under the Constitution, and allegations of the complaint beyond those which state a cause of action are mere surplusage. When the statement of the plaintiff's cause of action in legal and logical form, such as is required by the rules of good pleading, does not disclose that the suit is one arising under the Constitution or laws of the United States, then the suit is not one arising under that Constitution or those laws, and the Circuit Court has no jurisdiction."

In *Osborn v. Bank*, 9 Wheat. 738, 824, 6 L. Ed. 204, the court said:

"The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend upon the state of things when the action is brought."

In *Filhiol v. Torney*, *supra*, it was said:

"Any action by the government is matter of defense, and may never be presented by the defendant."

Such allegations are surplusage and cannot give jurisdiction. There is no act of Congress authorizing any officer of the government to commit any acts which constitute a libel, although it may be a good defense to plead, in answer to the charge, that they were officers, and that the publication was made by them in the discharge of their official duties and in reports to their superior officers, and that for this reason their acts were privileged. But this is clearly a matter of defense, and could not have been anticipated by plaintiff if it had sought to invoke the jurisdiction of this court by instituting this action originally therein. It is hardly necessary to say that this defense if set up in the state court, and, decided adversely to the defendants, such a decision could be reviewed by the Supreme Court of the United States on error to the highest court of the state.

The next case relied upon by defendant is *Railway Company v. Cody*, *supra*, and the cases following it, where it was held that the fact that the petition falsely alleged that the railway company, the defendant, was a corporation existing under the laws of the state of Texas and a citizen thereof, when in fact it was not such a corporation, but one created by an act of Congress, could not prevent a removal upon the ground that it was in fact a federal corporation, and that that fact could be shown in the petition for removal. But the removal was sustained solely upon the ground that in a case of that nature the rule governing removals on the ground of diversity of citizenship and

not that of a federal question being involved controls, and as the omission on the part of the plaintiff to set up in his petition the facts showing a diversity of citizenship, or stating it falsely, cannot cut off defendant's constitutional right as a citizen of a state other than that in which the suit was brought to choose a federal forum, so the false allegations as to citizenship of the federal corporation could not prevent the removal of the cause. The cases cited by counsel for the defendants (*In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55; *Ohio v. Thomas*, 173 U. S. 276, 19 Sup. Ct. 453, 43 L. Ed. 699; *Campbell v. Waite*, 88 Fed. 102, 31 C. C. A. 403) can have no application to a removal of a cause of this nature. In those cases the questions involved were the power of national courts to grant the writ of habeas corpus to determine whether the petitioner is unlawfully deprived of his liberty by state officers for acts alleged to have been committed by him by authority of a law of the United States. Nor are the cases determined by the courts inferior to the Supreme Court, which counsel for the defendants have cited, any more in point on that question.

In *Eighmy v. Poucher* (C. C.) 83 Fed. 855, which was an action for malicious prosecution for having caused the plaintiff to be indicted, arrested, and tried for an alleged violation of the pension laws of the United States, the complaint showed on its face that "during all the time and times above mentioned the said defendant was the United States Attorney, duly commissioned by the United States." *Wood v. Drake* (C. C.) 70 Fed. 881, practically sustains defendants' contention, but in *State v. Island Lime Co.* (C. C.) 117 Fed. 777, the same learned judge who had decided *Wood v. Drake* admitted that that case had in effect been overruled by the Supreme Court, and for this reason he expressly overruled it. *Winters v. Drake* (C. C.) 102 Fed. 545, involved the right of removal by a receiver appointed by a court of the United States, and was overruled as to that question in *Gableman v. Railway Co.*, 179 U. S. 335, 21 Sup. Ct. 171, 45 L. Ed. 220. As to the other part of the opinion which it is claimed is not affected by the *Gableman Case*, it is sufficient to say that it has no application to the issues before the court in this case. In that case the complaint showed on its face that the defendant was a receiver of a railroad, and that the cause of action was based upon his alleged negligence as such receiver in the management of the railroad, although it failed to allege that he had been appointed such receiver by a court of the United States. The removal was sustained by the court upon the ground that it would take notice of the fact that he had been appointed receiver by that court. The reasoning of the court was that:

"The defendant's representative capacity may be stated less technically and precisely than a plaintiff's, and, of course, being largely a matter of evidence, as to him the implication in pleading is the more readily indulged. 8 Enc. Pl. & Prac. 683. The rule permitting implication in pleading as to the name of the court appointing an administrator, according to the fact, adjusts itself still more readily to the case of suits against receivers, though no case has been found ruling the point."

In *Speckart v. German National Bank* (C. C.) 85 Fed. 12, it was held that a cause may be removed by a receiver of a national bank who,

on his own petition, was made a party defendant, although the time within which the original defendant could have removed the cause, had expired before that time. The decision of the court was upon the authority of *Powers v. Railway Company*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, and for the sole reason that as the right to remove did not exist until the receiver became a party defendant to the cause, he could not have removed it sooner, and for this reason was in time. This disposes of all cases cited by counsel for the defendants on that subject.

A case which is practically decisive of this matter is *Walker v. Collins*, 167 U. S. 57, 17 Sup. Ct. 738, 42 L. Ed. 76. In that case the plaintiff instituted an action against the defendant Walker, who was a United States marshal, and his deputies for an unlawful seizure of his property. The defendants justified their act upon the ground that they had acted as officers of the United States by virtue of a writ of attachment issued out of the Circuit Court of the United States, and thereupon filed a petition for removal upon the ground that their plea raised a federal question. A motion to remand was filed, but not acted on by the Circuit Court, nor passed upon by the United States Circuit Court of Appeals, to which court the cause was twice taken. 50 Fed. 737, 1 C. C. A. 642; 59 Fed. 70, 8 C. C. A. 1. In the Supreme Court the question of jurisdiction was raised, and it was held that the cause was improperly removed because the complaint failed to show on its face that a federal question was involved. The court said:

"As in the complaint in the case at bar there are no facts averred showing that the controversy was one arising under the laws of the United States, and it was not essential to the statement of the cause of action that such facts should be averred, the case comes directly within the operation of the ruling cited."

To cite the many cases following *Walker v. Collins*, and those cited in the first part of this opinion to this point, would serve no useful purpose, as they may be found in *Rose's Notes on United States Reports*.

But it is urged that even if defendants erred in removing this cause, under the provisions of section 2 of the act of March 3, 1887, it could have been brought into this court by certiorari under section 643 Rev. St. (U. S. Comp. St. 1901, p. 521), it being claimed that the defendants are revenue officers, and, for that reason, the cause should not be remanded, but the court should treat it as removed under that section. Assuming, without deciding, that the Assistant Attorney General for the Post Office Department and Post Office Inspectors are revenue officers within the meaning of section 643, Rev. St., has the court the power to act as suggested by counsel? That the court may permit amendments of immaterial matters where the jurisdiction is apparent from the face of the record is true. Cases in point on that question are *Kinney v. Columbia*, etc., Ass'n, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103; *Johnson v. Manufacturing Co. (C. C.)* 76 Fed. 616; *Stadlermann v. White Line Co. (C. C.)* 92 Fed. 209. Still, this does not justify the court in sustaining defendants' contention. An examination of these two provisions of the statutes will show that the proceedings are different entirely. In the one instance the petition is presented to the state court, and the order for removal made by that court. In

the other the petition is presented to the court of the United States and a *ceriorari* ordered by that court.

In *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051, the cause had been removed to the United States Circuit Court of Appeals from the District Court on appeal under section 25a of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), when it should have been removed for review of matters of law under section 21b of that act, and it was held that that was fatal, and the cause was remanded to the Circuit Court of Appeals, with directions to dismiss the appeal. For the court to treat the action now as removed under section 643 would practically amount to an amendment of a record which fails to show jurisdiction of the court. This is not permissible. *Crehore v. Railway Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144; *Martin v. Railway Co.*, 151 U. S. 673, 14 Sup. Ct. 540, 38 L. Ed. 318; *Dalton v. Germania Insurance Co. (C. C.)* 118 Fed. 936; *Shane v. Butte Electric Railway Co., (C. C.)* 150 Fed. 801.

In *Bryant Bros. Co. v. Robinson*, 149 Fed. 321, 79 C. C. A. 259, on which defendants confidently rely, the cause had been improperly removed under section 643, but the record further showed that the state court, from which the cause had been removed, had also ordered it removed, although it failed to show that a petition or bond for removal had been filed in that court. The original complaint showed on its face that the action was one arising under the laws of the United States, it being sought to enjoin the defendant, who was postmaster at Dallas, Tex., from withholding mail addressed to plaintiff, in pursuance of an order of the Postmaster General, and for this reason the court held that as it appeared from the face of the complaint that the cause was one of which the national court had jurisdiction, and that the state court had made an order for the removal, the court would treat it as properly removed under the act of 1887. Nothing of that kind appears in plaintiff's petition in this case.

It is also claimed that plaintiff's petition omitted to state the fact which was well known to it, that these defendants acted solely in their official capacity, which fact, it is charged, was concealed for the fraudulent purpose of preventing a removal to this court. This allegation is made in defendants' petition for removal, which was duly verified and is not denied by plaintiff. That the courts of the United States will, in cases of fraud, or concealment of facts known to plaintiff, if resorted to for the purpose of preventing a removal of the cause from a state to a national court, disregard the fraudulent statement or omission, has been conclusively settled in *Wecker v. National Enameling Co.*, 204 U. S. 176, 27 Sup. Ct. 181, 51 L. Ed. 430, but it must appear on the face of the record or from the evidence offered that but for that omission or fraudulent statement the cause would have been one which could have been brought originally in a national court.

In the case at bar there are no misstatements of facts in the petition; and what defendants claim are fraudulent omissions to defeat the removal could not have been pleaded by the plaintiff for the purpose of conferring jurisdiction on the Circuit Court, as it would have antic-

ipated defendants' defense which, as has been shown hereinbefore, cannot be done.

Upon the pleadings in this case, this court could not have assumed original jurisdiction, and unless that could be done, there can be none on removal. In re Wisner, *supra*.

The motion to remand is sustained.

UNITED STATES v. HAWLEY & LETZERICH.

(Circuit Court, S. D. Texas. February 4, 1908.)

No. 2,040 (1,981).

1. CUSTOMS DUTIES—"SEA STORES"—COAL.

Under Navigation Act March 3, 1897, c. 389, § 17, 29 Stat. 691 (U. S. Comp. St. 1901, p. 1871), permitting "sea stores" to be transferred from one vessel to another of the same line without payment of duties, coal is not "sea stores."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 6361.]

2. SAME—WORDS AND PHRASES—"SEA STORES."

"Sea stores" are the supplies of different articles provided for the subsistence and accommodation of the ship's crew and passengers, and do not include coal.

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below is reported as G. A. 6,643 (T. D. 28,321). The majority and dissenting opinions filed by the board are as follows:

"HAY, General Appraiser. Certain coal was transferred from the steamship Anselma de Larrinaga to the steamship Mercedes de Larrinaga, belonging to the Larrinaga Line, while the vessels were lying alongside of each other in the port of Galveston. This coal was assessed for duty by the collector under the first clause of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 415, 30 Stat. 190 (U. S. Comp. St. 1901, p. 1674), and a duty of 67 cents per ton levied thereon. Two protests are filed against this action. Protest 232,274 claims that 70 per cent. was slack and should be assessed at 15 cents per ton under one of the provisions of paragraph 415. Protest 232,275 claims that said coal should not have been assessed for duty; and, while the protest is a little awkwardly drawn, we think it fair to assume that the reason therein intended to be given is that said coal is exempt from duty as sea stores under the provisions of Act March 3, 1897, c. 389, 29 Stat. 691 (U. S. Comp. St. 1901, p. 1871). The papers submitted with the protests show that the steamships in question were of the same line; that the coal was transferred from one vessel to another, said transfer being effected by means of buckets, under the supervision of the customs officers, and that it was made without the coal touching the wharf.

"Section 415, 30 Stat. 190 (U. S. Comp. St. 1901, p. 1674), reads as follows: 'Coal, bituminous, and all coals containing less than ninety-two per centum of fixed carbon, and shale, sixty-seven cents per ton of twenty-eight bushels, eighty pounds to the bushel; coal slack or culm, such as will pass through a half-inch screen, fifteen cents per ton of twenty-eight bushels, eighty pounds to the bushel: Provided, that on all coal imported into the United States, which is afterwards used for fuel on board vessels propelled by steam and engaged in trade with foreign countries, or in trade between the Atlantic and Pacific ports of the United States, and which are registered under the laws of the United States, a drawback shall be allowed equal to

the duty imposed by law upon such coal, and shall be paid under such regulations as the Secretary of the Treasury shall prescribe; coke, twenty per centum ad valorem.'

"Section 17 of the act of March 3, 1897, c. 389, 29 Stat. 691 (U. S. Comp. St. 1901, p. 1871), reads as follows: 'That section twenty-seven hundred and ninety-seven of the Revised Statutes be, and is hereby, amended by adding thereto the following words: "Sea stores and the legitimate equipment of vessels belonging to regular lines plying between foreign ports and the United States delayed in port for any cause may be transferred in such port of the United States under the supervision of the customs officers from one vessel to another of the same owner, without payment of duties, but duties must be paid on such stores or equipments landed for consumption, except American products."'

"An attempt has evidently been made to bring the transfer of the coal in question within the purview of this statute; and, from the papers, that attempt has been successful, providing coal consumed upon the voyage, as this undoubtedly was intended to be, is classed as 'sea stores.' There is a clear distinction made by the law between ship stores and sea stores. The former are such articles as become a part of the equipment of the ship, including furniture, cables, tackle, etc.; the latter are such commodities as are consumed by the passengers or crew. In other words, ship stores become a permanent part of the equipment of the vessel; sea stores are to be consumed during the voyage.

"Section 2795 of the Revised Statutes (U. S. Comp. St. 1901, p. 1871) requires the master of a vessel to particularly specify in his report or manifest the articles that are to be used as sea stores on such vessel. To this he is to take an oath that the articles specified to be used as sea stores are not intended by way of merchandise or for sale, and these articles are thereupon made free of duty. This report must be delivered to the collector; and he, with the naval officer, where there is one, or alone, where there is no naval officer, under the provisions of section 2796 of the Revised Statutes (U. S. Comp. St. 1901, p. 1871), must determine if any part of the goods reported as sea stores is excessive, and estimate the amount of duty upon such excess. This section has no application to the case at bar, for no such finding was made by the collector.

"Section 2798 of the Revised Statutes (U. S. Comp. St. 1901, p. 1872) provides that the master of any vessel propelled by steam arriving in any port of the United States may retain all the coal such vessel may have on board at the time of her arrival, and may proceed with such coal to a foreign port without being required to land the same in the United States or to pay any duty thereon. This we do not think operates to take coal from out the category of 'sea stores' or to distinguish it in any way from other sea stores except to relieve it from the operation of section 2796—that is, there can be no excessive coal under such circumstances, as section 2798 provides that all the coal may be retained whether it is more or less than is necessary for the voyage.

"It is difficult to escape the conclusion that coal is 'sea stores' within the meaning of that phrase as used in the amendment to section 2797, Revised Statutes, cited above. The word 'consumed' is not to be so narrowly construed as to mean only such articles as are eaten. The candles or kerosene used to light the vessel are as much consumed by the passengers and crew in the course of a voyage as is the food they eat. If the candles and kerosene used in lighting the vessel are sea stores, then why not the coal on more modern vessels used to produce the power generating the electricity for lighting; and if so, why not the coal consumed in furnishing the power to propel the vessel? The Assistant Secretary of the Treasury, in a letter to the Commissioner of Navigation (T. D. 12,172), evidently takes this view, for he advises that coal retained in the bunkers of an American steam vessel is to be considered as sea stores. Ship stores and sea stores we think contemplate every article taken aboard ship to be used in connection with its navigation and voyage, and the distinction between the two is as above stated. In the Cunard Steamship Company's Case, G. A. 4,464 (T. D. 21,324), the coal which was held not to be 'sea stores' was used as ballast, and this

we think is clearly distinguishable from the coal intended to be consumed during the voyage, as in the case at bar.

"From the view here expressed it is not necessary to consider protest 232,274, as the coal under the circumstances stated herein we think is free of duty as 'sea stores' under section 17 of the act of March 3, 1897.

"Protest 232,275 is therefore sustained, and the collector directed to reliquidate the entry accordingly. Protest 232,274 is overruled.

"SOMERVILLE, General Appraiser. I dissent from the conclusion reached in these cases by my colleagues, and from the reasoning on which the decision is based. It appears from the facts in the case that certain coal imported at the port of Galveston was assessed with duty by the collector. * * * After arrival at Galveston the coal was transferred from the vessel in which it was contained to another vessel of the same line, lying alongside in the port of Galveston. The opinion construes the protest to claim that the merchandise is free of duty as sea stores. * * * It is held accordingly by my colleagues that this coal is sea stores, and is free of duty as such under the section last quoted. The error of the opinion consists in the fact that it fails to make any distinction between 'sea stores' and 'coal stores,' and that the transfer of the coal after arrival in the harbor of Galveston from one vessel to another of the same line was not an unloading of the coal, which is expressly prohibited by the terms of the present tariff act. This conclusion and the reasoning on which it is based are directly repugnant to and subversive of the decision made by this board on June 23, 1899, in the case of the Cunard Steamship Company, G. A. 4,464 (T. D. 21,324), and also of the decision of the district court of Michigan there cited, in the Fame Case, 1 Brown's Adm., 42, 8 Fed. Cas. 982 (No. 4,633). In the board decision last cited it was expressly decided that the tariff act of 1897, coupled with previous legislation, makes a clear distinction between 'sea stores,' by which is meant stores designed for the use and consumption of the crew and passengers of a vessel on the voyage, and 'coal stores' and 'other coal contained on board a vessel propelled by steam. It was further decided in this case that the transfer of coal stores from one vessel to another of the same line after arrival in this country at the port of entry was an unloading of this coal within the meaning of paragraph 523 of the present Tariff Act 1897, § 2, Free List, 30 Stat. 197 (U. S. Comp. St. 1901, p. 1682), which is prohibited by said paragraph. It was observed by the board in this decision, as follows: 'The various statutes enacted by Congress on this subject seem to make a distinction between what is commonly known as "sea stores" and "coal stores" and "other coal" contained on board vessels propelled by steam. Section 2795 of the Revised Statutes (U. S. Comp. St. 1901, p. 1871) provides for the exemption from duty of the sea stores of a vessel, and requires that the master shall particularly specify the articles, in the report or manifest to be made by him, designating them as sea stores of such vessel, and that they are truly such and not intended as merchandise or for sale.' It may be conceded for the sake of argument that coal stores used on vessels of this character might come within the purview of sea stores but for the fact that Congress has seen fit to designate such stores in our statutes and tariff acts as 'coal stores,' and has enacted a series of legislation placing them entirely in a separate and distinct category.

"The following statutes are cited on this subject for illustration:

"Tariff Act of July 24, 1897, c. 11, § 2, Free List, par. 523, 30 Stat. 197 (U. S. Comp. St. 1901, p. 1682). 'Coal, anthracite, not specially provided for in this act, and coal stores of American vessels, but none shall be unloaded.' Similar legislation occurs in Tariff Act August 27, 1894, c. 343, § 2, Free List, par. 441, 28 Stat. 539; also in Tariff Act October 1, 1890, c. 1244, § 2, Free List, pars. 536, 537, 26 Stat. 605; and Tariff Act March 3, 1883, c. 121, Free List, pars. 673, 674, 22 Stat. 518.

"Section 2798, Rev. St. (U. S. Comp. St. 1901, p. 1872), reads as follows: 'Sec. 2798. The master of any vessel propelled by steam arriving at any port in the United States may retain all the coal such vessel may have on board at the time of her arrival, and may proceed with such coal to a foreign port, without being required to land the same in the United States or

to pay any duty thereon.' So, the proviso to said paragraph 415 of the present tariff act, which makes coal dutiable by the ton, expressly provides that, 'On all coal imported into the United States which is afterwards used for fuel on board vessels propelled by steam and engaged in trade with foreign countries or in trade between the Atlantic and the Pacific coasts of the United States, and which are registered under the laws of the United States, a drawback shall be allowed equal to the duty imposed by law on such coal, and shall be paid under such regulations as the Secretary of the Treasury shall prescribe.'

"This same distinction for which I contend between coal stores and sea stores was made in board decision in *Re Pacific Coast Co.*, G. A. 5,435 (T. D. 24,705), relating to a cargo of an American steamer, consisting of coal, which was the property of the owners of the vessel, who, before arrival of the vessel at port, set aside a portion of the coal as coal stores of the steamer; and such coal as was not unloaded was held to be free as 'coal stores' of an American vessel, under paragraph 523 of the tariff act of 1897, notwithstanding the fact that the importers made an entry of the entire lot of coal at the customhouse. So, in the case of *McDormand*, G. A. 5,355 (T. D. 24,497), certain coal was imported on a steamship and entered at the customhouse at Boston, Mass., and a portion of it was purchased by the owners of the vessel and retained in the vessel's bunkers as a part of her coal stores for the return voyage but was never unloaded. It was held that the importation was complete when the goods were brought within the limits of the port with the intention of unloading them, and that the right of the government to duties then attached, and, further, that it was not essential to that right that the goods should actually be unloaded. In support of this conclusion the board cited the following decisions: *Meredith v. United States*, 13 Pet. 486, 494, 10 L. Ed. 258; *U. S. v. Vowell*, 5 Cranch, 368, 3 L. Ed. 128; *Arnold v. U. S.*, 9 Cranch, 104, 3 L. Ed. 671; and *Harrison v. Vose*, 9 How. 372, 381, 13 L. Ed. 179. These authorities fully supported the proposition in question. It was there held by the board that the coal under consideration was not free of duty under said paragraph 523 of the present tariff act, nor was the article free under section 2798 of the Revised Statutes, before cited.

"In the case of the steamer *Fame*, decided as far back as 1858, cited *supra*. It was held that the transfer of a cargo from a vessel while at wharf in port is an unloading and delivery within the meaning of section 50 of the act of March 2, 1799, c. 22, 1 Stat. 665. It was observed there by the court as follows: 'It is true that the cargo was not landed in the literal sense of the word—that is, placed on shore—but it was taken from one vessel to another while both were in port. This was clearly a landing within the intent of the statute, which was designed to prevent frauds upon the revenue.' It is immaterial in my opinion, and was so decided by the board in the case of the *Cunard Steamship Company*, cited *supra*, that this transfer is made to a vessel of the same line instead of a different line, the purpose of the statute being to prevent frauds on the revenue. It is manifest that such frauds would be just as liable to occur in the case of transfers made to a vessel of the same line as to another vessel.

"I have called attention before to the line of legislation, both in the Revised Statutes and in our tariff laws, making a clear distinction between 'coal stores' or such coal as is consumed by the steamship companies, and 'sea stores'; and it harmonizes with every canon of sound statutory construction that this distinction should be observed by judicial tribunals in construing such statutes. An illustration of this kind is found in the decision of the Supreme Court of the United States in *Seeberger v. Cahn*, 137 U. S. 95, 11 Sup. Ct. 28, 34 L. Ed. 599, where two provisions of the tariff act of March 3, 1883, c. 121, pars. 362, 363, Schedule K, 22 Stat. 508, on woolsens and worsteds, were construed by the court. It was there held that while worsted may in some respects be construed as a manufacture of wool, nevertheless it was differentiated as a separate article for tariff purposes, inasmuch as it was specially enumerated under said tariff act of 1883. Mr. Justice Gray, speaking for the court, used the following language in that case: "Though a worsted is doubtless a product of wool, and might in some respects be considered a manufacture of wool, yet manufactures of worsted, being subjected by the second

paragraph to different duties than those imposed by the first paragraph on manufactures of wool, it necessarily follows that the manufacture of worsted cannot be considered as a manufacture of wool within the meaning of this statute.' So, in the case of *Blumenthal v. U. S.* (C. C.) 135 Fed. 254; *Id.*, 75 C. C. A. 322, 144 Fed. 384, affirming board decision G. A. 5,640 (T. D. 25,194), it was held that while paste may be considered a kind of glass, yet for tariff purposes it must be considered a separate substance under its own peculiar name, 'paste,' described in the tariff act.

"Following the decisions above cited, from which no appeal was ever taken, I am of opinion that the coal in question is 'coal stores,' and not 'sea stores,' within the meaning of tariff legislation, and that the same is not exempt from duty, on the ground that the transfer of the coal from one vessel to another was an unloading within the meaning of paragraph 523 of the present tariff act. The protests should accordingly be overruled.

Harris & Harris, for importers.
Lock. McDaniel, U. S. Atty.

BURNS, District Judge. This suit is upon a petition to review the decision of the Board of Appraisers sustaining the protest filed by Hawley & Letzerich, growing out of a transfer of coal from the Anselma to the Mercedes, said vessels being steamships of the Larrinaga Line, while the vessels were lying alongside of each other in the port of Galveston. The collector of customs assessed a duty of 67 cents per ton upon the coal so transferred, to which action the respondents excepted, and in their original protest contend that 47 per cent. of said coal is what is commonly known as "slack" or "culm," and under the second clause of paragraph 415 of the tariff act (Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 190 [U. S. Comp. St. 1901, p. 1674]), subject to a duty of 15 cents per ton.

A second protest was filed with the collector claiming the coal so transferred as aforesaid was free of duty in that it was a part of "the legitimate equipment" under section 17 of the act "to amend the laws relating to navigation," approved March 3, 1897 (29 Stat. 687, 691, c. 389 [U. S. Comp. St. 1901, p. 1871]). See section 2797, Rev. St. (U. S. Comp. St. 1901, p. 1871), as amended. That portion of said section relied upon is as follows:

"Sea-stores and the legitimate equipment of vessels belonging to regular lines plying between foreign ports and the United States delayed in port for any cause may be transferred * * * from one vessel to another vessel of the same owner without payment of duties, but duties must be paid on such stores or equipments landed for consumption, except American products."

The first contention was overruled by the General Appraisers, and the same has been waived and is not here insisted upon, for the very substantial reason that respondents are relieved from the payment of all duties by the decision of the board. It may be observed that the second protest, based upon the theory or contention that the coal is exempt from duty upon the ground that it is within the designation of "the legitimate equipment of the vessel so delayed," is not sustained by the board; but the holding is there made that the respondents intended by their protest to urge that the coal in question was a part of the "sea stores" of the vessel, and the board finds by a majority opinion that this last contention is sound, and thereupon dismisses the first protest, affirms the second, holding the coal so transferred not subject

to duty, with directions to the collector of customs to reliquidate the entry in accordance with said finding, to which action of the board one of the members thereof dissents, and files his opinion as a part of the record brought here for review.

The sole question for review as disclosed by the pleadings and relied upon in the argument is whether or not "coal" is a part of the sea stores of the vessel. "Sea stores" are defined in Commercial Navigation as "the supplies of different articles provided for the subsistence and accommodation of the ship's crew and passengers."

It follows, therefore, that coal being no part of the vessel's sea stores the petition for review should be sustained, the decision of the board reversed, and the action of the collector of customs in all things affirmed.

In re GROSS.

(District Court, E. D. New York. February 17, 1908.)

ALIENS—NATURALIZATION—DECLARATION OF INTENTION BY MINOR.

Under Rev. St. § 2165 (U. S. Comp. St. 1901, p. 1829), it was competent for an alien minor over 18 years of age to make a declaration of intention to become a citizen of the United States, and such a declaration is sufficient basis for a final application for citizenship under the proviso to Naturalization Act of June 29, 1906, c. 8592, § 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 420).

Petition for Naturalization.

William J. Youngs, U. S. Atty., and Hugh Govern, Jr., Asst. U. S. Atty.

Jonas Gross, pro se.

CHATFIELD, District Judge. The petitioner is an alien 25 years of age. He arrived in the United States more than 5 years ago, being at the time of his arrival of the age of 19 years and 4 months. When 19 years and 9 months old he filed a declaration of intention to become a citizen of the United States, and his petition for a certificate of citizenship is now before the court.

The case is typical, in that the petitioner is well educated, has completed his studies for the profession of the law, can apply for examination for admission to the bar of the state of New York as soon as he becomes a citizen of the United States, and more than 5 years have elapsed since the filing of his declaration of intention. The applicant being satisfactory in all other respects, objection is made by the United States attorney on the ground that the law in effect prior to September 23, 1907, did not authorize the filing of a declaration of intention by any person under 21 years of age.

The provisions of the former statute were repealed by Act June 29, 1906, c. 3592, and section 4 of this latter statute (34 Stat. 596 [U. S. Comp. St. Supp. 1907, p. 420]), contains the following language:

"That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

"First. He shall declare on oath before the clerk of any court authorized by this act to naturalize aliens, * * * two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States. * * * Provided, however, that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration."

This statute is now in effect, and the present application is made under its provisions.

It is well recognized that a person in the apparent possession of his faculties, over the age of 14 and under the age of 21, may be a witness in the United States Court, and is presumptively competent to take an oath. Prior to the age of 14 the question of such competency must be determined by the court before the oath can be administered, while under the age of 7 the burden is upon the person offering the witness to satisfy the court that the witness possesses an understanding of the meaning and responsibilities of the oath to be taken. No person under 21 can maintain an action except through the aid of a guardian ad litem or special guardian, as the statutes may provide, but the taking of an oath and the making of a declaration of intention, not capable of being used till the person has reached the age of 21, could hardly be likened to the commencement of litigation for which the party litigating is financially responsible. It is necessary, therefore, to consider the language of the statutes, and to ascertain, so far as possible, the intent of Congress in this particular matter.

Section 2165 of the Revised Statutes (U. S. Comp. St. 1901, p. 1329), which constituted the law formerly in force, is worded as follows:

"An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise:

"First. He shall declare on oath, * * * two years, at least, prior to his admission," etc.

"Third. It shall be made to appear to the satisfaction of the court admitting such alien that he has resided within the United States five years at least," etc.

There is nothing in this statute specifying any requirements as to age, but it has been universally held that final papers cannot be given to an alien applicant under 21. The succeeding statutes grant privileges to certain aliens. Section 2166 provides that any alien, of the age of 21 years and upward, shall be admitted, without previous declaration, provided he has been honorably discharged after enlistment in the regular or volunteer forces of the army of the United States. Act July 26, 1894, c. 165, 28 Stat. 124 (U. S. Comp. St. 1901, p. 1332), contains an exactly similar provision, upon slightly different terms of service and residence, to "aliens of the age of twenty-one years and upwards," who have been honorably discharged from the navy or marine corps.

Section 2167, before repeal, extended a similar privilege to certain other minor residents, in the following language:

"Any alien, being under the age of twenty-one years, who has resided in the United States three years next preceding his arriving at that age, and who has continued to reside therein to the time he may make application to be admit-

ted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he has resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration," etc. "But such alien shall make the declaration required therein at the time of his admission; and shall further declare, on oath, and prove to the satisfaction of the court, that, for two years next preceding, it has been his bona fide intention to become a citizen of the United States"; etc.

A strict interpretation of the language of this statute would lead to the conclusion that the alien must be under the age of 21 years after he arrives at that age, but it is manifest that the former words refer to the time of residence prior thereto, rather than being intended as a description of the word "alien." And, again, it will be noticed that this section was merely a privilege to certain aliens, who at the time of applying had never secured such first papers, although they had been of age a sufficient time so to do.

Section 2168 extends the privilege of citizenship, upon taking the prescribed oath, to the widow and children of any alien who has filed his declaration of intention, and dies before becoming actually naturalized. It is manifest that, if no person were entitled to file a declaration of intention until after he had reached the age of 21 years, this provision would be of benefit to less persons than if held to cover the case of an alien who had filed his declaration before becoming 21. The effect of the latter interpretation serves as an illustration of the point involved, but there is nothing in the statutes definitely stating the intention of Congress with reference thereto. The Supreme Court of the United States, in the case of *Boyd v. Nebraska*, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103, has held that section 2168 gives to the child of a petitioner, dying before obtaining final papers, the privilege of ratifying that act upon becoming 21, again showing that residence during the formative period is the basis of the determination of qualification, and also making it fairly certain that no more risk would be involved under one interpretation than under the other. The qualifications of the person who gains citizenship are the important subjects of scrutiny, rather than the age of the deceased. The doctrine of the voidability of an infant's contract, and the necessity of ratification after arrival at the age of 21, is well established, and has been recently considered in this court in *Re Huntenberg*, 153 Fed. 768.

The provisions of section 2167, providing for proof, subsequent to arrival at the age of 21 years, of an intention for the two years next preceding, is an apparent recognition of the validity of the intention—that is, of the state of mind of the minor, finally ratified when of age. Numerous certificates have been granted in this court which might be invalidated unless restored by act of Congress, if it should be definitely settled that no paper could have been validly issued without a declaration of intention made by an adult. Inasmuch as the new law provides for all cases in the future, and inasmuch as in this district and in the neighboring Southern district, the rule has been that a declaration by a minor is sufficient, it is believed that the previous interpretations of the intent of Congress should be followed, and in the present case the applicant allowed to have his papers. It might well have been held

from the analogy of the language of section 2167 that Congress intended under the former law to cover by that section all cases of minors under the age of 18, leaving to any person over that age, when arriving in this country, the necessity of filing his declaration of intention; and under the former law no hardship would have been involved, by requiring a person to be at least of the age of 18 years before filing such intention. All aliens would then have been in one of the two classes; that is, those who under 18 required no first paper, and those who over 18 must have filed such a paper. But it is hardly conceivable that Congress would have extended the privilege of applying without first papers to a boy arriving at the age of 17 years and 364 days, while denying it to a boy who arrived at the age of 17 years and 365 days, and who immediately thereafter filed his declaration of intention.

It would seem to follow from this that the necessary intention on the part of Congress to cover all cases adequately and fairly, would indicate that the statutes, when passed, contemplated the sufficiency of a certificate of intention by a minor between the ages of 18 and 21. The provisions of section 2167 having been repealed, and the present law providing for the use of declarations of intention filed under the former law, it would necessarily follow that the recognition of the validity and sufficiency of a declaration by a minor should be extended to any case in which the person was presumptively competent to take the required oath.

THE SANTIAGO.

THE PHILADELPHIA.

(District Court, E. D. Pennsylvania. April 10, 1908.)

No. 2.

1. COLLISION—ANCHORED VESSELS—VIOLATION OF RULES AS TO LIGHTS.

The provision of article 11 of the Inland Navigation Rules (Act June 7, 1897, c. 4, § 1, 30 Stat. 98 [U. S. Comp. St. 1901, p. 2879]), which requires a vessel of 150 feet or upwards in length when at anchor to carry two lights, one at the forward part and the other at or near the stern at a lower height, to indicate the length of the vessel and the direction in which she is pointing is of great importance and must be strictly observed, and, if violated, a loss caused by a collision resulting must be borne by the vessel so violating it.

2. SAME—SPEED ON ANCHORAGE GROUNDS AT NIGHT.

A speed of four miles an hour, increased to perhaps six by the tide, held not excessive on the part of a steamer in an anchorage ground at night.

3. SAME—MOVING AND ANCHORED VESSELS—ANCHOR LIGHTS.

A collision between a pilot boat and a barge 271 feet long anchored on the anchorage ground inside the Delaware Breakwater on a dark night held due solely to the fault of the barge whose stern anchor light had been blown out five minutes before, and had been taken by the anchor watch into the pilot house to be relighted, and not restored, the evidence also being conflicting as to whether her forward light was burning.

In Admiralty. Suit for collision.

N. Dubois Miller and H. Alan Dawson, for libellant.

John F. Lewis and Francis C. Adler, for respondent.

HOLLAND, District Judge. This libel is filed to recover damages for the total loss of the barge Santiago and her cargo, which occurred while she was lying at anchor inside of the Delaware Breakwater early on the morning of December 3, 1904, as a result of being run down by the pilot boat Philadelphia. The Santiago was built of wood in June 1901, and was comparatively new. She was 271 feet long over all, 46 feet 3 inches beam, with a draught of 20 feet when fully loaded. She had four masts, and was schooner rigged. On the after part of her main deck, about 20 feet forward of her stern, there was a two-story house, the lower one about 25 feet long, 15 feet wide, and 7 or 8 feet high, above which was another house about 11 feet wide by 20 feet long and 7 feet high, divided into the pilot house and men's quarters aft, and surrounded by a deck on the roof of the lower house, 2 or 3 feet wide, on all but the after end, where it was about 5 feet wide. On November 30, 1904, the Santiago, loaded with a cargo of coal, manned by a captain, an engineer who acted also as a mate, a cook, and three seamen (all Portuguese), left Newport News for Providence, R. I., and on the afternoon of December 2, 1904, on account of threatening weather, put into the Delaware Breakwater. She was being towed by the tug Cuba in company with two other barges, the Canton and the Mantanzas. She came to anchor at about 3:45 o'clock that afternoon to the westward of the south end of the Northern Breakwater, with the Cuba the north of her, the Canton north of the Cuba, and the Mantanzas about 600 feet to the eastward of the Santiago. There were a great many other vessels there, this being an anchorage ground. The barge was heading eastward. Neither moon nor stars were shining, and it was a very dark night. The sky was overcast, the wind blowing fresh from the northeast, with occasional sprinkles of rain. A vigilant anchor watch had been maintained, and two riding lights, one in the starboard rigging of the foremast about 25 feet above deck, and the other on a staff on the top of the cabin near the stern, were set and burning up to within five minutes of the accident, when the after light was blown out, and the watch had taken it to the pilot house to relight it. This was about 2:45 o'clock in the morning, and while so engaged the pilot boat Philadelphia collided with the barge on the starboard side abaft the spanker rigging and abreast of the forward end of the cabin. The force of the blow cut into the plank sheer below the water line, and she sank in about one hour.

The libel charges that the collision and damage were not due to any fault or neglect on the part of the libellant or those on board the Santiago, but were wholly due to the fault of those in charge of the Philadelphia (1) in that they had no proper lookout; (2) that they had no competent officer in charge; (3) that they entered the Breakwater at an improper speed without taking the precautions needful in navigating through a place of anchorage during the night; (4) in not avoiding and keeping clear of the Santiago, and in not stopping or reversing her engine in time to avoid a collision; (5) in not changing her helm and passing under the barge's stern; (6) in not taking ordinary precaution to avoid anchored vessels in a place and at a

time where they were in great number. All of these allegations are denied in the answer, wherein it is claimed the pilot boat (1) was in charge of competent officers; (2) that she entered the Breakwater at proper speed; (3) that as soon as the Santiago was and could be seen the engines of the Philadelphia were promptly stopped and reversed; (4) and her helm put hard astarboard in an effort to avoid the collision. The answer further avers that the collision was wholly due to the fault of those in charge of the Santiago in failing to exhibit proper anchor lights on the barge, as required by law, and in failing to have a proper anchor watch.

The evidence establishes to the satisfaction of the court that there was an anchor watch maintained until 2:45 a. m., about 5 or 10 minutes before the collision, at which time, however, there was nobody on the deck of the Santiago, and that the regulation anchor lights had been put up, one in the starboard rigging of the foremast, about 25 feet above deck, and another on the flag pole fastened at the end of the deckhouse. These lights were not in the best condition, and would blow out in heavy puffs of wind. The forward light had been protected by a piece of bagging at the bottom of it, placed there early in the evening. About five minutes before the collision Fidelis Mattis, who was on watch, discovered the light in the stern had blown out. It was reported to the captain who directed him to take it to the pilot house and relight it. While thus engaged the collision occurred. There was no watchman on the deck of the Santiago at the time, and the stern light was out, and at about the point where the light should have been is where the pilot boat came in contact with the barge. The evidence is as conflicting as is usual in these cases as to whether or not there was a light burning in the foreward part of the barge at the time of the accident. All of the pilots aboard the Philadelphia, to the extent of 10 or 11, swear positively there was no light at all on the barge either fore or aft. They all, however, agree that after the accident, when they were summoned to the sinking barge to take the crew off, there was then a light up on the starboard rigging of the foremast and a lantern on the top of the cabin aft. Disinterested witnesses on the boats anchored nearby testify that these anchor lights on the barge were burning brightly in the early part of the evening and as late as midnight, but no witness, outside of the captain and three of his men aboard the Santiago, testify that the light in the starboard rigging was burning at the time the collision occurred, and all of the pilots, to the number of 10 or 11, testify positively no light warned them of the existence of the barge either fore or aft, and that in the darkness it was impossible to see the Santiago at more than 50 feet away, when they were unable to prevent the collision, although every known effort was adopted to do so, the engines reversed, and the wheel put hard astarboard in order that they might pass under the barge's stern. The pilot boat was running at the rate of four miles an hour with the tide which was running two, making a speed of six miles an hour over the ground. At the time of the accident one man was on the lookout, who was standing forward on her deck with nothing to obstruct his view; the master was at the port side of the pilot house, an experienced

pilot at the starboard side, and an able seaman at the wheel. The barge was seen by the lookout as soon as it was possible to see her in the darkness without a light on her stern. She only came in view when the light of the pilot boat lit up her mast, and then she was immediately discovered by the man on watch. No reasonable precautionary regulation or requirement seems to have been neglected by those in charge of the pilot boat, and when we remember that on this anchor ground, upon this night, there were as many probably as 30 vessels, each with its regulation anchor lights here and there and all about the pilot boat as it entered the anchorage, it might easily be that a light was burning in the starboard fore rigging of the Santiago, but, being 271 feet long, that light would be no protection to the stern of the vessel as the pilot boat approached, and even if the light in the starboard fore rigging had been seen, the night was too dark to enable those in charge of the approaching vessel to know the direction of the barge's stern, and they had a right to expect to see a stern light on a vessel of her length, and the absence of this light at this critical moment, without any watch or other means of warning approaching vessels, was the cause of the collision, and the fault is that of the barge.

Article 11 of the pilot rules for inland waters provides:

"A vessel under one hundred and fifty feet in length when at anchor shall carry forward, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light, in a lantern so constructed, as to show a clear, uniform and unbroken light visible all around the horizon at a distance of at least one mile.

"A vessel of one hundred and fifty feet or upwards in length when at anchor shall carry in the forward part of the vessel, at a height of not less than twenty and not exceeding forty feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall not be less than fifteen feet lower than the forward light, another such light." Act June 7, 1897, c. 4, § 1, 30 Stat. 98 (U. S. Comp. St. 1901, p. 2879).

These rules require that where a vessel is of 150 feet or upward in length two lights must be displayed when at anchor, the stern light lower than the one forward to indicate they are both upon the same vessel and the direction she is pointing. The importance of this is indicated by the occurrence of this accident, and the omission on the part of the barge to observe this rule as to the stern light for the short space of five minutes shows the danger in permitting this regulation to be violated for a moment, and if it be violated, the loss caused by an accident that may occur as a result must fall upon those who are guilty of a failure in this regard. Obedience to this important requirement of the law must be certain and unremitted. The master must know that the lights are continually up. The *Oliver* (D. C.) 22 Fed. 851. When this light went out there should have been another at hand to put up at once so that the stern of the vessel would not be left in darkness, unguarded by a watch, while a seaman with no special knowledge for the work was attempting to repair a defective lamp. The *Erastus Corning* (D. C.) 25 Fed. 572; *Connolly v. Granite Co.* (D. C.) 108 Fed. 99. It is true the law requires a steam vessel entering an anchorage ground upon a dark night, such as this, to carefully feel her way to avoid accidents, and in case of

collision with an anchored vessel, she must repel the presumption of negligence, or make good the loss. *The Brady* (D. C.) 24 Fed. 300. This we think has been done, and the fault has been shown to be entirely with the barge.

There has been a failure to establish any negligence at all on the part of the pilot boat, unless the speed at which she was running at the time can be said to have in some degree contributed to the accident under the circumstances. She was running at not more than four miles an hour with the tide which it is claimed was carrying her an additional rate of two miles, making a total speed of six miles over the ground. A man can walk four miles an hour, and we cannot say that a vessel was negligent in running at this speed through an anchorage ground. In the case of *Rogers v. Steamer St. Charles*, 60 U. S. 108, 15 L. Ed. 563 the rate was 9 to 11 miles per hour, and in *The Oregon*, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943, 15 miles per hour, in both of which cases it was held to be negligent, but it is always a question of fact in each particular case whether the speed was excessive or not, and in determining that question the locality, the hour, the state of the weather, the darkness of the night, the surroundings, and all the circumstances of the occasion are to be fully considered. *The Colorado*, 91 U. S. 692, 23 L. Ed. 379.

In this case the circumstances established by the evidence, which is undisputed, leads to the conclusion that the collision was the result of the libellant's negligence, and the libel should be dismissed. It is so ordered.

WALTER BAKER & CO., Limited, v. DELAPENHA et al

(Circuit Court, D. New Jersey. April 13, 1908.)

1. TRADE-MARKS AND TRADE-NAMES—RIGHT TO TRADE-MARK—USE.

A manufacturer can acquire the right to a trade-mark only by its use on goods sold.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 31.]

2. SAME—FOREIGN TRADE-MARK—NECESSITY OF USE IN UNITED STATES.

A foreigner can acquire the right to a common-law trade-mark in the United States only by its use on goods sold in this country.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 34.]

3. SAME—LENGTH OF USE.

The right to a trade-mark does not depend upon any particular period of user, but once it is adopted in good faith and used, the right thereto inures, and will prevail against any subsequent user.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 31.]

4. SAME—INFRINGEMENT—ISSUES IN SUIT FOR INFRINGEMENT.

In a technical trade-mark case, questions of deception, confusion, or injury are unimportant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 75.]

5. SAME—TRADE-MARK FOR CHOCOLATE.

Complainant's registered trade-marks of the word "Auto" and a picture of a motor car, both for use on packages of chocolate, *held* infringed by defendants by the use of both the word and a picture of an automobile on packages of imported chocolate of similar kind, although of somewhat different style and coloring, and although the design was registered as a trade-mark in Switzerland before its use by complainant, where it was not until afterward used on goods sold in this country.

In Equity. On final hearing.

Archibald Cox and Putnam & Putnam, for complainant.
Carrick & Wortendyke, for defendants.

CROSS, District Judge. This is strictly a trade-mark case, and presents no element of unfair competition in trade. The complainant is a well-known manufacturer of chocolate, doing business at Boston, Mass., and is the owner of two common-law trade-marks registered under the act of Congress of February 20, 1905, c. 592, 33 Stat. 724 (U. S. Comp. St. Supp. 1907, p. 1008). One of the trade-marks consists of the word "Auto" and is registered as No. 44,405; the other consists of the representation of a "motor car" and is registered as No. 45,580. The application for the former was filed April 3, 1905, and it was registered July 4, 1905; the application for the latter was filed April 14, 1905, and it was registered August 22, 1905. An application was originally filed February 17, 1905, under the trade-mark act of 1881, which embraced both the picture and the word "Auto," but when the trade-mark act of 1905 took effect, as it did on the 1st of April of that year, an amended application was filed under the new act which embraced only the representation of an automobile and another application was filed April 3, 1905, for the word "Auto." The president of the complainant corporation testifies that he conceived the idea of these trade-marks for use upon the wrappers of small packages of sweet chocolate for eating purposes, in the fall of 1904; that the design of an automobile, for use as a trade-mark, was suggested to him while looking over magazines containing advertisements of those vehicles, and that from such advertisements he selected one which he regarded as the prettiest and most suitable in size for the purpose, and having changed the color from black to red, had a cartoon prepared which showed the picture of an automobile and the word "Auto" on it, for use upon wrappers containing the article above mentioned. Packages of chocolate thus wrapped were sold in large quantities in the course of trade to customers in the various states of the United States, and in foreign countries, beginning in the month of December, 1904, and thereafter continually to the present time. The president of the complainant company also testifies that, at the time he adopted the above trade-marks, he did not know of their use by anybody in this country or elsewhere, upon similar or like preparations, and that so far as he knew their use by the complainant in that connection was absolutely novel. The bill of complaint in this cause is filed to enjoin the defendants, who do business in New York as agents of foreign importers, from selling in the United States chocolate manufactured by Société Anonyme,

J. Klaus of Locle, Switzerland, bearing trade-marks infringing the complainant's. The packages of chocolate manufactured abroad and sold by the defendants, bear upon the wrapper the word "Auto" and also a design of an automobile, which word and design it appears were registered by the foreign manufacturers in Switzerland, in September, 1903, but it does not distinctly appear that the trade-marks so registered were placed upon any goods actually sold in Switzerland. It does appear, however, that a company known as the Canadian Swiss Trading Company, imported the Klaus Auto-Noisettes into the Dominion of Canada a few months before they were imported into the United States by the defendants, but whether or not they were imported for sale, or any were sold, is not disclosed. There is no positive proof to show that the foreign trade-marks were ever placed upon any goods which were actually sold anywhere prior to those which came into the hands of the defendants, about the 1st of March, 1905, which was several months after the complainant had adopted and used its trade-marks, and several days after it had filed its original application for their registration. Upon this point counsel for the complainant in their brief well say, "A manufacturer does not acquire a trade-mark by sending goods bearing it to his agents and by the agents sending it to subagents, as from its nature a trade-mark must be used on goods sold." Section 16 of the trade-mark act of 1905, constitutes registration prima facie evidence of ownership, and thereby imposes upon the defendants the burden of disproving such ownership. This burden they have not sustained. The most that has been conclusively shown is foreign registration, but this did not confer title, certainly not in the absence of user. But granting that an inference of prior use in a foreign country may be drawn from the testimony, the fact still remains that there is no evidence whatever from which even an inference can be drawn of any use or sale in the United States of any goods on which the foreign trade-marks appeared, until some time after the complainant had, in good faith, adopted and used its trade-marks in question, and upon this foundation, if no other, I think the complainant's case can be rested. The following rule is laid down in Hopkins on Trade-Marks, p. 62:

"A foreigner has no common-law right to a trade-mark in the United States as against a citizen who had adopted a similar mark in good faith before the alien has sold any goods in this country."

A footnote shows that this doctrine is rested upon the authority of Richter v. Anchor Remedy Company (C. C.) 52 Fed. 455, where Judge Acheson of this circuit, at page 458, says:

"As we have seen, prior to his first registration, the plaintiff had never sold in the United States any of his medicines. Nor had he himself made any importations thereof before that registration. Having then no trade in this country we do not see how the plaintiff could well have here a common-law trade-mark."

See, also, Richter v. Reynolds et al., 59 Fed. 577, 8 C. C. A. 220; Eiseman v. Schiffer et al. (C. C.) 157 Fed. 473, 475.

Nor does the fact that the complainant adopted and used its trade-marks but a short time before the defendants imported and sold goods

bearing like trade-marks, alter the situation. The complainant's rights accrued as soon as it had put goods upon the market bearing its trade-marks. Priority of use rather than priority of invention confers the right. The right to use does not depend upon any particular period of user; once a trade-mark is adopted in good faith and used, the right thereto inures and will prevail against any subsequent user. As was said in *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 463, 14 Sup. Ct. 151, 152, 37 L. Ed. 1144, "the exclusive right to the use of the mark or device claimed as a trade-mark is founded on priority of appropriation; that is to say, the claimant of the trade-marks must have been the first to use or employ the same on like articles of production." The point under consideration is considered somewhat at length in *Kathreiner's Malzkaffee Fab. v. Pastor Kneipp Med. Co.*, 82 Fed. 321, 27 C. C. A. 351, where the Circuit Court of Appeals for the Seventh Circuit at page 326 of 82 Fed., page 356 of 27 C. C. A., says:

"It is enough, we think, if the article with the adopted brand upon it is actually a vendible article in the market, with intent by the proprietor to continue its production and sale. It is not essential that its use had been long continued, or that the article should be widely known, or should have attained great reputation. The wrong done by piracy of the trade-mark is the same in such case as in that of an article of high and general reputation, and of long-continued use. The difference is but one of degree, and in the quantum of injury. A proprietor is entitled to protection from the time of commencing the use of the trade-mark."

See, also, *Tetlow v. Tappan* (C. C.) 85 Fed. 774; *Welsbach Light Co. v. Adam* (C. C.) 107 Fed. 463; and *McAndrew v. Bassett*, 4 De Gex, J. & S. 380, 384.

It is further insisted upon the part of the defendants, however, that the device and wording of the defendants' wrapper do not so closely resemble the device and wording of the complainant's as to be capable of being properly described as a colorable imitation; the point apparently being that the defendants' packages do not resemble the complainant's to a misleading degree. Upon both nevertheless, the word "Auto" appears, although in different type, and also the picture of an automobile, which is likewise somewhat dissimilar—that is, the defendants' picture represents an automobile commonly known as a "runabout," while the complainant's represents a two-seated vehicle generally known as a "touring-car." Furthermore, speaking generally, the packages, as packages having wrappers of different colors, are dissimilar in appearance. But when we take into consideration the distinguishing marks in question, and it is with them that we mainly have to deal, they do, notwithstanding the difference noted, closely imitate each other; they represent the same idea or conception. In suits of this character, slight differences in the trade-marks and differences in the appearance of packages and the prices at which they are sold, are not controlling, but on the contrary are comparatively immaterial. In a technical trade-mark case, question of deception, confusion, or injury are unimportant. This rule was substantially laid down by the Circuit Court of Appeals for the Second Circuit in *Gannert v. Rupert*, 127 Fed. 962, the court saying at page 964, 62 C. C. A. 594, at page 596:

"It is of no moment that the proof fails to show deception, confusion, or injury to any marked extent. Such proof is unnecessary where infringement of a valid trade-mark is clearly established."

Again, in *Bass et al. v. Feigenspan* (C. C.) 96 Fed. 206, at page 212, the court says:

"No one who has counterfeited a legitimate trade-mark and applied the spurious symbol in competition with the genuine can avoid the charge of infringement by showing that the false mark has in practice been so accompanied on labels, capsules or otherwise, by trade-names, designations, descriptions or other accessories, not forming part of it, as to render it unlikely that the public has been deceived."

So, also, in *Walter Baker & Co., Limited, v. Puritan Pure Food Co.* (C. C.) 139 Fed. 680, the court, quoting from *Bass et al. v. Feigenspan*, at page 682, says:

"The lawful appropriator and employer of a trade-mark has an exclusive right of use, and is entitled to be effectually secured in the full enjoyment of that right. If other persons are to be permitted to violate that exclusive right on the plea that the counterfeit symbol, as applied in a given case, has such accessories as to render deception of purchasers improbable, or even impossible, an element of uncertainty and confusion will be introduced, which cannot fail to encourage fraud and promote litigation. A sound public policy requires that the spurious trade-mark be suppressed, whether it is or is not for the time being accompanied, by such accessories, not constituting part of it, as to avoid deception or render it unlikely."

Among dealers and users of packages of chocolate, I think that the picture of an automobile accompanied by the word "Auto" would carry far more weight than the color of the packages, the names of the manufacturers or other advertising matter appearing thereon. Trade-marks in such cases are usually well remembered, easily recognizable and at once catch the eye and fix the attention well-nigh to the exclusion of everything else.

Again it was urged, but not strongly, that the defendants' goods are not of the same descriptive properties as the complainant's. The complainant's registrations cover chocolate in all its forms, although up to this time their registered marks have not been used upon any other preparation than "Auto Sweet Chocolate" made of cocoa beans, roasted, ground and mixed with sugar. The defendants' "Auto-Noisettes" are made of cocoa beans, roasted and ground and mixed with a percentage of sugar, extract of vanilla and ground filberts. Both are put up in small attractive packages, adapted to be carried in the hand or pocket. The complainant's product is described upon the label as "Sweet Chocolate" the defendants' "Chocolate Surfin pour Croquer," and as "Chocolat Auto-Noisettes." The descriptions on the packages and also the testimony of the witnesses make it apparent that both preparations are adapted to meet the same class of trade; that they are substantially alike and are so regarded by consumers. Language which would describe one would appropriately describe the other. They are chocolates intended to be eaten in the form in which they are sold. I cannot therefore but regard the products of the complainant and defendants as having substantially the same descriptive properties. In the *Collins Co. v. Oliver Ames & Sons* (C. C.) 18 Fed. 561, the defendant was enjoined from using on shovels the plaintiff's trade-

mark for edge-tools. In *Church & Dwight Co. v. Russ et al.* (C. C.) 99 Fed. 276, the defendants were enjoined from using on packages of baking powder the plaintiff's trade-mark for baking soda and saleratus. In *Bass et al. v. Feigenspan*, supra, the defendants were enjoined from using on half and half the plaintiffs' trade-mark for ale, and in *Enoch Morgan's Sons Co. v. Ward*, 152 Fed. 690, 81 C. C. A. 616, the complainants who used the trade-mark "Sapolio" upon a scouring soap in a cake form, asked for an injunction against the defendants prohibiting them from using the word "Sopono" as a trade-mark for washing powder. The injunction was allowed, the court saying at page 693 of 152 Fed., page 619 of 81 C. C. A., "the fact that sapolio is a cake and sopono a powder is of no moment. The appeal is made to the same class of customers who use the respective articles for the same general purpose." Other similar cases might be cited, but it seems unnecessary. In conclusion, I think the complainant has established its rights to the trade-marks in question; that the defendants have infringed them, and that an injunction should issue to restrain such infringement, pursuant to the prayer of the bill of complaint.

The complainant is entitled to costs.

Ex parte DILLIN.

(Circuit Court, M. D. Tennessee. April 14, 1908.)

UNITED STATES—DEFAULTING OFFICERS—IMPRISONMENT—STATUTES—CONSTRUCTION.

Rev. St. § 3625 (U. S. Comp. St. 1901, p. 2418), provides that whenever any collector of the revenue, receiver of public money or other officer who has received the public money before it is paid into the treasury of the United States, fails to render his account or pay over the same, as required by law, a distress warrant shall be issued against the officer and his sureties, which section 3627 provides shall be levied on the officer's property, and if the same is insufficient to satisfy the warrant it may be levied on the officer's person, who may be committed to prison, there to remain until discharged by due course of law. *Held*, that such act was applicable only to persons holding office under the government at the time the writ was issued, and that a defaulting officer could not be imprisoned thereunder, where his government service had terminated prior to the issuance of the writ.

Frank P. Bond and John R. Aust, for petitioner.

A. M. Tillman, U. S. Dist. Atty., and Lee Brock, Asst. U. S. Dist. Atty.

McCALL, District Judge. Joseph W. Dillin, the petitioner in this application for a writ of habeas corpus was the surveyor of customs for the Port of Nashville, Tenn., for several years prior to June 30, 1907. At that date his term of office expired, and his successor qualified and took charge of the office. As a result of an examination made of Dillin's accounts in September, 1907, it was ascertained that he was indebted to the government in the sum of \$6,898.32, as is shown by a letter of date of September 25, 1907, of W. Andrews, auditor, addressed to the Secretary of the Treasury. It further ap-

pears that, at the October term of this court, the said Joseph W. Dillin was indicted for embezzling funds of the government that came into his hands as collector of the port at Nashville. The defendant was arrested and gave bond for his appearance at the October term of this court. The case was continued until the present term.

It further appears that on March 31, 1908, under and by virtue of section 3625 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 2418), Maurice D. O'Connell, as Solicitor of the Treasury, issued a writ directed to John W. Overall, Esq., U. S. marshal for the Middle District of Tennessee, reciting that the "said Dillin, late surveyor of customs of the Port of Nashville, in the state of Tennessee, stands indebted to the United States in the sum of \$6,502.30, agreeably to the settlement of his account made by the proper accounting officer of the Treasury," and that "the said Joseph W. Dillin, having failed to pay over the said sum of \$6,502.30," the said U. S. marshal, in pursuance of section 3625 of the Revised Statutes of the United States, is commanded to proceed immediately to levy and collect the said sum of \$6,502.30, by distress and sale of the goods and chattels of the said Dillin, giving 10 days' previous notice of said intended sale at two or more public places in the town or county where such goods and chattels may be taken, or in the town or county where the owner of said goods and chattels may reside, and if there should not be found sufficient goods and chattels to satisfy said sum, the marshal is commanded to commit the body of Joseph W. Dillin to prison, there to remain until discharged by due process of law.

There is no return of the execution of this writ indorsed upon it, but the petition for writ of habeas corpus, filed by said Dillin, alleges that under and by virtue of said writ said Overall has arrested him, and he is now incarcerated in the jail of the county of Davidson, at Nashville, Tenn., and is illegally restrained of his liberty, and prays that the writ of habeas corpus issue to bring him before this court that the legality of his imprisonment may be inquired into, and that he be set at liberty. First, because, as he alleges, he is not now, and was not at the time of the issuance of said process and the service of same, an officer of the United States government, and did not hold the position of collector of moneys, or any other position under the government; second, he alleges that at the October term of the United States Circuit Court of the Middle District of Tennessee he was indicted, and under which indictment he was arrested and gave bond for his appearance before said court at its ensuing term, and that said court now has petitioner in its exclusive custody and jurisdiction, charged with a crime. He further alleges that he is and has been under the exclusive custody and jurisdiction of said court since his said arrest in October, 1907, and that the process now in the hands of said John W. Overall, United States marshal, was issued by the Solicitor of the Treasury of the United States on the 31st day of March, 1908.

Upon this petition a writ was issued, directed to the marshal of the United States for the Middle District of Tennessee, commanding him to have the body of said Dillin before the Circuit Court of the United States for the Middle District of Tennessee, at the Custom House, in

the United States circuit court room at Nashville, Tenn., at 2 o'clock p. m., on the 13th day of April, 1908, to be dealt with according to law. In obedience to said writ, the said marshal produced the body of said Dillin at the time and place designated in said writ, together with his return, by which it is shown that said Dillin was seized and was imprisoned in pursuance of the writ issued March 31, 1908, by the said Solicitor of the Treasury, herein above referred to. The case has been elaborately and ably argued by the United States District Attorney for the government, as well as by counsel for petitioner.

The sections of the Revised Statutes under which this proceeding is had provide as follows:

"Sec. 3625. Whenever any collector of the revenue, receiver of public money, or other officer who has received the public money before it is paid into the Treasury of the United States, fails to render his account, or pay over the same in the manner or within the time required by law, it shall be the duty of the First Comptroller of the Treasury (or the Commissioner of Customs, as the case may be.) to cause to be stated the account of such officer, exhibiting truly the amount due to the United States, and to certify the same to the Solicitor of the Treasury, who shall issue a warrant of distress against the delinquent officer and his sureties, directed to the marshal of the district in which such officer and his sureties reside. Where the officer and his sureties reside in different districts, or where they, or either of them, reside in a district other than that in which the estate of either may be, which it is intended to take and sell, then such warrant shall be directed to the marshals of such districts respectively."

"Sec. 3627. The marshal authorized to execute any warrant of distress shall, by himself or by his deputy, proceed to levy and collect the sum remaining due, by distress and sale of the goods and chattels of such delinquent officers; having given ten days' previous notice of such intended sale, by affixing an advertisement of the articles to be sold at two or more public places in the town or county where the goods or chattels were taken or in the town or county where the owner of such goods may reside. If the goods and chattels be not sufficient to satisfy the warrant, the same may be levied upon the person of such officer, who may be committed to prison, there to remain until discharged by due course of law."

To the present generation, this proceeding is a novel one. It is most extraordinary and drastic, and the statute authorizing it seems long since to have fallen into innocuous desuetude. If it is ever permissible to presume that a statute is repealed by long-continued disuse or failure to enforce it, this would appear to be a proper case for the indulgence of such presumption. I am unable to divine any reason why it has not before been resorted to within the last three-quarters of a century in cases similar to the one under consideration, unless it be for the reason that the opinion in the case of *Ex parte Randolph* (presently to be noticed) was considered to have practically annulled it in such cases. I am inclined to think that that is true. No case arising under these sections has been before the courts, so far as I am advised, since 1855. That was the case of *John Den v. Hoboken Land Co.*, 18 How. 272, 15 L. Ed. 372, in which the constitutionality of the law was attacked. The Supreme Court of the United States sustained its constitutionality. In that case, however, the question of imprisonment did not arise, but it was a case in which the validity of the title to land sold under the proceeding provided for by the sections above quoted, was before the court. It was held that a distress

warrant, issued by the Solicitor of the Treasury, under the act of May 15, 1820, c. 107, § 2, 3 Stat. 592 (U. S. Comp. St. 1901, p. 2418), carried into the United States Statutes at section 3625 et seq. against a delinquent collector, is not in conflict with the Constitution, but is due process of law. The next case prior to the Den Case, arising under these statutes—the case of U. S. v. Nourse, 9 Pet. 8, 9 L. Ed. 31—was in 1835. The next preceding case was *Ex parte Randolph*, 1833. The last case referred to is reported in 20 Fed. Cas. No. 11,558, and was heard before Chief Justice Marshall, sitting in the Circuit Court with Judge Barbour, District Judge.

In discussing these sections, Chief Justice Marshall held that they must be strictly construed; that the officers of the government cannot act under these sections on other persons or on other subjects than those specifically pointed out therein, nor can they proceed in manner different from that it prescribes, and he adds:

"It may be said with confidence that the Legislature has not passed any act which in its construction is to be more strictly confined to its letter. By this rule its words will be examined."

The first cause assigned by the petitioner, Dillin, why he should not be restrained of his liberty under these sections, is that he is not now, and was not at the time of the issuance of the process, and the service thereof, an officer of the United States government, and did not hold the position of collector of moneys or any other position under the government, and therefore is not one of the persons on whom the law was designed to operate. The language of section 3625, in describing those upon whom this law is intended to operate, is:

"Any collector of the revenue, receiver of the public money, or any other officer who shall have received public money before it is paid into the Treasury of the United States."

Chief Justice Marshall, in *Ex parte Randolph*, in construing these words, says:

"The obvious construction of these words is, I think, that they describe persons who hold office under the government, to whose hands the public money comes before it reaches the Treasury."

Undoubtedly, Mr. Dillin, while he was in office, was a collector of the revenue, and falls within the description of the statute. But the words of the Chief Justice, just quoted, are in the present tense. "Persons who hold office under the government." It is not asserted that at the time of the issuance of this writ, as well as at the time of its execution, that Dillin was an officer, but upon the other hand, it is alleged, and not denied, that he held no office at that time, and that he was a private citizen.

Chief Justice Marshall further says that:

"The word 'officer' is retained and is regularly used throughout the section, showing plainly that no other debtor than one who was properly designated by the term 'officer' was contemplated by the act."

Was Mr. Dillin an officer at the time of the issuance of the process and of his arrest? The process, by authority of which he is in prison,

designates him as the "late surveyor of customs for the Port of Nashville, in the state of Tennessee."

It is strenuously insisted by the district attorney that Mr. Dillin had been an officer of the government, and that while an officer of the government he was a defaulter. It may be assumed that this is true, and, in a proceeding against him, no one would deny that he is responsible for the money which he failed to pay to the government, and to the same extent as he would have been had he been continued in office, but as was said by Chief Justice Marshall:

"It is not his responsibility to the United States, but his liability to this particular process which is the subject of inquiry."

In my judgment, these drastic sections were enacted against officers of the government, and were intended to be enforced against them while in office for the purpose of seizing them where they were short in their accounts before they had time to dispose of the ill-gotten money, or had time to abscond. The statute does not reach all public debtors, and has selected especially those to which it was intended, and those are officers named in the act. No others can be brought within its purview. The principles of strict construction which apply to all laws restrictive of common rights forbid it. And I think the rules of the strictest construction should especially be applied in a case like the present, where the party to be imprisoned has been indicted in the courts of the country for his misconduct in office, and it is sought to inflict this additional hardship upon him months after he has become a private citizen.

It seems clear that the petitioner's days of imprisonment under this writ would have no end, if their termination depends upon his paying the amount the government claims, and for the failure to do which he is incarcerated.

Entertaining these views, I am constrained to direct an order discharging the prisoner from further imprisonment under this writ.

I deem it unnecessary to pass upon the other questions raised.

GREEN v. WILLHITE et al.

(Circuit Court, D. Idaho, C. D. October 31, 1906.)

No. 270.

PUBLIC LANDS—DESERT LANDS—ENTRY—STATUTES—CONSTRUCTION—"CONSTRUCTED."

Act Cong. Aug. 30, 1890, c. 837, 26 Stat. 391 (U. S. Comp. St. 1901, p. 1553), provides that all patents for lands thereafter taken up under any of the land laws of the United States on entries or claims validated by the act, west of the one hundredth meridian, should reserve a right of way for ditches or canals, "constructed" by authority of the United States. *Held*, that the word "constructed," as so used, did not limit the reservation to a right of way for ditches already constructed, but extended as well to those "to be constructed" by the government in furtherance of its irrigation scheme for the reformation of arid lands.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, p. 1468.]

On Demurrer to Complaint.

Wood & Wilson, for complainant.

N. M. Ruick, for defendants.

BEATTY, District Judge. By this action complainant, as the owner of certain lands, is asking an injunction against defendants, restraining them from further excavating a certain canal over such lands, which they are constructing under the authority of the government. To the complaint the defendants interpose their demurrer, assigning that it does not state a cause of action.

To a proper understanding of the case the consideration of two acts of Congress is necessary. By the act approved October 2, 1888 (25 Stat. 526, c. 1069 [U. S. Comp. St. 1901, p. 1552]), it is provided that:

"All the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals for irrigation purposes, and all the lands made susceptible of irrigation by such reservoirs, ditches or canals, are from this time henceforth reserved from sale as the property of the United States, and shall not be subject after the passage of this act to entry, settlement or occupation until further provided by law."

The act approved August 30, 1890 (26 Stat. 391, c. 837 [U. S. Comp. St. 1901, p. 1553]), provides for the repeal of so much of the above act "as provides for the withdrawal of the public lands from entry, occupation and settlement," but provides:

"That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by authority of the United States."

There are three tracts of land involved and described in the complaint, and all are such as are referred to by both said acts. By the first act it is provided that all "lands made susceptible of irrigation by such reservoirs, ditches or canals, are from this time henceforth hereby reserved from sale * * * and shall not be subject after the passage of this act to entry, settlement or occupation." As to the first-described tract, the S. W. $\frac{1}{4}$ of section 7, the complaint alleges that it "was entered as desert land, under the desert land laws of the United States, on the 25th day of May, 1888, by Calvin Cobb," who thereafter made his final proof and received his patent therefor. It is presumed that what complainant means is that on that date a "declaration" was filed as the law requires, and not that the land was entered, within the usual meaning given that word under the land laws and practice. It was the incipient step taken towards the acquisition of title to the land. This step was taken some months prior to the approval of the said first act of October 2, 1888.

The question occurs whether this initial step was sufficient to constitute such a right or title to or in the declarant as would prevent the Congress from legislating concerning it or of depriving the declarant of it. In the case of *Frisbie v. Whitney*, 76 U. S. (9 Wall.) 187, 19 L. Ed. 668, it was held under the pre-emption laws that the pre-emptor procured no title, which the government could not declare void, until he paid his purchase money and received his final receipt. Does this

also apply to a claim under the desert law? This law (Act March 3, 1877, c. 107, 19 Stat. 377 [U. S. Comp. St. 1901, p. 1548]) says "that it shall be lawful for any citizen * * * upon the payment of twenty-five cents per acre, to file a declaration under oath * * * that he intends to reclaim a tract of desert land," and then further directs how he shall proceed to finally procure his patent. Whether the rule applied by 76 U. S. 187, 19 L. Ed. 668, to the pre-emption law, also applies here, has not been specially discussed by counsel. I think, therefore, I should not finally pass upon it, further than to suggest that, as a portion of the purchase money must be made at the time the incipient steps are taken to acquire title, it would seem that the design of the act is to give the party such a title as cannot be taken from him, provided, he further so complies with the act as to be finally entitled to his patent.

The only serious contention by counsel is concerning the word "constructed," as used in the latter part of the clause above quoted from the act of 1890, to wit:

"A right of way thereon for ditches or canals constructed by authority of the United States."

The complainant contends that it refers only to ditches or canals already constructed, while defendants claim that it includes those to be constructed in connection with the irrigation reclamation service under the direct control of the government. But for the doubts suggested by counsel, none would have occurred to me as to the meaning of this word from a reading of the entire paragraph or the statute in which it is used. The acts referred to show that the Congress had been contemplating a system of government irrigation of the arid lands of the West which would require reservoirs and a canal system, and which should be under the direct management and control of the government. We know that often in such matters the government moves slowly, and takes its preliminary steps and discussions long before it finally puts the chief work into operation. In the legislation referred to, it was providing for preliminary surveys and investigations. Up to this time it never had entered upon any system of irrigation for the interest or benefit of the general public, although it may have had some small irrigating schemes on government reservations, where it owned or controlled all the lands, and which were not open to settlement by its citizens. It did many years since by acts, now revised into sections 2339, 2340, Rev. St. (U. S. Comp. St. 1901, p. 1437), make provision for the protection of such ditches and water rights as were recognized by local laws for "mining, agricultural, manufacturing and other purposes." In a sense it may be said that such ditches and canals are constructed by the authority of the United States; but the ditches or canals referred to in the acts under discussion are those to be constructed by the government in its irrigation schemes for the reclamation of its Western arid lands. As, at that time, it had no such ditches or canals, Congress must and could have referred only to those it intended to construct. But the act also provides for this right of way over lands to be hereafter taken up. If Congress referred only to canals already constructed, this provision would seem useless; for,

if a party enters lands on which the government already has a canal, he must take it with notice thereof and as it is, and the government needs no reservation for its right of way,

If there could be any serious doubt as to the meaning to be attached to this word, I think it is entirely dissipated by a consideration of the debate had in Congress over this act. That clearly shows that the intention was to include canals to be constructed by the government in its irrigation scheme. As my impression is that the parties will desire the ruling of a higher court, I deem it unnecessary to pursue the discussion further; but I cannot doubt that this word "constructed" is used in the statute in a general sense, and applies to ditches or canals constructed by the authority of the government, without reference to time.

The demurrer is therefore sustained.

In re HARGRAVES.

(District Court, S. D. Georgia, S. W. D. December 18, 1907.)

BANKRUPTCY—EXEMPTIONS—HOMESTEAD.

Const. Ga. art. 9, § 5 (Code 1895, § 5916), provides that the debtor shall have authority to waive or renounce in writing his right to the exemption provided for in section 4 (Code 1895, § 5915) except as excepted in section 3. Section 4 (Code 1895, § 5915) declares that the General Assembly shall provide for the setting apart and valuation of the homestead exemption, but that nothing therein contained shall repeal existing laws for the exemption of property from sale contained in paragraphs 2040-2049 of the Code of 1873, it being optional with the applicant to take either, but not both, of such exemptions, and section 3 (Code, § 5914) declares that the debtor shall have power to waive or renounce in writing his right to the benefit of the exemption provided for in such article except as to wearing apparel, and not exceeding \$300 worth of household and kitchen furniture and provisions, to be selected by himself and his wife. *Held*, that where all of the property of a bankrupt resident of Georgia had been reduced to money, the bankruptcy court, though having no procedure for the enumeration and setting apart of the exemptions prescribed by the state law, was nevertheless a court of equity, and was authorized to direct an allowance to the bankrupt out of the proceeds of his assets of an amount in money sufficient to supply him with household and kitchen furniture and provisions so exempt.

In Bankruptcy. Petition to review ruling of referee, denying a homestead to the bankrupt, on account of waiver.

G. L. Patterson, for bankrupt.

W. W. Lambdin, for mortgage creditors.

SPEER, District Judge (orally). The determination of this case must depend upon the policy of the United States and the policy of the state of Georgia, as they each relate to the homestead and exemption laws of the state. The settled policy of Congress, as made plain by the bankruptcy law, is to preserve in substance the beneficial result to the citizen of such homestead and exemption as the state seeks to grant to and preserve for him. This will comprehend as well the state exemption and the limitations thereof in behalf of creditors. It has long been

the policy of Georgia to allow such exemptions. The first act, adopted, I believe, in 1822, for the reason that it included in its protected articles a "trooper's horse," has been popularly termed a "pony" homestead. These articles must, under the state practice, be set apart by the ordinary before it can become operative under the state laws. Another homestead was that provided for by the Constitution of 1868. This was enacted in the period of our history about which few of us can have any particular pride. The Constitution then adopted provided an absolute exemption of a large amount, \$3,000, I believe, and the courts of that period held that, with regard to this, a general waiver in behalf of creditors was null and void. This became unsatisfactory to the conscientious and debt-respecting people of the state, and there was substituted therefor a homestead exemption by the Constitution of 1877. This was in the amount of \$1,600, and many careful provisions were made to preserve it, so that it might be the basis of a home for the family. It is well known that this Constitution was composed by a large body, comprising many eminent statesmen and lawyers, whose knowledge of the character and necessities of our people, and whose learning in the science of jurisprudence, has scarcely been surpassed. To the people and the bar of Georgia, it would be superfluous to recite the bead-roll of illustrious names who formed that body. We all know how they loved Georgia, how well they understood the necessities of our people, and particularly, of our plain people, and at the same time how clear was their conception of the absolute importance of preserving the credit of the state, and at the same time the importance of securing to the men of moderate means for temporary use the fund with which to carry on their agricultural or other industrial pursuits. They provided, as we have seen, an exemption by no means so liberal as that which had been granted by the Constitution of 1868, but they gave to the head of the family the right to waive it. To make this operative, they gave such dignity and effect to a note or other contract, containing such waiver, that it became easy to perfect the lien against such part of the homestead as was pledged to secure the debt. This waiver, the bankruptcy courts of the United States, including the Supreme Court, have carefully protected.

The clauses of the organic law of the state, granting this homestead and authorizing the waiver, are found in article 9 of the Constitution, and particularly in section 5916 of the Code of Georgia. There are several provisions, which must be considered together in order to determine the precise question now under consideration. The section just quoted provides:

"The debtor shall have authority to waive or renounce in writing his right to the benefit of the exemption provided for in section four, except as is excepted in section three of this article."

When we turn to section 4, we find a provision in this language:

"The General Assembly shall provide by law, as early as practicable, for the setting apart and valuation of said property. But nothing in this article shall be construed to affect or repeal the existing laws for exemption of property from sale, contained in the present Code of this state in paragraphs 2040

to 2049, inclusive, and the acts amendatory thereto. It may be optional to the applicant to take either, but not both, of such exemptions."

When we further recur to section 3 of the article, referred to in section 5916 of the Code of 1895, we find the following unequivocal language:

"The debtor shall have power to waive or renounce in writing his right to the benefit of the exemption provided for in this article, except as to wearing apparel, and not exceeding three hundred dollars' worth of household and kitchen furniture, and provisions, to be selected by himself and his wife, if any," etc.

Now, the benevolent object of the clause last mentioned and of all the clauses, construed in *pari materia*, is very clear. It was the purpose of the state, as expressed by the convention of its people, that the man of humble means should not be stripped of all he possessed, made destitute, and penniless and hopeless, "turned out in the big road." The philosophic and broad-minded men who enacted these provisions clearly understood what calamities had resulted in the past, and might result thereafter, from harsh, severe, and irresistible measures against the debtor class. They did not mean that Georgia should be a state wherein the decay of its citizenship should keep even-step with the accumulation of its wealth. They gave to the poor man, therefore, notwithstanding his own misguided conduct, notwithstanding any obligation he might make, or covenant he might sign, and to his family, the power to retain in an emergency enough to protect the family from destitution, from starvation, and from positive discomfort and degradation for want of clothing. How valuable was this provision is known to all who are familiar with the short and simple annals of the poor. How many, who, though for a time unfortunate, have in their virile and industrious manhood taken advantage of this provision to seize the opportunity for a new start in the contests of life. What increment of happiness and comfort to the people, and of wealth to the state, cannot be estimated, but that much good has resulted cannot be doubted. This provision, then, for food and clothing is not the subject of waiver. It is inexorable and organic law which preserves it as the last resource of the humble, the hungry, and the hopeless.

It is, however, said that the bankrupt did not ask for this provision, that he sought to obtain the "pony" homestead, and that he sought for a sum out of the \$1,600 homestead, against both of which his waiver can be made effective. This makes little difference. We cannot in this court adopt the machinery of the state court. We have no ordinary to enumerate and set apart either of these homesteads, but a bankruptcy court of the United States is a court of equity. It can mold and frame its decrees so as to carry out in substance the beneficial purposes intended by the state law. The fact that this property was not set apart in specifics, or applied for in specifics, concerns us not at all. We have the power here to make that substantially certain, which the state officers upon proper application could have made entirely certain. Since it is competent, the court, therefore, will protect the bankrupt in his substantial right, whether he sought that right or some other. The act creating a uniform system of bankruptcy is a

great remedial statute; mainly for the benefit of the necessitous and the poor. The whole record is before us on the petition for review. This may be regarded as an investigation de novo, so far as this application for exemption is involved. We may direct the bankrupt's attorney by suitable amendment to ask for an order that we may grant to the bankrupt the exemptions as to wearing apparel, household and kitchen furniture, and provisions, authorized by the state laws, and since it seems that the whole estate has been reduced to cash in the hands of the trustee, while we cannot so far administer the state law as to require the purchase of the specific articles thus protected, we may direct that enough values in the hands of the trustee may be turned over to the bankrupt, to do with it as best he can in securing this benefit to himself and family. This is the rule with regard to all exemptions which are secured by the bankrupt act. The decree may provide that the bankrupt shall not be deprived of his wearing apparel, and that enough shall be turned over to him to supply him household and kitchen furniture, and provisions, in the amount secured by the law of the state. To that end, an order may be taken, authorizing the bankrupt to make this amendment. When this is done, the ruling of the referee, so far as that portion of the exemption is concerned, will be reversed, but it will be affirmed as to all the values in the hands of the trustee, exceeding the values of the household and kitchen furniture, and provisions, which the Constitution of the state has so carefully guarded.

GUARANTY TRUST CO. OF NEW YORK v. PHILADELPHIA & L. V. TRACTION CO. et al.

SAME v. LEHIGH VALLEY TRACTION CO. et al.

(Circuit Court, E. D. Pennsylvania. April 2, 1908.)

Nos. 1, 2.

STREET RAILROADS—MORTGAGES—FORECLOSURE—PREFERRED CLAIMS.

Where receivers were appointed for two traction companies in mortgage foreclosure proceedings, and the property brought less than the mortgages, but a fund was provided to pay preferred claims, and it appeared that one-fourth of an expenditure for repairs to a bridge were necessary for the continued operation of the roads, and had been performed on the credit of the earnings within six months prior to the appointment of the receivers, and that three-fourths of the work was unnecessary, the claimant was entitled to a preference only to the extent of one-fourth of the amount due.

In Equity. On exceptions to master's report.

Joseph T. Foulke, P. K. Erdman, and Edward Harvey, for exceptions.

J. Percy Keating, opposed.

HOLLAND, District Judge. These exceptions to the master's report are filed by intervening creditors in this foreclosure proceeding.

Some of the claims are against the Lehigh Valley Traction Company, and others against the Philadelphia & Lehigh Valley Traction Company. Some are disallowed as a whole, while others are allowed in part and disallowed as to part. They are unsecured claims presented for payment against a fund in the hands of the receivers on foreclosure proceedings on two mortgages, one against the Lehigh Valley Traction Company, and one against the Philadelphia & Lehigh Valley Traction Company. The properties brought less than the mortgages, but a fund has been provided for the payment of all claims found to be preferential.

The master, with great care, went into the question of what claims were for necessary operating expenses contracted on the credit of the earnings within six months of the time of the appointment of receivers, and which claims were beyond that period and not preferential; also what claims were not contracted on the credit of the earnings for necessary operating expenses, and for that reason not preferential. Some, however, were found to be in part preferential, and part not so, because they were contracted prior to the six months period. In passing upon each, whether allowed or not, the master has properly disposed of the claims presented, both as to his findings of fact and the application of the law, so well settled in the United States courts as to all questions raised by the exceptions to his report. An examination of this report shows that in his disposition of each disputed claim the master is supported by a similar case decided in the United States courts.

The only exceptions are the claims of the National Bridge Company and George F. Schlicher against the Lehigh Valley Traction Company. The claim of the bridge company is for \$10,777.86, and that of Mr. Schlicher is for \$721.78. The former is for the erection of a bridge connecting West Bethlehem with Bethlehem. The latter is for lumber furnished to that bridge. One-fourth of each of these claims was allowed by the master, upon the theory that to that extent the expenditure was for necessary operating expenses contracted on the credit of the earnings of the company, and therefore preferential; but the other three-fourths of the cost of the bridge, not being a necessary operating expense, but voluntarily assumed by the railroad company without any necessity therefor, was not such an expenditure as under the law is regarded as preferential. In this we think the master is right. The uncontradicted evidence shows that three-fourths of the work was unnecessary. Alfred Claire, the engineer for the Lehigh Valley Traction Company, who was in charge of the repairs of this bridge before the appointment of the receivers, testified as follows:

"Q. Was all this work necessary for the purpose of strengthening the floor system that you did? A. I should not say it was absolutely necessary; no. Q. Was it necessary for the purpose of carrying the heavy cars? A. Our portion was necessary to carry our heavy cars. Q. Was it necessary to renew the public side at all? A. No, sir; not at all. That could have existed to-day as it was then. Q. Why did you do it? A. Simply to make the construction uniform. * * * Q. What proportion of the work done on the public way was not necessary to strengthen the bridge? A. I should say fully three-quarters of the bridge. Q. Was the supporting part of this structure touched at all? A. None whatever."

The testimony of this witness was not contradicted, and the finding of the master that one-fourth of the expenditure was preferential, as for necessary operating expenses, and disallowing the remaining three-fourths, because not preferential, we think, was justified.

All the exceptions are dismissed, and the report is confirmed.

In re KEYES.

(District Court, D. Massachusetts. April 10, 1907.)

No. 8,744.

1. **BANKRUPTCY—CLAIMS—REJECTION—REHEARING.**

Where a referee's order disallowing claims in bankruptcy on the sole ground that the claims were not offered for proof within the time required was sustained on a petition for review, and shortly thereafter the Circuit Court of Appeals in another case so construed the bankruptcy act that such claims would not have been barred, claimants were entitled to a rehearing, though no appeal was claimed.

2. **SAME—JURISDICTION—ORDERS IN BANKRUPTCY—REVIEW.**

In bankruptcy proceedings, the court's power to reconsider and revise its orders and decrees does not expire with the term at which they were made.

3. **SAME—CLAIMS—"LIQUIDATED BY LITIGATION."**

After bankruptcy, certain proceedings were brought in the state court to set aside a conveyance of property from the bankrupt to claimants before adjudication. If the conveyance had been held good, the claims would have been satisfied from the property conveyed, which claimants sought to hold as security for their claims, in which they were unsuccessful. Held that, though such litigation did not in terms relate to the amounts due claimants, the question litigated necessarily involved a determination of the net amount for which their claims should be finally allowed, and hence such claims should be regarded as "liquidated by litigation," within Bankr. Act July 1, 1897, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), providing that if claims are liquidated by litigation, and final judgment therein is rendered within 30 days before or after the expiration of a year from the adjudication, they shall be proved within 60 days after the rendition of such judgment.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4175.]

In Bankruptcy. On petition of George A. Williams and Williams & Bridges for rehearing.

Henry L. Parker, Jr., for trustee.

T. H. Gage, Jr., for creditors.

DODGE, District Judge. The referee disallowed claims offered for proof by these petitioners, and on petition for review the disallowance was sustained by this court November 8, 1906. The petitioners claimed no appeal, and the time for claiming one under section 25 of the bankruptcy act expired November 18, 1906. On January 24, 1907, the opinion of the Circuit Court of Appeals for this circuit in *Powell v. Leavitt*, 150 Fed. 89, 80 C. C. A. 43, was handed down. If that opinion had been announced before November 8, 1906, this court could

not in this case have sustained the referee, as it did, upon the sole ground that the petitioners' claims were not offered for proof until after the time had expired which is allowed for such proof by section 57n of the bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]). The referee held that the proof was too late, even if the claims were to be regarded as "liquidated by litigation," within the meaning of the section referred to, and in this view the court agreed. But in *Powell v. Leavitt* the Circuit Court of Appeals has expressly declared that the exception contained in section 57n with regard to claims "liquidated by litigation" is to be interpreted as if it read:

"If the final judgment therein is rendered within thirty days before the expiration of such time or at any time thereafter."

Under this construction, the petitioners' proof was within the time limited, and the referee and this court were wrong in disallowing it.

Of the above construction of section 57n, now authoritatively settled as the true construction in such manner as to bind the courts of bankruptcy within this circuit, it seems to me that the petitioners ought to have the same benefit which they would have had if the decision in *Powell v. Leavitt*, had been announced a few weeks earlier, or if my decision in this case had been delayed until a few weeks later. Notwithstanding the fact that the petitioners claimed no appeal, as they might have done, I see no reason why a rehearing may not be ordered for this purpose; it being conceded that no steps have been taken since November 8, 1906, which have changed the situation of the parties so far as the distribution of the assets is concerned. The same funds which were then in the hands of the trustee he holds now, and it is not too late to admit the petitioners, if their right is clear, to a share in their distribution. The term of the court within which its decision of that date was made came to an end before this petition for rehearing was filed; but I think I am justified in holding that, in bankruptcy proceedings, the court's power to reconsider and revise its orders and decrees does not expire with the term at which they are made. In *re Ives*, 113 Fed. 911, 51 C. C. A. 541; In *re Kaufman* (D. C.) 136 Fed. 262. A rehearing is therefore ordered.

One question still remains open to the creditors who oppose the allowance of the claims. They contend that the claims were not "liquidated by litigation" at all, and are not, therefore, within the exception contained in section 57n, however that exception may be construed. This was urged and controverted before the referee, and again before the court on the petition for review; but neither the referee nor the court has passed upon the question. The argument has been made and replied to again upon this application for rehearing, and it is understood that no further opportunity to be heard is desired by either party. Upon that understanding the question may now be considered and decided. Upon its decision the allowance or disallowance of the claims now depends.

The referee's certificate recites the history of the litigation in the state courts to set aside the conveyance of property which the bankrupt

had made to these petitioners before adjudication. It further states that, if the bill of sale had been held to be good, the claims of the petitioners would have been satisfied, and they would not have presented any claims against the bankrupt estate. They sought to hold the property covered by the bill of sale as security for these very claims now presented. Their claims were satisfied or unsatisfied, according as the bill of sale was held good or bad in the result of the litigation. Although the litigation did not in terms relate to the amounts due these creditors, yet, since the question litigated necessarily involved the determination of the net amount for which their claims should be finally allowed, I think the claims are to be considered as "liquidated by litigation," within the meaning of section 57n. *Hutchinson v. Otis*, 115 Fed. 937, 53 C. C. A. 419; *Powell v. Leavitt*, 150 Fed. 89, 80 C. C. A. 43.

The former order of November 8, 1906, affirming the decision of the referee disallowing these claims, is therefore now to be vacated. The referee's decision is reversed, and the claims are to be allowed.

IN RE BURSTEIN.

(District Court, D. Connecticut. May 4, 1908.)

No. 1,817.

BANKRUPTCY—RIGHT TO DISCHARGE—EVIDENCE CONSIDERED.

Evidence considered, and *held* insufficient to warrant the denial of a bankrupt's discharge on the ground of concealment of assets, or failure to keep books with intent to conceal his true financial condition.

In Bankruptcy. On application for discharge.

The following is the report of Special Master Henry G. Newton upon petition for discharge:

I, Henry G. Newton, referee in bankruptcy for the New Haven county district of the district of Connecticut, to whom the above-entitled case was referred as special master, do hereby certify:

That the above-named Jacob Burstein, of Wallingford, Conn., was duly adjudicated a bankrupt herein on June 19, 1907; that on October 24, 1907, the petition of the bankrupt for a discharge from all his debts in bankruptcy was duly filed with the clerk of said court, and was duly referred to me by said court for further proceedings; that on October 29, 1907, I fixed the 8th day of March, 1908, at 3 p. m., at my office, Room 9, No. 818 Chapel street, New Haven, Conn., as the time and place for a hearing on said petition for discharge, for examining the bankrupt, and for showing cause, if any, why such discharge should not be granted; and on October 29, 1907, I gave due notice thereof to all creditors whose names appear upon the schedules of the bankrupt, to all attorneys who appear in the case, and to all persons interested, by mailing and publishing, as appears by my certificate with copy of notice hereto annexed. Henry Horton, one of the principal creditors, appeared to object and filed in due time his specifications. The bankrupt thereupon filed his motion to dismiss the specifications, which was declined by the special master. A copy of the specifications, motion, and decision of master are hereto annexed. The matter was then heard on the facts, and the referee finds and recommends as follows:

Bankrupt signed and filed his petition June 19, 1907. He was engaged in the business of selling bicycle and automobile goods and making repairs. Between January 1, 1907, and said June 19, 1907, he bought goods to the

amount of nearly \$1,750. Of the goods so bought, he had on hand at the time of bankruptcy not more than \$300 worth, estimated at cost. All the others had been disposed of at a profit, and all were paid for, except about \$36.50 then due. There were no losses from bad debts. I estimate that the \$1,450 worth of goods, being the \$1,750 bought, less \$300 on hand, with the work on repairs which would go with them, brought in somewhere between \$1,850 and \$2,200. The bankrupt accounts for this somewhat as appears by his bill of items hereto annexed. Of these items, less than \$225 was paid for goods; and \$415 is claimed to have been paid for loans. The bill of items appears to be correct, except the items of \$100 for baby clothes, which I do not think should have amounted to \$25; the \$264 for living expenses, which I think is too high; and the \$66 for incidental expenses, as to which I have no means of estimating. Deducting, however, from the \$1,930.43 appearing on the bill of items, \$75 for baby clothes and \$125 for household and incidental expenses, making \$200, would leave \$1,730.43. And, while this is less than the amount probably received from the \$1,450 worth of goods, I do not think that the evidence, aside from the failure to keep books, is so clear as to concealment as the cases on that subject require, and cannot recommend that the discharge be denied, unless, with the uncertainty, the failure to keep books under the circumstances detailed justifies such denial.

The specification as to keeping books is: "(4) Said bankrupt, with the intent to conceal his true financial condition, has destroyed, concealed, and failed to keep books of account or records from which such condition might be ascertained, and has destroyed and concealed any and all records showing his financial condition." As to whether this allegation is sufficient, I cite, in addition to the authorities contained in the memorandum of decisions upon the motion to dismiss, the following: In *Re Patterson*, 10 Am. Bankr. Rep. 371, 373, 374, 121 Fed. 921 (Northern district of New York, Judge Ray), allegation approved. *Godshalk Co. v. Sterling* (United States Circuit Court of Appeals, Third Circuit) 12 Am. Bankr. Rep. 302, 129 Fed. 580, 64 C. C. A. 148, specification that "said bankrupts did, with intent to conceal their financial condition, fail to keep books of account or records from which such condition might be ascertained." On page 303 of 12 Am. Bankr. Rep., page 582 of 129 Fed., page 150 of 64 C. C. A., the court says: "We cannot assent to the suggestion that it was the duty of the objecting creditor to specify what books of account the bankrupts should have kept. We think the specification went far enough when it affirmed that the bankrupts, with intent to conceal their financial condition, failed to keep books of account or records from which condition might be ascertained." In *Milgraum v. Ost*, 12 Am. Bankr. Rep. 306, 120 Fed. 827, a specification that "said bankrupts have, with intent to conceal their financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained," was held insufficient; Judge McPherson saying that this has been so often decided to be bad that nothing more need be said upon the subject." In *re Ginsburg*, 12 Am. Bankr. Rep. 459, 130 Fed. 627, Judge Holland (Eastern district of Pennsylvania) holds that a specification that "bankrupt failed to keep books of account or records from which his true condition might be ascertained" was sufficient. In *Re Garrison* (U. S. C. C. A., Second Circuit) 149 Fed. 178, 79 C. C. A. 126, Judge Cox delivering the opinion, the allegation is that the "bankrupt failed to keep any books of account, records, or papers from which his true financial condition or interest in said business might be ascertained." There appears to have been no question as to the sufficiency of this allegation.

In the present case no books of account from which the financial condition could be ascertained were kept. The only book presented is the bank pass book, in which account \$700 were deposited during the time in question. Beside his books, a quantity of checks and receipts were produced. No evidence that the failure to keep books was with intent to conceal his financial condition was offered, other than substantially that which would be necessary to prove the foregoing facts. It was claimed upon the hearing by bankrupt's counsel that the bankrupt was a foreigner, ignorant and unable to keep books, and that his bank book and checks and receipts, and the evidence offered, sufficiently showed his financial condition. The bankrupt testified he

had no intent to conceal his financial condition; and gave as his reasons for failing to keep such books that he was ignorant of bookkeeping, never had been accustomed to keep books, and had only a few months' schooling in his lifetime, and could not spell well. He testified that he kept on file his checks, receipts, and unpaid bills; that none of these papers were at any time destroyed or concealed; and that he had turned over to the trustee such papers and bills as had been asked for. Bankrupt had been able to make out accurate schedules of his creditors and the amounts due them in the preparation of his petition in bankruptcy. Bankrupt had been in business only the previous season on his own account, and he testified that during that time he kept his accounts in the same manner, and had settled his former bills, and preserved similar vouchers. During the winter months the bicycle and automobile supply business, in which the bankrupt had engaged, was practically shut down in Wallingford. Aside from the signing of his name to checks, which appear to have been invariably filled out by his wife or some other person, the bankrupt has not been shown to have done any writing. Bankrupt's father-in-law, before bankruptcy, offered to raise the money for a compromise of 35 per cent. if the creditors would have accepted it. The total amount of claims is about \$1,525. In *Re Alvord*, 14 Am. Bankr. Rep. 264, 135 Fed. 236, the specification apparently was "that, with intent to conceal his financial condition from his creditors, he failed to keep books of account or records which would disclose his condition." The court says that the bankrupt, during former services, must have learned the value of accurate bookkeeping, and that he was amply equipped with the knowledge which educated intelligence must possess, and that his conduct was unwise and unwarranted, and that the discharge should be denied.

In the present case it would scarcely seem possible that there could be a more complete failure to keep books of account. Whether the duty imposed upon this petitioner by the bankrupt act would bring the case within that of *In re Alvord*, the court can best judge. It is a case in which any one, seeing this sale at a profit of goods costing \$1,450 and payments of less than \$225, must desire that a discharge be denied, if such denial is legal; but it seems to me that on these facts the law and the decisions require that the discharge be granted.

Unless the court should think that the above facts justify a denial, I recommend that a discharge be granted.

O. H. D. Fowler, for petitioner.

Chas. A. Harrison, for opposing creditor.

PLATT, District Judge. This matter has been carefully examined, and I am bound to say that the bankrupt deserves no help. I am sorry for the creditors, and wish they had listened to the offer of settlement. The trouble is that the law and the facts happen in this instance to be of service to an unworthy man. As to concealment of assets, there is nothing more than the veriest guesswork. The proof falls far short of supporting the specifications bearing upon that point. He kept no books; but it is impossible, from the facts set forth, to draw the inference that his failure to keep them was "with the intent to conceal his true financial condition."

With mixed emotions, I am constrained to accept the report of the special master, and in compliance with his recommendation to order that the discharge be granted.

THOMSON-HOUSTON ELECTRIC CO. v. HOLLAND et al.

(Circuit Court, N. D. Ohio. March 28, 1907.)

DISMISSAL AND NONSUIT—DISMISSAL WITHOUT PREJUDICE—RIGHT OF COMPLAINANT.

A complainant is entitled to discontinue a cause without prejudice as a matter of right on payment of costs, where no cross-bill has been filed and no testimony taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dismissal and Nonsuit, § 27.]

On Motion to Discontinue.

See 143 Fed. 903.

Betts, Sheffield, Bentley & Betts, for plaintiff.

Thurston & Woodward, for defendants.

TAYLER, District Judge. In this case (Thomson-Houston Electric Co. v. Henry Holland and Ernest Backendorf, composing firm of H. Holland Trolley Supplies Co.) a bill of complaint was filed on January 24, 1906, for injunction and other relief growing out of an alleged infringement of a patent. On March 8, 1906, a preliminary injunction was allowed. From this interlocutory order an appeal was taken to the Circuit Court of Appeals, which reversed the decision of this court, and the case was remanded for further proceedings. An answer has been filed by the defendants and a replication by the complainant. By a stipulation between the parties the time for taking complainant's testimony for the final hearing was extended to April 2, 1907. No testimony for the final hearing has been taken by either the defendant or the complainant.

A motion is now made by the complainant for leave to discontinue the cause without prejudice, upon payment of the costs, and to the allowance of this motion the defendants interpose an objection. The general rule is, stated in the form most favorable to the defendants, that a motion to discontinue without prejudice upon payment of costs will be allowed where no rights have attached to the defendants, as by a cross-bill, or where no testimony has been taken. I know of no case where it is held, and I can conceive of no reason why it should be held, that where no testimony has been taken, and no cross-bill filed, the complainant would not have the right to dismiss his case. To hold otherwise would be to say that the courts are anxious to encourage litigation. As declared by the court in *Pennsylvania Globe Gaslight Co. v. Gaslight Co.* (C. C.) 121 Fed. 1015, the annoyance to the defendant of the second litigation is no ground for refusing to dismiss the bill.

The motion will therefore be sustained, and the bill dismissed, without prejudice, at complainant's costs.

MERCHANTS' COAL CO. v. FAIRMONT COAL CO. et al.

(Circuit Court of Appeals, Fourth Circuit. January 15, 1908.)

No. 779.

1. JUDGMENT—PERSONS CONCLUDED—EFFECT AS BAR TO SUBSEQUENT PROCEEDING.

The judgment of a federal court in a mandamus suit brought by a coal company operating mines on the line of a railroad against the railroad company to compel a fair distribution of cars, upon an allegation of discrimination in violation of the interstate commerce law, does not inure to the benefit of any other operator not a party to the suit, nor bar an independent suit or proceeding by such operator on its own behalf in court or before the Interstate Commerce Commission to secure similar relief; nor is it estopped to maintain such independent suit or proceeding by the fact that it aided the relator in the prior suit or contributed to the expense thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1190, 1191.]

2. CARRIERS—INTERSTATE COMMERCE ACT—CUMULATIVE REMEDIES FOR VIOLATION.

An action in a federal court for a mandamus, under Act March 2, 1889, c. 382, § 10, 25 Stat. 862 [U. S. Comp. St. 1901, p. 3172], amendatory of the interstate commerce act, which authorizes such action by a shipper against an interstate carrier to compel a compliance with the act, and further provides that "the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement," does not preclude the relator or others from proceeding in respect to the same matter by petition to the Interstate Commerce Commission under section 13 of the original act of Feb. 4, 1887, c. 104, 24 Stat. 383 [U. S. Comp. St. 1901, p. 3164], and the court in the mandamus suit is without power on an ancillary bill to enjoin such proceeding.

Appeal from the Circuit Court of the United States for the District of Maryland.

William A. Glasgow, Jr., and George Weems Williams (Frank Gonnell, on the brief), for appellant.

Edgar H. Gans (Charles Markell, Jr., on the brief), for appellees.

Before PRITCHARD, Circuit Judge, and PURNELL, District Judge.

PRITCHARD, Circuit Judge. This is an appeal from an order or decree of the Circuit Court of the United States for the District of Maryland passed on the 21st day of October, 1907, granting a preliminary injunction restraining the appellant from prosecuting its petition against the Baltimore & Ohio Railroad Company before the Interstate Commerce Commission, and restraining the said railroad company from answering or defending said petition. On the 4th day of October, 1907, the appellees, who are the Fairmont Coal Company, Clarksburg Fuel Company, Southern Coal & Transportation Company, Pittsburg & Fairmont Fuel Company, Somerset Coal Company, Consolidation Coal Company, and Cumberland & Pennsylvania Railroad Company, and who, with the exception of the Cumberland & Pennsylvania Railroad Company, are engaged in the mining, shipping, and selling

of coal, filed their bill of complaint in equity against the appellant, which is a West Virginia corporation, also engaged in the mining, shipping and selling of coal, and against the Baltimore & Ohio Railroad Company, which is a Maryland corporation engaged as a common carrier in interstate commerce. The object of the bill was to have the appellant enjoined from prosecuting its petition before the Interstate Commerce Commission against the railroad company, and to restrain the railroad company from answering or defending said petition. The bill of complaint alleges substantially as follows:

That in January, 1907, there was filed in the Circuit Court of the United States for the District of Maryland a petition for mandamus by the United States of America ex rel. Pitcairn Coal Company, against the Baltimore & Ohio Railroad Company and certain other corporations (154 Fed. 108), all of which other corporations were organized under the laws of West Virginia for the purpose of mining and disposing of coal, and operated coal mines grouped about the Monongah division of the Baltimore & Ohio Railroad in West Virginia. That said petition for mandamus substantially charged the Baltimore & Ohio Railroad Company with violating the interstate commerce law in such a way as to prevent the relator, the Pitcairn Coal Company, from having interstate traffic moved by that railroad company upon terms and conditions as favorable as those given by the railroad company for like traffic under similar conditions to those who are complainants in said bill of complaint. That said petition for mandamus charges that the railroad company, in its distribution and assignment of cars for service in shipment from the coal mines operated along its road, subjected the relator and all of the other independent coal operators who were made defendants in said petition to undue and unreasonable prejudice and disadvantage in its system of coal distribution, and that all of those who are now the complainants in said bill of complaint, except the Cumberland & Pennsylvania Railroad Company, were privileged corporations in whose favor the railroad company in the supply of cars gave undue and unreasonable preference and advantage, and that when the supply of cars on the Baltimore & Ohio Railroad Company was insufficient to fill all orders cars were distributed by said company on a percentage basis to all the mines in the Monongah division, but that before such distribution was made certain arbitrary assessments of cars were made reducing the said total number of cars to be distributed on said percentage basis as follows: (1) All cars placed at mines for the fuel of the railroad company were not charged against the percentages to which the mines furnishing such fuel were entitled. (2) When foreign railroads—that is, companies other than the Baltimore & Ohio Railroad Company—sent their own cars for coal to mines on the Baltimore & Ohio Railroad, such fuel cars were not charged against the percentages to which such mines were entitled. (3) Cars owned by operators and commonly known as “individual cars” were placed at the mines of their owner, and not charged against the percentages of such mines. (4) That whenever a coal shipper on the railroad company shipped cars to Curtis Bay, a tide terminal of the railroad company, if such cars were handled prop-

erly in any one month such shipper was allowed in the succeeding month a premium of fifty per cent. of the number of cars so shipped in addition to his regular percentage. (5) That when certain consignees of coal shipped by those who are now complainants in said bill of complaint, on the line of said railroad company sent their own individual cars for coal to the mines of said complainants on the railroad such cars were not charged against the percentage of the mines to which they were sent.

That the petition for mandamus further asserted that all of these exceptions, limitations, and rules as aforesaid were made to the undue advantage and preference of the appellees, except the Cumberland & Pennsylvania Railroad Company, which is not a coal company, and for the reason that the Baltimore & Ohio Railroad Company was financially interested in said corporation, and that the Baltimore & Ohio Railroad Company arbitrarily took from its equipment a very large number of cars each day, and assigned the same to the Cumberland & Pennsylvania Railroad Company at its junction with the Baltimore & Ohio Railroad Company at Cumberland, and thus took from its equipment a large number of cars to which the shippers on its own lines were entitled, and this arbitrary allotment of cars was unjust, unfair, and unreasonable, and gave an undue and unreasonable advantage to shippers over the Cumberland & Pennsylvania Railroad Company, and subjected the Pitcairn Coal Company and other shippers of coal on the Monongah division to undue and unreasonable prejudice and advantage. That the petition further stated that the motive for the undue preference and advantage given to the appellees was found in the ownership by the railroad company of a majority of the capital stock of the Consolidation Coal Company, one of the defendants in said petition and one of the appellees herein, which had been sold prior to the filing of said petition, but in which the railroad company was still interested by reason of the balance of the purchase money due to it from the sale of said stock. That the petition prayed that in the event of a scarcity of cars to be furnished by the railroad company to shippers of coal on the Monongah division that the railroad company be required to furnish the relator with the proper percentage of cars without deducting the arbitraries above mentioned. That the railroad company on February 15, 1907, filed its return to said petition, wherein it denied that its distribution of coal cars to any coal company served by it violated the interstate commerce law, or had the effect of giving the appellees any undue advantage or preference. That the appellees filed an answer to the petition (a copy of the answer was filed as an exhibit with and as a part of the bill of complaint), and that the other defendants filed formal answers to the said petition (a copy of one of said answers was filed as an exhibit and as a part of said bill of complaint) asking that their rights might be adjudicated and determined.

That when said petition for mandamus was at issue the court took evidence on all the allegations thereof as the same were put in issue, and, after a full hearing, adjudicated all matters involved in said mandamus proceeding, determining that the system of coal car distribution of the railroad company did not violate the interstate commerce

law, and did not give any undue or unreasonable preference to the appellees except that the individual cars owned by them should be charged against the percentages of their mines, but that such individual cars should not be used by the independent operators. That on July 8, 1907, the court signed an order for the issuance of a mandamus requiring the railroad company, in case of car shortage, without discrimination, exception, or limitation, and upon conditions as favorable as those given to any other shipper, to furnish to the Pitcairn Coal Company for the transportation of its coal, and to those shippers in like condition as the Pitcairn Coal Company, their just and fair proportion of the total car supply on the said railroad at that time properly distributable by the railroad company on the Monongah division, and, in making the pro rata distribution of car supply for the shipment of coal from the mines on the railroad and to the shippers thereon, the railroad company should include in the available car supply as the basis of calculation for distribution to the Pitcairn Coal Company and all shippers on the Monongah division the individual cars of mine operators used on the railroad, and charge such individual cars against the percentage which the mines using such individual cars are entitled. That the railroad company and the Pitcairn Coal Company both appealed from the judgment of the court in the mandamus proceeding. The appeal of the railroad company and the appellees herein was accompanied by a supersedeas bond of the Pitcairn Coal Company. That an examination of the mandamus proceeding will show that the question of car distribution of the railroad among all the mines on its lines was before the court therein, not only as the system of car distribution affected the parties to the proceeding, but as it involved all other owners of mines along the railroad. That all the allegations of the petition as to the undue preferences presented an issue in which all owners of mines along the railroad were directly interested, and that the nature of the mandamus proceeding was such that any mine owner could have intervened therein and become a party. That evidence was taken in said proceeding as to the general system of car distribution, and that the president of the appellant testified therein as to the operation of the system in the Sommerset region in Pennsylvania. That the Pitcairn Coal Company and other independent operators, including the appellant, "were parties to an agreement by which these alleged preferences to the appellees should be brought before the court of the United States, and that as a member of the said organization promoting said litigation the Merchants' Coal Company (the appellant) did agree that the rights of the so-called independent operators should be presented to the court in a test case with the said Pitcairn Coal Company as relator, the object being by said agreement to have the rights of all the independent coal operators who had the same grounds of complaint against the system of the Baltimore & Ohio Railroad Company tried in one litigation, and to that end the said Merchants' Coal Company united in the agreement to employ counsel and did with others employ counsel to fight said litigation, and did contribute to the expense of said litigation." That the officers of the appellant took an active and open part in said litigation as representing the appellant and actually gave evi-

dence therein, and that said litigation was brought by a number of independent operators along the line of the railroad company, of which the appellant was one. And that the said litigation was as much under its control as under the Pitcairn Coal Company and was brought for the purpose of protecting the rights and claims of the appellant against the appellees quite as much as it was brought to protect the claims of the Pitcairn Coal Company.

That thereafter, on September 18, 1907, the appellant filed a petition before the Interstate Commerce Commission in which it is alleged that it operated mines in West Virginia and Pennsylvania along the lines of the Baltimore & Ohio Railroad Company, and complained of the system of car distribution enforced by such railroad company which permitted the use of fuel cars, foreign fuel cars, and individual cars without deducting the same from the percentages chargeable to the mines using the same, and which allowed a premium or addition to their percentages to shippers under certain circumstances, and charged that this system gave the persons enjoying the use of the arbitrary cars an undue and unreasonable preference. That the petition filed before the Interstate Commerce Commission also alleged that a part of the equipment owned by the Baltimore & Ohio Railroad Company and which should be supplied to shippers of coal upon its lines requiring the same is supplied by the said railroad company to the Cumberland & Pennsylvania Railroad Company for loading coal at the mines situated on the latter's railroad, a majority of which mines are owned by the Consolidation Coal Company, and that the depletion of its coal car equipment is contrary to the interstate commerce act, and that the railroad company thereby discriminates against the appellant. That the said petition filed before the Interstate Commerce Commission further charges that the railroad company aforesaid is interested in the Consolidation Coal Company (one of the appellees), which in turn owns the stock of other companies largely engaged in the shipping of coal, and asks for an investigation into this alleged interest, and whether such interest shows and accounts for its discrimination against the appellant. That the other companies referred to in said petition filed before the Commission whose stock is owned by the Consolidation Coal Company for the appellees herein, so that while said petition is only against the railroad company it is virtually directed against the appellees, as all the alleged preferences claimed against are in favor of the appellees. That every question presented by the said petition before the Interstate Commerce Commission, as will appear from an inspection of the exhibit filed with the bill of complaint, was fully adjudicated and determined by the Circuit Court in the Pitcairn Coal Company Case, and that if the appellant is permitted to prosecute said petition before the Interstate Commerce Commission, not only will the railroad company and the appellees be obliged to defend the method of car distribution of the railroad company by the same evidence which was adduced in the former proceeding, but any order that the Interstate Commerce Commission would be asked by appellant to pass would, if effective, nullify the rights of the appellants as adjudicated by the Circuit Court. That the prosecution of the petition before the

Interstate Commerce Commission, a hearing on which had been set down for October 8, 1907, would inflict irreparable injury upon the appellees, is simply vexatious and in manifest disregard of the binding efficiency of the adjudication by the Circuit Court, which had complete jurisdiction over the whole controversy, sought to be reopened, and that the court had jurisdiction to protect the effectiveness of its own adjudication through its jurisdiction over this their ancillary bill of complaint.

These are substantially the averments of the bill of complaint in this case.

The appellant did not file its answer, but at the hearing of the application for a preliminary injunction filed the affidavit of its president, Mr. Boswell, which showed: That prior to the institution of the Pitcairn Coal Company mandamus proceeding referred to in the bill of complaint, a meeting of coal operators operating on the lines of the Baltimore & Ohio Railroad Company was held in Baltimore to consider ways and means of securing a fair distribution of cars to the mines on the said railroad, and that the affiant was present at the meeting, representing the appellant, and agreed to contribute a certain sum of money toward the prosecution of the suit or suits for the enforcement of the rights of the coal operators to a fair and equal distribution of cars. There was no agreement at that time as to what suit or suits should be brought, but that subsequently the operators who contributed to the fund were advised that it was best to confine the effort to mandamus proceedings to force a fair and equal distribution of cars to be operated on the Monongah division alone of said railroad, and thereupon the mandamus proceeding was instituted, and in it the most, if not all, of the operators on the Monongah division were parties defendant to the mandamus proceeding. That the coal operations of the Merchants' Coal Company (appellant) were not and are not on the Monongah division of said railroad, and that the Merchants' Coal Company was not a party to the proceeding instituted by the Pitcairn Coal Company, and while it is true that its president and several officers and employes of the Merchants' Coal Company were called as witnesses by the Pitcairn Coal Company at the trial of the mandamus proceeding, that the Merchants' Coal Company was advised, prior to the trial of the mandamus proceeding aforesaid, that the judgment therein was not binding so far as the Merchants' Coal Company's rights were concerned, and that the mandamus, if issued, would not require the Baltimore & Ohio Railroad to furnish to the Merchants' Coal Company its fair and just proportion of cars. That there was no agreement between the Baltimore & Ohio Railroad Company or the other defendants to said mandamus proceeding and the plaintiff therein, so far as the affiant knows, that the case of Pitcairn Coal Company should be a test case, and that the Merchants' Coal Company never agreed with the Baltimore & Ohio Railroad Company or any one else that the case of the Pitcairn Coal Company, above referred to, should be a test case. That he, the affiant, is advised that the judge of the Circuit Court of the United States for the District of Maryland in the case of Pitcairn Coal Company v. Baltimore &

Ohio Railroad Company et al., above referred to, held that there was no sufficient evidence in that case to show that the allotment of cars to the Cumberland & Pennsylvania Railroad Company by the Baltimore & Ohio Railroad Company was an unfair allotment and that it worked an unjust discrimination against the Pitcairn Coal Company. That the said allotment of cars to the Cumberland & Pennsylvania Railroad Company is an unfair allotment and works an unjust discrimination against the Merchants' Coal Company, and affiant expects to be able to prove this fact before the Interstate Commerce Commission upon a hearing of its complaint above referred to, and that question is one of the main issues raised in the proceeding aforesaid before the Interstate Commerce Commission. That the petition for mandamus in the case of the Pitcairn Coal Company v. Baltimore & Ohio Railroad Company was confined to alleged unfair and unjust treatment by the Baltimore & Ohio Railroad Company of coal operators on the Monongah division of said road, and the question of how other operations in different territories from the Monongah division were treated was not an issue in that case, and that opportunity to investigate the conditions in other territories than the Monongah division was not offered at that time, although that during the progress of the case the methods of the Baltimore & Ohio Railroad Company in other districts were frequently referred to, and in said suit no opportunity was given to the Merchants' Coal Company to appear by counsel and introduce evidence or cross-examine witnesses. That affiant aided in every way he properly could the Pitcairn Coal Company in its litigation with the Baltimore & Ohio Railroad Company above referred to, and hoped that, if the Baltimore & Ohio Railroad Company was required to fulfill its duty with the Pitcairn Coal Company and the operators on the Monongah division, it might help the Merchants' Coal Company thereafter in asserting its right to have a fair and equal distribution in its territory. But affiant was advised at the time and understood that the judgment in the Pitcairn Case was not to be binding on the Baltimore & Ohio Railroad Company so far as the Merchants' Coal Company was concerned, and again denies that there ever was any agreement with any individual, firm, or corporation that the case of Pitcairn Coal Company v. Baltimore & Ohio Railroad Company should be a test case, so far as the rights of the Merchants' Coal Company were concerned, or should, in anywise affect or determine its rights.

No affidavits or answers were filed by the railroad company. The railroad company declined in writing to appeal or to join in this appeal.

The statement of facts in this case shows that the Pitcairn Coal Company, in pursuance of section 23 of the interstate commerce act (Act March 2, 1889, c. 382, § 10, 25 Stat. 862 [U. S. Comp. St. 1901, p. 3172]) instituted proceedings in the Circuit Court of the United States for the District of Maryland, in an action entitled, The United States of America ex rel. Pitcairn Coal Company v. Baltimore & Ohio Railroad Company et al., 154 Fed. 108, for the purpose of determining whether there had been a fair and equal distribution of car service

within the Monongah division. After a full and complete hearing, judgment was rendered in the Circuit Court, and both parties appealed from the judgment thus rendered, and that case, on appeal, is now pending in this court.

The appellant is engaged in operating coal mines on the Cumberland & Connellsville or Pittsburg divisions on the line of the Baltimore & Ohio Railroad Company. Subsequent to the institution of the mandamus proceeding hereinbefore mentioned, to wit, on the 18th day of September, 1907, the appellant filed a petition with the Interstate Commerce Commission, asking that body to take up and determine certain questions pertaining to the distribution of car service within a certain territory. This petition was filed in pursuance of section 13 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 383 [U. S. Comp. St. 1901, p. 3164]). Thereafter, to wit, on the 4th day of October, 1907, the Circuit Court granted a preliminary injunction restraining the appellant from prosecuting its petition against the Baltimore & Ohio Railroad Company before the Interstate Commerce Commission, and restraining said railroad company from answering or defending such petition. On the 21st day of October, 1907, the case was heard on the bill, affidavits, and exhibits thereto, together with the affidavit of Thos. T. Boswell, president of the appellant, the Merchants' Coal Company, and after considering the allegations of the bill, as well as the exhibits filed therein, the court made an order continuing the preliminary injunction theretofore granted restraining appellant, its officers, attorneys, from further prosecuting its petition before the Interstate Commerce Commission until the further order of the court.

It is insisted by counsel for appellees "that the questions decided by the Circuit Court for the District of Maryland are precisely the same which it is sought to reopen before the Interstate Commerce Commission." It is also insisted that while the independent operators who were parties to the suit for mandamus in the proceeding before the Circuit Court were all engaged in coal operations in the Monongah division of the Baltimore & Ohio Railroad Company, yet the system of coal car distribution which was attacked in that proceeding was a system that was applied, not only to the Monongah division of the Baltimore & Ohio Railroad Company, but to all other divisions of said railroad company. It is also insisted that the appellant company employed counsel and was present at the hearing of the mandamus proceeding, and that certain of its officials then and there testified as to the manner of distribution of car service in the other divisions of the said railroad company. Counsel for appellees also insist that the questions sought to be raised by appellant in its petition before the Interstate Commerce Commission are similar to those passed upon by the Circuit Court in the mandamus proceeding, and therefore the action of the lower court in restraining appellant from proceeding before the Interstate Commerce Commission was proper. That it is not necessary to make every coal operator in the various divisions interested in the question a technical party, where the parties are numerous, and where the suit is an object common to all of them, and while all parties interested may not be made parties to the proceeding, yet, it is really a suit on behalf of the parties instituting

the same and all others interested in the same way. It is further insisted by counsel that the rights of the appellees are not only similar, but are identical with those of the appellant, and that the suit in the mandamus proceeding was instituted for the purpose of compelling the railroad companies to perform certain duties required by the interstate commerce act, which, when carried out under the rule of equality, would afford equal protection to all parties in a situation similar to that of the petitioners in the original proceeding.

While it appears from an inspection of the record that appellant and other parties similarly situated appeared and consulted with the plaintiff in the mandamus proceeding, and that some of the officers of the appellant company testified in said proceeding, nevertheless we are unable to find anything in the record in that case which tends to support the contention that the matter then being litigated was to be treated by the companies not parties to that suit as a "test case." It is not alleged by the appellees that the appellant entered into an agreement with the defendants to the mandamus proceeding that the litigation therein should be treated as a "test case." An agreement between the plaintiff in the mandamus proceeding and certain persons who were not parties thereto that the litigation in said suit should constitute a "test case" could have no binding effect upon the defendants in the absence of an agreement with the defendants. It is well settled that estoppels to be binding must be mutual. Even if the Pitcairn Coal Company should succeed ultimately in securing the relief sought to be obtained in the mandamus proceeding, nevertheless the appellant and others similarly situated, who were not parties to that proceeding, could not invoke the aid of the court in that proceeding to compel the defendants to grant them the relief to which they might be entitled under the provisions of the statute.

Suppose that the appellant should request the Baltimore & Ohio Railroad Company to grant it a distribution of car service in accordance with the judgment granted in the mandamus proceeding, and the railroad company should refuse to comply with such request, what would be the remedy, under the circumstances, to which appellant would be entitled? The railroad company could not be attached for contempt for a failure to comply with a request of this character from a person who was not a party to the proceeding in which the judgment was entered against the railroad company, and the writ of mandamus obtained on behalf of the Pitcairn Coal Company could not be used for the purpose of enforcing the rights of those who were not parties to the proceeding in the first instance. The remedy by mandamus is personal in its character, and from the very nature of things can only inure to the benefit of those who may be parties plaintiff in the proceedings in which it may be obtained. Nor would the appellant be entitled under any circumstances to be made a party to the mandamus proceeding after a judgment had been rendered, for the purpose of enforcing any rights that might be conferred upon it by the statute. A judgment obtained in a mandamus proceeding of this character can only be used as a precedent in a trial of another cause involving the same question, and cannot be pleaded as a bar in such action.

However, if the contention of appellee as to the effect of the judgment in the mandamus proceeding be correct, then it would be *res judicata* as to appellants and all other parties similarly situated, and in that event the appellees would not be entitled to equitable relief by injunction. In discussing this phase of the question the Supreme Court of the United States in the case of *Litchfield v. Goodnow*, Adm'r, 123 U. S. 549, 8 Sup. Ct. 210, 31 L. Ed. 199, says:

"The defense of prior adjudication is disposed of by the fact that Mrs. Litchfield was not a party to the suit in which the adjudication relied on was had. At the time of the commencement of the suit she was the owner of her lands and they were described in the bill, but neither she nor any one who represented her title was named as a defendant. She interested herself in securing a favorable decision of the questions involved as far as they were applicable to her own interests, and paid part of the expenses; but there was nothing to bind her by the decision. If it had been adverse to her interest, no decree could have been entered against her personally either for the lands or the taxes. Her lands were entirely separate and distinct from those of the actual parties. A decree in favor of or against them or their title was in no legal sense a decree in favor of or against her. She was indirectly interested in the result, but not directly. As the questions affecting her own title and her own liability for taxes were similar to those involved in the suit, the decision could be used as a judicial precedent in a proceeding against her, but not as a judgment binding on her and conclusive as to her rights. Her rights were similar to, but not identical with, those of the persons who were actually parties to the litigation."

The conduct of the appellant company as described in the affidavit of its president, Mr. Boswell, cannot be construed to mean that the agreement between parties to the mandamus proceeding was such as to estop those who were not made parties in such proceeding from instituting proceedings under section 23 before the Interstate Commerce Commission. While the rights of appellant in many respects were similar, they were not identical with the rights of the Pitcairn Company. It is not only alleged in the petition filed by the appellant before the Interstate Commerce Commission that there was an unequal distribution of car service, but it is also alleged that there was an inadequate supply of cars. Subsection of paragraph 2 of the petition filed before the Interstate Commerce Commission reads as follows:

"Which percentage or allotments of cars to complainant are entirely insufficient for its ordinary needs and requirements, are inequitable, unjust, and unfair."

This allegation raises a new and distinct issue which was not and could not within the scope of the pleading have been passed upon in the mandamus proceeding, and affords a strong reason why the court should not interfere by injunction with the proceedings pending before the Interstate Commerce Commission.

It further appears from the record that the petition filed before the Interstate Commerce Commission contains, among other things, an allegation to the effect that there was an unequal distribution of car service between the Monongah division and the division or divisions in which the appellant is operating, and this raises still another issue, which was not raised or considered in the mandamus proceeding and affords another reason why an interference with or a stay of the pro-

ceeding by injunction before the Interstate Commerce Commission would not be proper.

Section 23, in pursuance of which the mandamus proceedings were instituted, contains the following proviso:

"Provided, that the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement."

This proviso clearly indicates that it was the intention of Congress that the remedy by mandamus should be cumulative. In the case of *People v. Superior Court of New York, N. Y.*, 10 Wend. (N. Y.) 285-294, the court in referring to the word "cumulative" said:

"The definition of the word 'cumulative' is that which augments by addition; that is added to something; in law, that augments as evidence, facts, or arguments of the same kind."

Webster:

"It is derived from the latin cumulo to heap, or cumulus a heap."

Again in the case of *Regina v. Eastern Archipelago Co.*, 18 Eng. Law & Eq. 167-183, Judge Coolidge, says:

"The term 'cumulative' is not, I think, very correctly applied here; where one thing is cumulative on another, whether it be remedy, penalty, or power, we are speaking commonly of two things which are at least consistent and might, without incongruity, be applied at the same time, attachment and summary proceeding, fine and imprisonment, action for breach of covenant and ejectment for forfeiture. Two ways of doing the same thing where one or two can in fact be used may make a case of election, but they are hardly cumulative."

The learned judge in that case clearly draws the distinction between where one thing is cumulative on another and where there are two ways of doing the same thing, where only one of them in fact can be used.

Section 23 is a part of an act which is supplemental to the interstate commerce act, and was passed several years after the main body of the act which contained sections 9 and 13 was adopted. This section being intended to supplement the interstate commerce act, and containing as it does a plain proviso that the writ of mandamus shall be cumulative, clearly indicates that it was the intention of Congress that the remedy granted in section 13 should be treated as being consistent with the remedy granted by section 23, and that it could, without incongruity, be applied at the same time. That this was the purpose of Congress is evidenced by the fact that, in every instance where the remedy provided was intended to be exclusive, such intention was made clear and explicit by adding a proviso to that effect as is shown by the proviso contained in section 9. While two remedies are afforded shippers in section 9, it is expressly provided therein "that such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which of the two methods of procedure therein provided for he or they shall adopt." Thus Congress clearly provided that while two remedies were given by section 9 they should not be treated as cumulative, and, in order that there might be no doubt as to the proper construction to be placed upon that section, it was clearly provided

that one seeking to avail himself of such remedies should be required to elect, and that the adoption of one excluded the other. However, there is another reason why one who has proceeded under section 23 is not precluded from pursuing his remedy under section 13. The proviso of section 23 not only declares the remedy by mandamus to be cumulative, but it also provides that the remedy by mandamus "shall not be held to exclude or interfere with any other remedy" provided by the act. This obviously means that one who proceeds by mandamus is not precluded from resorting to the other remedies afforded by the act.

If Congress had intended that the remedy afforded by section 23 was to be exclusive, it would have added a proviso similar to the one incorporated as a part of section 9, and not having done so it is manifest that it was the intention of Congress that the remedy provided by section 23 was not to be treated as exclusive, and especially inasmuch as it is expressly provided that the remedy granted therein shall be cumulative, and shall not be held to exclude or to interfere with other remedies granted by the act. Any other construction of this proviso would be in direct conflict with the plain provisions of the law, and, in view of this provision, we are of opinion that the court below was without power to restrain the appellant from proceeding before the Interstate Commerce Commission under the provisions of section 13, and that the court did not have jurisdiction of the subject-matter sought to be litigated in this proceeding.

The decree of the Circuit Court authorizing the issuance of the injunction herein is therefore reversed, and the cause is remanded to the lower court with directions to dismiss the bill filed herein.

Reversed.

SLOSS-SHEFFIELD STEEL & IRON CO. v. DRANE.

(Circuit Court of Appeals, Fifth Circuit. March 31, 1908. On Rehearing, April 20, 1908.)

No. 1,516.

DEATH—CHILDREN—ACTION BY PARENTS—MEASURE OF DAMAGES.

Code Ala. 1896, § 25, provides that a father, or, in certain cases, the mother, may sue for an injury to a minor child, a member of the family. Section 26 declares that, when the death of a minor is caused by the wrongful act of another, the father or mother or personal representative of the minor may sue and recover "such damages as the jury may assess," and section 27 provides that a personal representative may maintain an action and recover such damages as the jury may assess for the wrongful act of another, whereby the death of his testator or intestate was caused, the proceeds of which are distributable under the statute of distributions, without liability for debts. *Held*, that in an action by a father for the wrongful death of his minor son, he was not limited to the recovery of compensatory damages only, but was entitled to recover such damages as the jury might assess under all the facts and circumstances in the case, uninfluenced by passion, sympathy, or feeling.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 123.]

Newman, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

R. W. Walker and Jno. P. Tillman, for plaintiff in error.

Travis Williams, for defendant in error.

Before McCORMICK, Circuit Judge, and NEWMAN and BURNS, District Judges.

McCORMICK, Circuit Judge. This was a suit by Polk Drane, the defendant in error, to recover damages for the death of his minor son, Carleton Drane, who was alleged to have been employed by the defendant without the plaintiff's knowledge or consent. Each count of the complaint alleges that the minor was employed without the knowledge and consent of the father, and put to work in a dangerous place. There was a judgment in favor of the plaintiff. The plaintiff in error assigns as errors the action of the trial court in overruling demurrers to the complaint, in sustaining demurrers to pleas interposed by the defendant, in declining to give the affirmative charge requested by the defendant, and in giving certain instructions to the jury, to which exceptions were reserved by the defendant.

The demurrers to the complaint were properly overruled. If the trial court erred in his action on the demurrers to any of the pleas (which we do not affirm), we are satisfied from our view of the whole case that it was an error without injury, as the pleas stricken were not supported by any proof, and the record affirmatively shows that all of the evidence that could have been offered or did exist was admitted under the general issue. On the issue as to whether the minor was a member of the plaintiff's family up to the time the injuries were received, the jury were properly instructed, and the proof on this issue was sufficient to sustain their verdict. The trial court did not err in declining to give the affirmative charge requested by the defendant. Whether it erred in giving certain instructions to the jury touching the measure of damages, to which exceptions were reserved by the defendant, is a question which has received studious consideration, and calls for ampler treatment.

The statutes of Alabama provide:

"A father, or (in certain cases) the mother, may sue for an injury to a minor child, a member of the family." Section 25, Code 1896. "When the death of a minor child is caused by the wrongful act, or omission, or negligence of any person or persons, or corporation, his or their servants or agents, the father, or the mother, in the cases mentioned in the preceding section, or the personal representative of such minor, may sue and recover such damages as the jury may assess; but a suit by the father or mother in such case is a bar to a suit by the personal representative." Section 26. "A personal representative may maintain an action, and recover such damages as the jury may assess for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death; * * * and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distribution." Section 27, Code 1896

The Legislature of Alabama passed an act "to prevent homicides," approved February 21, 1860, which provided:

"That, when the death of a person is unlawfully caused by another, the personal representative of the deceased may maintain an action against the latter at any time within two years thereafter, and may recover such sum as the jury deem just, and the amount so recovered shall be distributed as the personal property of an intestate is now distributed, and shall not be subject to the payment of the debts of the deceased." Laws 1859-60, p. 42.

The author of the Revised Code, made some years after the passage of this act, overlooked it, and omitted to embrace it in his revision, and retained several sections of the previous law which the omitted statute has repealed. To remedy this oversight, and to restore the statute, "the Legislature, at the session of 1871-2, re-enacted the statute 'to prevent homicides,' with the same title, and, in all material respects, in language identical with that employed in the act of February 21, 1860." Laws 1871-72, p. 83; *Railroad v. Shearer*, 58 Ala. 678. Immediately after the re-enactment on February 5, 1872, of the act "To prevent homicides," the Legislature provided by statute that, "When the death of any minor child is caused by the wrongful act or omission of any officer or agent of an incorporated company, or private association of persons, the father of such child, or if the father be not living, the mother, may maintain an action against such corporation or private association of persons, for such wrongful act or omission, and may recover such damages as the jury may assess." This act, for reasons given in the opinion of the court, was held to be unconstitutional in the case of *Smith v. Railroad*, 75 Ala. 449. Soon thereafter the Legislature passed the act, the provisions of which are now embraced in section 26, above set out. The act "To prevent homicides" applied as well to infants as adults, but it did not, as construed by the courts, create any right of action in the father or mother, and, as soon as this became sufficiently known, the law now in force was passed (Acts 1884-5, p. 99), the sole purpose and effect of which was to extend the right of action already lodged in the personal representative to the father, and, in certain contingencies, to the mother. And while there is no express limitation in this statute to cases in which recovery might have been had by the party injured, had not death ensued, the decisions in Alabama measure the father's recovery under this section of the Code by a consideration of what the child's right would have been had he survived, at least to the extent of confining the former to cases in which the latter might have recovered, though not extending it to all such cases. The only effect which section 26 of the Code had is to give the father, and, in the contingencies named in section 25, the mother, or the personal representative, of a minor whose death has been caused by wrong and negligence, the right to recover damages, and to confine the personal representative's right to cases where neither the father nor mother has instituted suit. The parent cannot sue at all on a cause of action arising under the employer's liability act. Sections 1749-51, Code 1896; *McNamara v. Logan*, 100 Ala. 187, 14 South. 175.

The group of statutory enactments in Alabama, to which we have referred, are all, to some degree, in derogation of the common law. The habit of thought in the professional legal mind, both on the bench and at the bar, receives its trend from the classic, and almost sacred, rules and canons of the common law. The opening words of the trial judge's charge to the jury, "At common law in England and in this country no action can lay at all for the death of a human being," constitute a "proof-text" or a known or admitted major premise in most judicial and professional reasoning on this subject, and the reason which he gives also stamps its complexion on such discussions. He says, "The idea was that the injury was merged in the felony." Touching the terms of one of these statutes, we find in an early case (1883) this language:

"The statute is highly penal in its terms, and must be construed as a penal statute." 75 Ala. 449.

In a later case (1898), this language occurs:

"But while the damages recoverable are undoubtedly, under our former rulings, punitive in their nature, and not compensatory, they are not, in a strict sense, a penalty, nor is the action penal, or quasi-criminal, within the meaning of the constitutional provisions as above construed. The statute is remedial, and not penal, and was designed as well to give a right of action where none existed before, as to 'prevent homicides,' and the action given is purely civil in its nature for the redress of private, and not public wrongs." So. Ry. Co. v. Bush, 122 Ala. 489, 26 South. 168.

The cases arising in Alabama on or under these statutes are numerous. We note in the margin those which we have examined and considered.¹

The very able and distinguished counsel for the plaintiff in error urges in his printed brief, as he did in his oral argument, that the ruling of the trial court on the question we are now considering is directly opposed to the decision in the case of Williams v. S. & N. A. R. R. Co., 91 Ala. 635, 9 South. 77. He insisted with confidence before us in his oral argument, as he also does in his brief, that "In that case the court expressly limited the recoverable damages to compensation to the father for the loss of the minor's services." And the counsel for the defendant in error in his brief concedes that the

¹ Nashville C. & St. L. Ry. Co. v. Hill, 146 Ala. 240, 40 South. 612; Bube v. Br. L. & P. Co., 140 Ala. 276, 37 South. 285, 103 Am. St. Rep. 33; So. Ry. Co. v. Bush, 122 Ala. 489, 26 South. 168; L. & N. R. R. Co. v. Orr, 121 Ala. 489, 26 South. 35; Ala. G. S. R. R. Co. v. Burgess, 116 Ala. 509, 22 South. 913; Buckalew, Adm'r, v. Tenn. C. I. & R. R. Co., 112 Ala. 146, 28 South. 606; L. & N. R. R. Co. v. Markee, 103 Ala. 160, 15 South. 511, 49 Am. St. Rep. 21; Ala. G. S. R. R. Co. v. Dobbs, 101 Ala. 219, 12 South. 770; Tenn. C. I. & R. R. Co. v. Herndon, Adm'r, 100 Ala. 451, 14 South. 287; McNamara et al. v. Logan, 100 Ala. 187, 14 South. 175; Kansas City, M. & B. R. R. Co. v. Sanders, 98 Ala. 293, 18 South. 57; Richmond & D. R. R. Co. v. Freeman, 97 Ala. 289, 11 South. 800; Williams v. S. & N. A. R. R. Co., 91 Ala. 635, 9 South. 77; L. & N. R. R. Co. v. Orr, 91 Ala. 548, 8 South. 360; Lovell v. De Bardelaben C. & I. Co., 90 Ala. 13, 7 South. 756; Stewart v. L. & N. R. R. Co., 83 Ala. 493, 4 South. 373; Smith v. L. & N. R. R. Co., 75 Ala. 449; S. & N. A. R. R. Co. v. Sullivan, Adm'r, 59 Ala. 272; Savannah & M. R. R. Co. v. Shearer, Adm'r, 58 Ala. 672.

case of Williams seems to assert a different doctrine from that for which the defendant in error here contends. With much diffidence we feel constrained to announce our belief that the authority of the case of Williams does not go to the extent claimed. And to show and support our view, we will summarize more largely than is usual with us the report of that case. We begin with the syllabus, which, in substance and almost literally, is as follows:

"1. Under the statute defining the liability of the master (or employer) for injuries to the servant (or employé) while in the service, the right of action for injuries which result in death is given only to the personal representative of the decedent, but a right of action is given to the father by another statute, when the death of his minor child is caused by the wrongful act, omission, or negligence of any person or corporation.

"2. Contributory negligence on the part of the person injured, while employed as a brakeman on a railroad, is a defense to an action for damages, unless the evidence further shows that, after his peril was discovered, or ought to have been discovered, the injury might have been avoided by the exercise of due care and diligence on the part of the engineer.

"3. When the father sues to recover damages for the death of his minor son, who was killed while in the employment of the defendant railroad company as a brakeman, without his consent, the contributory negligence of the minor is no defense to the action, though it might be available as a defense to an action by the minor himself, if death had not ensued from the injuries; but, if the father consented, expressly or by implication, to the employment of the minor in the service, the contributory negligence of the minor is imputed to the father, and defeats his right of action.

"4. The use of 'kicking-switches,' or 'running-switches,' in detaching and propelling cars, cannot be said to constitute negligence, as 'they seem to be in general use by well-regulated railroads,' but there may be negligence in connection with their use, by failing to instruct a young and inexperienced brakeman as to the attendant danger.

"5. The damages recoverable by the father, in a statutory action for injuries resulting in the death of his minor son, are compensatory only, and not punitive."

The following language, quoted by counsel, appears in the opinion:

"At common law the father could sue for and recover damages for an injury not resulting in death wrongfully done to his minor son. The damages were to compensate him for the loss of services. If death resulted, the action was not maintainable. The statute (Alabama) confers the right of action on the father, although death may have resulted. * * * We hold that, under section 2588 of the Code (1886), the father may recover in all cases where at common law he might have recovered if the injury had not resulted in death, and the purpose of this statute was to give the father the right of action, although death resulted from the injury."

The following also appears:

"The second, third, fourth, and fifth counts of the complaint do not negative that the employment was with the father's consent; and these counts are evidently founded upon the supposed liability of the defendant under the employer's act. Sections 2590, 2591, Code of 1886; sections 1749-1751, Code of 1896. The father cannot maintain an action to recover under the employer's act (citing authority). As he cannot recover on these counts, under any state of evidence, there was no error in giving the general charge in favor of the defendant, of which plaintiff can complain, so far as it denied his recovery on these counts. * * * The correctness of this charge involves the inquiry whether any count of the complaint, if sustained by proof, entitled plaintiff to recover; and if so, was there any evidence before the jury, which tended to sustain such count of the complaint.

"Code, § 2588 (1886) (26, 1896) provides as follows: 'When the death of a minor child is caused by the wrongful act, or omission, or negligence of any person, or persons, or corporation, his or their servants, or agents, the father may sue, and recover such damages as the jury may assess.'"

Then follows more than two full pages, constituting the body of the opinion, of a discussion bearing upon the question of parties and the application of the doctrine of contributory negligence, concluding with this paragraph:

"The first and last counts of the complaint aver that the decedent was a minor son of the plaintiff; that he was wrongfully employed by the defendant to perform the duties of a brakeman, without the knowledge and consent of plaintiff, and that while attempting to obey the orders of his superior in the performance of his duties as brakeman, he was injured and killed by the wrong and negligence of the defendant's agents or servants. These two counts show a good cause of action, and there was evidence tending to sustain the averments of these two counts. It was error to give the general charge for the defendant."

The only language of the court bearing expressly on the measure of damages is contained in the last three lines of the opinion, as a separate paragraph, viz.:

"The damages recoverable by the father are compensatory, and not punitive. *L. & N. R. R. Co. v. Orr*, 91 Ala. 548, 8 South. 363, and authorities cited."

We will now notice the *Orr Case*. This was an action brought by Horace Orr, administrator of the estate of Henry Griffin, deceased, to recover damages for the wrongful and negligent acts of the defendant and its servants, which, as alleged, caused the death of Griffin while in the defendant's service as a brakeman. We quote from the opinion in that case:

"In this state, the statute provides that, in certain cases, the master or employer 'is liable to answer in damages' to the servant or employé. Code, § 2591 (1886). The record presents the direct question, as to what is the measure of damages under the statute, where death results."

After a liberal discussion of the English common-law rules and the evolution of the new doctrines and reference to authorities, the opinion proceeds:

"These principles furnish a correct exposition of our statute; and consequently we declare, under the provision of section 2591 of the Code, neither exemplary nor vindictive damages are recoverable. The purpose of this statute is entirely different from that intended by the act of February 5, 1872 (Laws 1871-72, p. 83), the object of which was to 'prevent homicide.'"

The deceased, at the time he was killed, was 35 years of age. The suit was brought under the employer's act. And, in the decision and opinion of the court, no reference to the damage which a parent might recover for the death of a minor child, a member of the family, was made or would have been pertinent.

The distinguished counsel for the plaintiff in error calls our attention to language taken from the opinion of the court in the case of *Nashville, etc., Ry. Co. v. Hill*, 146 Ala. 240, 40 South. 612, viz.:

"The gravamen of the eighth count is 'the alleged wrong of the defendant in putting the plaintiff's minor son to work at a dangerous place upon a dan-

gerous work without her consent.' The count avers that in consequence of such wrong her son was killed, and the plaintiff (thereby) lost his service during his minority, and plaintiff was damaged by reason of said injury. This damage was the deprivation of his service and wages until he attained his majority."

The complaint originally contained seven counts, and count 8 was added by amendment. The suit was brought within a year from the happening of the accident, but count 8 was not filed until more than a year thereafter. The defendant pleaded the statutes of limitations of one year, upon which issue was joined. We quote from the opinion:

"The comparison of count 1 with count 8 shows that the subject-matter of the latter was within the lis pendens of the original suit, and hence said count introduced by amendment is saved from the ban of the statute of limitations by the doctrine of relation back to the commencement of the suit."

The language, "this damage was a deprivation of his service and wages until he attained his majority," has relation logically to the averment in the count "that, in consequence of such wrong, her son was killed, and the plaintiff (thereby) lost his service during his minority, and plaintiff was damaged by reason of said injury." She could not recover more than she claimed.

The only questions before the court in the Hill Case, were, first, whether the cause was removable to the federal court; second, the question of limitations; and, third, whether the amendment changed the form of action. The counsel in his printed brief says:

"This court itself has expressly decided in the case of *McGehee v. McCarley*, 91 Fed. 462, 33 C. C. A. 629, that in a suit under section 26 of the Alabama Code the damages recoverable are compensatory, and not punitive, following the decision in *Williams v. Railroad Co.*, *supra*. The result in the *McCarley* Case was changed on rehearing (*McGehee v. McCarley*, 103 Fed. 55, 44 C. C. A. 252), but that change was not due to any change in the opinion of the court as to the construction of section 26 of the Code, but to the discovery by the court that the suit was brought, not under section 26, but under section 27 of the Code."

We reply to this suggestion of counsel by quoting in full all that this court said on the subject in the case of *McGehee v. McCarley*:

On first hearing:

"We find nothing in the statute law of Alabama which would require a departure from the doctrine announced in *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97. On the contrary, we find that the Supreme Court of Alabama, in construing the very statute under which this action was brought (Code Ala. 1886, § 2588), said that the damages recoverable under that statute are compensatory, and not punitive. *Williams v. Railroad Co.*, 91 Ala. 635, 9 South. 77." *McGehee v. McCarley*, 91 Fed. 465, 33 C. C. A. 629.

On rehearing:

"This cause was fully stated when it was first passed upon by this court. See 91 Fed. 462, 33 C. C. A. 629. An application for rehearing having been made by the defendant in error, and, the same having been granted, the cause has been fully reargued, and the court has again carefully considered it. The single error heretofore found by this court in the cause was that the trial court refused to charge the jury that only compensatory, and not punitive, damages were recoverable in the cause. On the first hearing of this cause the argument and the briefs treated very imperfectly, and in an unintentionally misleading manner, the matter of the statute law upon which this cause was

based. Assisted by the argument and briefs on the rehearing, the court has carefully re-examined the point upon which it ordered this cause to be remanded, and has concluded that the statute law of Alabama permits a personal representative to recover punitive damages in such a cause as the one at bar, and that therefore it is not within the doctrine of *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97. The court has also re-examined the other questions involved in this cause, and finds no error in the cause. It is therefore ordered that the former order of this court, reversing the judgment of the lower court and remanding this cause for a new trial, be, and the same is hereby, annulled and set aside. It is further ordered that the judgment of the lower court be, and the same is hereby, affirmed." 103 Fed. 55, 44 C. C. A. 252.

Does our decision sustain the contention of the plaintiff in error? Does it not, to the contrary, support the contention of the defendant in error? We think that it at least does show the danger of mistaking some inadvertent language in an opinion for the authority of the case.

It would unduly extend this opinion to notice ever so briefly all of the numerous cases in the Alabama Reports which relate to the adoption, development, and application, in that state, of the doctrines of Lord Campbell's Act; but one who will examine the cases cited in the margin will be able to discover sufficient grounds to conclude, as we do, that the trial judge did not err in that part of his charge to the jury, wherein he said to them:

"The section of the Code, under which the plaintiff has brought this suit, says that the plaintiff shall recover 'such damages as the jury may assess,' and in that sense, by the letter of the statute under which this suit is framed, the assessment of damages is left to the jury, but it is left to the jury under the control of the law, and under the control of the court, and an excessive verdict produced by appeals to passion, or to prejudice, or to sympathy would of necessity have to be set aside or reduced by the court. I do not say to you in this case that the amount of damages should be limited to the amount of wages or earnings that this lad might have made from the time of the accident to the time he reached his majority. I do not say to you that there is such a limit. The plaintiff can recover 'such damages as the jury may assess,' and you should have regard to all the facts and circumstances of the case which have been so well discussed by counsel, not being influenced by any appeal to passion, sympathy, or feeling. We sit here to decide the case, all of us, according to the proper rules of justice between the parties."

It follows that the judgment of the Circuit Court should be affirmed. And it is so ordered.

NEWMAN, District Judge (dissenting). I am unable to agree with the majority of the court in the conclusion reached in this case. In my judgment, the statutes of Alabama as construed by the Supreme Court of that state, allow only compensatory damages in cases of this character; that is, the loss to the parent of the minor's services during minority. Under the law of Alabama, as I understand it, when a minor child is employed without the knowledge or consent of the parent in a dangerous service, and is injured in such service, and dies from the injuries, the father, and the mother in certain contingencies, may sue and recover against the employer; the measure of damages being the value of the child's services during minority; that is, the parent's pecuniary loss. In such cases the contributory negligence of the deceased is not a defense. In another class of cases, when a minor child is killed in the service of another, the right of action which he

would have had if he had been injured and had not died in case of death survives to the personal representative or to the father, or, under certain circumstances, to the mother, and in these cases the defense of contributory negligence may be interposed.

The plaintiff, the father in this case, elected the former cause of action. The pleas of contributory negligence filed by the defendant company were stricken because it was this character of action, and the case was tried on that theory, as the whole record, including the instructions by the court to the jury, shows. There was no evidence in the case as to the value of the services of the deceased. His age was proven, which of course would give the length of time that would elapse until he attained his majority, but this was all. The court instructed the jury that the plaintiff, the father, was entitled to recover such damages "as the jury might assess." The court was careful to tell the jury while stating that the suit provided for such damages as they might assess, that the amount they should find ought to be found as their "calm and deliberate judgment," and under the control of the law, and that they should not be moved to find an undue amount by prejudice or sympathy. All this, however, simply left the jury to find such amount as in their judgment might be fair and reasonable for the killing of the father's minor child. I think the jury should have been restricted to the value of the child's service to the parent during minority. As to what this would have been, as has been stated, there was no evidence.

In my judgment this question is settled by the construction placed by the Supreme Court of Alabama on the Alabama statutes. The most important case on that subject is the case of *Williams v. Railroad Co.*, 91 Ala. 635, 9 South. 77. A brief extract from the conclusion of the opinion in that case will show what was determined as to the question here involved:

"The first and last counts of the complaint aver that decedent was a minor son of plaintiff; that he was wrongfully employed by the defendant to perform the duties of a brakeman without the knowledge and consent of the plaintiff, and while attempting to obey the orders of his superior, in the performance of his duties as brakeman, was injured and killed by the wrong and negligence of the defendant's agents and servants. These two counts show a good cause of action, and there was evidence tending to sustain the averments of these two counts. It was error to give the general charge for the defendant. The damages recoverable by the father are compensatory and not punitive." Citing *Railroad Co. v. Orr*, 91 Ala. 548, 8 South. 863, and cases there cited.

The rule announced in this case, so far as my examination shows, has never been changed by the Supreme Court of Alabama. On the contrary, in the last case on this subject to which attention has been called, or which I have been able to find (*Railway Co. v. Hill*, 146 Ala. 240, 40 South. 612), the same view of the measure of damages is announced, as will be seen by an extract from the opinion, in the following language:

"The gravamen of the eighth count is 'the alleged wrong of the defendant in putting the plaintiff's minor son to work at a dangerous place upon a dangerous work without her consent.' *Marbury Lumber Co. v. Westbrook*, 121 Ala. 179, 25 South. 914. The count avers that in consequence of such wrong her son was killed, and plaintiff (thereby) lost his services during his

minority, and plaintiff was damaged by reason of said injury. This damage was the deprivation of his service and wages until he attained his majority; the father being dead, and the son not having been emancipated."

But these statutes of Alabama have been construed by this court. In *McGehee v. McCarley*, 91 Fed. 462-465, 33 C. C. A. 629, in the opinion of the court, this language is used:

"But the majority of this court finds material error in this cause resulting from the failure of the trial court to charge the jury, as the defendants below requested, that only compensatory; and not punitive, damages were recoverable in the case. It is plain to us that under the doctrine of *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, no punitive damages could be recovered in this case. It is not claimed that the corporation ever authorized or ratified the alleged negligence or assault. While the corporation may be compelled to make compensation for the tortious act of its servant committed in the scope of his employment, even if the act be wilful and wanton, yet, if the corporation be itself innocent, it cannot be punished by the infliction of vindictive damages. See Circuit Court of Appeals, Seventh Circuit, in *Railway Co. v. Russ*, 6 C. C. A. 597, 57 Fed. 822. We find nothing in the statute of Alabama which would require a departure from the doctrine announced in *Railway Co. v. Prentice*, *supra*. On the contrary, we find that the Supreme Court of Alabama, in construing the very statute under which this action was brought (Code Ala. 1886, § 2588), said that the damages recoverable under that statute are compensatory and not punitive. *Williams v. Railroad Co.*, 91 Ala. 635, 9 South. 77. We are clear that the judgment must be reversed because of the error above stated."

There was a rehearing in this case and the judgment of the court was changed, and instead of being reversed it was affirmed, but upon the ground it seems that the suit was found to have been brought under section 27 of the Code of Alabama of 1896, and not under section 26, as was assumed when it was first decided. To this last decision Judge Pardee filed a dissenting opinion. *McGehee v. McCarley*, 103 Fed. 55, 44 C. C. A. 252.

The case now before the court, it is conceded, is proceeding under section 26. Judge McCORMICK, however, evidently entertained and acted upon the same view in both decisions in the case of *McGehee v. McCarley* which he has expressed in this case.

I think the distinction I have drawn, which seems to me to be supported by the statutes and decisions in Alabama, is right, and is founded not only in reason, but in justice. If the parent elects to sue in right of the survivorship of the minor child's cause of action, and brings a suit against which any contributory negligence of the deceased may be set up as a defense (if the child has attained such age as that contributory negligence can be pleaded), then the parent would be entitled to, and ought to recover, if liability is shown, a substantial verdict, how to be measured under the law of Alabama it is unnecessary to say, but certainly going beyond any mere value of minority service. If, however, the parent wishes to avoid any defense which the employer might properly set up against the deceased, and chooses to sue in his or her own right as parent, for the child's death, it seems to me that the recovery in justice should be restricted to the parent's pecuniary loss; that is, the value of the child's services during minority. In my judgment this is not only fair and right, but it is the law of Alabama deducible from its statutes and decisions. Certainly a statute undertaking to give any greater right should do so clearly and distinctly.

I think the decision of the Circuit Court should be reversed, and the case remanded and a new trial had, in which the law of damage could be stated to the jury in accordance with what has been herein said.

On Petition of Plaintiff in Error for Rehearing.

PER CURIAM. The judges who concurred in the decision of this case are satisfied with the views expressed in the opinion of the court, and see no reason in the petition for rehearing sufficient to induce them to grant the same; and the application therefor is denied.

NOTE.—The following is the charge to the jury:

SHELBY, Circuit Judge (charging the jury orally). At common law in England and in this country no action lies for the death of a human being. The idea was that the injury was merged in the felony, and under that system, although a man could bring a suit in the event he was personally injured and not killed, if it killed him no one at all could sue. But a long time ago an act was passed in England, called "Lord Campbell's Act," which authorized a suit to be brought in the event of death from the wrongful or negligent act of another, and that act has been substantially adopted in all or nearly all the states of the Union, so that the law now is by statute that, wherever death is produced by the wrongful or negligent act of another, an action accrues to some one. We have in Alabama statutes of that kind. We have acts which permit a suit to be brought by the administrator of a person who is negligently or wrongfully killed, and then we have a law, which is section 26 of the present Code of Alabama (Code 1896), which provides that the father, if living, or the mother, if the father is dead, may bring an action for the wrongful or negligent killing of a minor child who is a member of the father's family. It is under that section of the Code that this suit is brought.

The plaintiff alleges that his son, who was a minor, was killed by the wrongful act or the negligent act of the defendant's agents or servants. The wrongful and negligent acts charged are described in the declaration and have been detailed in the evidence. The plaintiff also alleges, as it was necessary for him to allege under the section of the Code under which this action is brought, that his son who was killed was a member of his family. The defendant files a plea of not guilty, which is in effect a denial of all of the wrongs alleged in the complaint. It also pleads specially that the son who was killed was not a member of the plaintiff's family at the time he was killed. Now, the issues joined upon these pleas involve the questions which are submitted to the jury. The burden of proof in the first instance, is upon the plaintiff; that is, the plaintiff must prove in this case the allegations of his complaint. If proved by a preponderance of the evidence and to the satisfaction of the jury, the plaintiff then becomes entitled to a verdict. On the failure of such proof by the plaintiff, the defendant is entitled to a verdict. In this case, as in every case, or in nearly every case, that is litigated and tried, there are many facts which are practically conceded, and but few points that are earnestly contested. Now, there is no controversy here about the proposition that the plaintiff in this case is the father of the young man who was killed. There is no controversy about his employment, and about the fact that he was killed. There is no controversy about the fact that he was killed while in the employment of the defendant. The chief controversy in the case is over the question as to whether or not at the time he was killed he was a member of the plaintiff's family. That he was his son there is no dispute; but the question is submitted to the jury, as a question of fact in this case, whether or not he was a member of the plaintiff's family at the time of the accident. At the beginning of the evidence on this question this young man was residing at the house of his father, and at that time there could be no question about the fact that he would then be a member of the family within the statute. The defendant contends that subsequent occurrences before the killing amounted to an emancipation of the lad, and caused him to cease to be a member of the family of his father. It is argued before

you on that line that the father no longer had any interest in him, did not seek to collect his wages, did not make any inquiry as to where he was, and that there was a long absence not accounted for in any way from the paternal roof. The plaintiff, on the other hand, says that the evidence shows that there was some controversy or dispute between the lad and his parents in reference to his attention to a young woman who lived near by, and that that controversy led to the lad's going temporarily away from home, and his father consented to his absence for fear that his return might lead to a marriage between the boy and the young woman. It is contended on the part of the defendant that the absence was intended, so far as the proof shows, to be permanent, and that the boy was no longer a part of the family, and that the family relations were permanently and forever severed. The plaintiff says that the absence was merely temporary, that it was mere prudence and care on the part of his parents to permit him to stay away without any inquiry for some time, and that the disruption of the family relation was not of the character to cause him to cease to be a member of the family. If there was an abandonment of the relation of parent and child, intended to be permanent, or intended to be absolute for the time, though limited, the jury might be justified in concluding that the lad was not at the time a member of the family; but if the absence was only temporary, and was permitted by the father, and not a case of permanent estrangement, but simply in view of the father's idea as to what effect might be produced by the son's presence near the girl whom he did not wish him to marry, if the absence was only of that kind, and permitted for that reason, the jury, I think, would not be justified in holding that he ceased to be a member of the family. That question is left for the jury to determine, whether in the light of the facts he remained a member of the family. You should look at it in the light of your experience, at every fact from the time of the controversy, about his attentions to the girl until the lad was returned home a corpse. If in your view, in the light of this evidence and the inferences you draw legitimately from it, the lad remained a member of the family, then that defense fails; but if you find from the evidence, or draw the inference, that the family relations were severed, and that under the circumstances he was no longer a member of the family, the defense would be good, because it is incumbent on the plaintiff to show that this lad was a member of the plaintiff's family at the time the accident occurred. You will bring your common knowledge and experience to bear upon questions of that kind, and I submit this one to the jury, believing that they are better able to deal with it than lawyers at the bar or the judge on the bench.

I think that I might say to you that a temporary absence with the intention of returning to the family roof would not prevent the lad from remaining a member of his father's family. I think I might say to you that the father might permit, without dissolving the family relation, an absence of this kind, if he did not intend the permanent estrangement and dislodgement from the home, and the lad yet remain a member of the family. It is a question of intention upon the part of the parent and upon the part of the child, to be deduced from the actions and circumstances that surround the case.

One of the averments in several of the counts of the declaration is that the lad came to his death by the wrongful and negligent act of the defendant. Proof is offered on the part of the plaintiff tending to show that there was a defect in a step which was used in getting on the engine. Proof is offered on the part of the defendant to show that the defect was not of such a character as would be negligence on the part of the defendant. You will remember the conflict upon this subject. I will not go into details, because they would enlarge the charge too much. It is the duty of the employer to provide a safe place for his employé to work, and to keep sound implements of labor, or to exercise, I will say, at least ordinary care in keeping the implements and machinery which his employé is to use in a reasonably safe condition. If the jury find from the evidence that the step which was used to get up or down from the engine was so defective as to make its use dangerous, they would be justified in inferring negligence on the part of the defendant from that defect. This and other averments of negligence and wrong that appear in the complaint must be proved, for the burden of proof is upon the plaintiff, and the jury, in considering each of them, will consider

all the evidence in ascertaining whether or not due proof is made. If you find, under the instructions which I have given you, that proof is made of the averments of the declaration, or of any count of the declaration, to your satisfaction, including the averment that the lad was a member of the father's family, then it would be your duty to find a verdict in favor of the plaintiff, and the question would then arise as to the mode or rule by which you would estimate the damages to which the plaintiff may be entitled.

There are always in cases of this kind two extreme views submitted to the jury by the parties. It is fortunate that neither the plaintiff nor the defendant is allowed to establish the rule of damages, because either is inclined to go to an extreme. Invariably the plaintiff's tendency is to exaggerate the amount, and to claim the utmost sum, and the defendant's tendency is to make it as small as possible. Now, the plaintiff, gentlemen, can claim what he pleases in his declaration. That is no criterion to go by. He might sue for a million dollars as well as one, and whatever he sues for is usually argued for. I think I should say on that question, if you get to it, that you should exercise a calm and deliberate judgment, not be influenced by any appeals to sympathy, remarks about poverty, nor any remarks about the defendant being a corporation. Whatever sympathy we have, we are not justified in exercising it at the improper expense of others. The section of the Code under which the plaintiff has brought this suit says that the plaintiff shall recover "such damages as the jury may assess," and in that sense, by the letter of the statute under which this suit is framed, the assessment of damages is left to the jury; but it is left to the jury under the control of the law, and under the control of the court, and an excessive verdict, produced by appeals to passion, or to prejudice, or to sympathy, would of necessity have to be set aside or reduced by the court. I do not say to you, in this case, that the amount of damages should be limited to the amount of wages or earnings that this lad might have made from the time of the accident to the time he reached his majority. I do not say to you that there is such a limit. The plaintiff can recover "such damages as the jury may assess," and you should have regard to all the facts and circumstances of the case which have been so well discussed by counsel, not being influenced by any appeal to passion, sympathy, or feeling. We sit here to decide the case, all of us, according to the proper rules of justice between the parties. If, under the instructions I have given you, you conclude the plaintiff is entitled to recover the form of your verdict will be: "We, the jury, find for the plaintiff, and assess his damages at \$——," filling up the blank.

If you come to the conclusion that the plaintiff is not entitled to a verdict, but the defendant is, then the form of your verdict would be: "We, the jury, find for the defendant."

That is all, I believe, that I desire to say to you.

The following is section 26, Code Ala. 1896, being section 2485, Civ. Code Ala. 1907, with the note of Code Commissioner Mayfield appended thereto:

"2485. (26) (2588) (2899). Suits for Injuries Causing Death of Minor Child.—When the death of a minor child is caused by the wrongful act, or omission, or negligence of any person or persons, or corporation, his or their servants or agents, the father, or the mother, in cases mentioned in the preceding section; or if the father and mother are both dead, or if they decline to bring the action or fail to do so within six months from the death of the minor, the personal representative of such minor may sue, and in any case shall recover such damages as the jury may assess; but a suit by any one of them for the wrongful death of the minor shall be a bar to another action, either under this section or under the succeeding section."

"Note.—Genesis of Statute. This section first appeared as act approved February 28, 1872 (Acts 1871-72, p. 82), which was codified in the Code of 1876, and appears as section 2809, and a similar statute was enacted January 23, 1885 (Acts 1884-85, p. 90). The act as originally passed was never construed by the Supreme Court. It was very greatly modified, when codified as it appeared in section 2588 of the Code of 1886, and was brought forward as section 26 of the Code of 1896. It was evidently the intention of the Legislature to give the parents, the father and mother, respectively, in the

cases mentioned, a right of action for the wrongful death of their infant in the same manner as the right of action was conferred upon the personal representative under the homicide act, section 27 of the Code of 1896, but to make the action by the parent a bar to an action under the homicide act, so as not to allow an action by both the parent and personal representative for the same wrongful act causing death of infant. There was evidently some confusion or lack of clearness as to the relation of this section to the one following. An action by the parent for the wrongful death of the infant would certainly be a bar to an action by the personal representative under section 26. Would it also be a bar to an action by the personal representative under section 27, or was the effect of the statute of January 23, 1885, or the act as codified (section 26 of the Code of 1896), to take away the right of action under section 27 of the Code of 1896 for the wrongful death of infant? There was also some confusion in the decisions of the court construing these two sections. Each statute provides that the damages recoverable shall be such 'as the jury may assess.' The cases, construing section 27 hold that the damages are punitive, while the case of *Williams v. S. & N. R. R. Co.*, 91 Ala. 635, 9 South. 77, construes section 26, holding that the damages are compensatory and not punitive. This would imply that each statute created a different cause of action, and therefore that two actions might be maintained for the same wrongful death—one under section 26, by the parent or personal representative, and the other under section 27, by the personal representative. There is further confusion for this reason: That section 27 provides that the damages, when recovered, are not subject to the payment of debts of the testator or intestate, but must be distributed according to the statute of distribution, whereas section 26 has no similar provision. In fact, it has no provision as to the status or disposition of the damages when recovered; that is to say, if an action should be brought by the personal representative under section 26, would the damages be distributed between the distributees of the decedent's estate, or would they be for the benefit of the parent exclusively? Another cause for confusion in the statute itself is that it provides that an action by the parent is a bar to a suit by the personal representative, but it does not provide that a suit by the personal representative is a bar to one by the parent; e. g., if the personal representative should bring an action under section 26 of the Code, and recover judgment, would it bar an action by the parent under section 27? The section as now written was intended to make its meaning certain, and not to change it. Amendment of complaint changing cause of action from section 25 or section 26 to section 27. 141 Ala. 325, 37 South. 431. Damages under section 27 held punitive, while those under section 26 held compensatory. Damages under this section should be the same; the language of each as to damages being the same. In action by parent, contributory negligence of the parent may be defense as to simple negligence. *A. G. S. R. R. Co. v. Burgess*, 116 Ala. 509, 22 South. 913. Damages recoverable under this section held to be pecuniary compensation to parent. *Id.* Policy of statute. *Williams v. S. & N. R. Co.*, 91 Ala. 635, 9 South. 77; *Winslow v. State*, 92 Ala. 78, 9 South. 728. Recovery solely for benefit of parents. *Tenn. C. I. & R. Co. v. Herndon*, 100 Ala. 451, 14 South. 287. Parent can only recover where minor could have recovered at common law, had he survived. *Lovell v. De Bardelaben C. & I. Co.*, 90 Ala. 13, 7 South. 756; *Williams v. S. & N. R. Co.*, 91 Ala. 635, 9 South. 77; *Harris v. McNamara*, 97 Ala. 181, 12 South. 103. Contributory negligence—effort to avoid injury—when questions for jury. *A. G. S. R. Co. v. Dobbs*, 101 Ala. 219, 12 South. 770; *Williams v. S. & N. R. Co.*, 91 Ala. 635, 9 South. 77. (See, also, citations to next section.) Damages under this section compensatory and not punitive. *Williams v. S. & N. R. Co.*, 91 Ala. 635, 9 South. 77. (This decision, if not dictum, is wrong and should be corrected.) See *Mayfield's Digest*, vol. 2, pp. 1029, 1044; vol. 3, p. 978; vol. 5, p. 504."

McCLOSKEY v. PACIFIC COAST CO.

(Circuit Court of Appeals, Ninth Circuit. February 17, 1908.)

No. 1,414.

1. COMMON LAW—APPLICATION IN ALASKA.

The common law, by act of Congress, has been declared to be in force in the territory of Alaska.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Common Law, §§ 9-11.]

2. NAVIGABLE WATERS—LITTORAL RIGHTS.

Under the common law the King was the owner of the bed of the ocean and of everything below the line of ordinary high tide, the littoral owner holding only to the line of ordinary high tide, with the right of access to the navigable waters in front of his land and every part thereof, though, like a riparian proprietor, he had a right to the water frontage belonging by nature to his land, a right distinct from the right of navigation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 184, 241-244.]

3. SAME—RIGHT OF ACCESS—INJUNCTION.

A littoral owner, while not entitled to wharf out on the tide lands in front of his property, is entitled to an injunction against the erection of any structure on such lands or in the water in front thereof which would interfere with his right of access.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 241-244.]

4. PUBLIC LANDS—TOWN-SITE ENTRY—DEDICATION BY TRUSTEE.

Where a town site is located on public land, as authorized by Rev. St. § 2387 (U. S. Comp. St. 1901, p. 1457), a trustee of the town site takes title for the individual occupants of the town, and also for the occupants collectively as a community, and therefore has no power as against the individual occupants to dedicate land in the site to public use for street purposes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 91.]

5. SAME—LEGAL TITLE—TRUSTS.

On the establishment of a town site on public land, as authorized by Rev. St. § 2387 (U. S. Comp. St. 1901, p. 1457), a legal title is vested in the trustee in his official and public capacity, and, simultaneously with the entry, there is vested in the beneficiaries an absolute right in the trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 87.]

6. SAME—STREETS—DEDICATION.

The streets contemplated by the act, providing for the establishment of town sites on public land, and as to which a public right attaches, are those which in fact existed at the time of the town-site entry either by actual use or dedication; the trustee being without authority by any act of his own to dedicate a street.

7. SAME.

A claimant under the town-site law may, before his right to a deed is established, by his acts make a common-law dedication binding as to him, and such as will operate as an estoppel in pais.

8. SAME—EVIDENCE.

When a town-site entry was made, a sidewalk above high tide line, and a roadway below such line, had been in continual public use for more than 12 years. The trustee of the town site caused the map to designate the sidewalk as a public walk, after which the owners of the upland made

no objection to the map or the continuous use of the walk, and five years after the entry such owners accepted deeds from the trustee in which the property conveyed was described as lots and blocks, which abutted on the sidewalk in accordance with the map; the deeds also reciting that the trustee had entered the land in trust for the several use of the occupants, and had made survey thereof into lots, blocks, squares, streets, and alleys, after which complainant by deed to the city quitclaimed an easement for public use of the street or roadway then "occupied and used." *Held*, that such facts operated as a dedication by complainant and its grantors of the land so used to the public for street purposes.

9. DEDICATION—DEDICATION OF STREET—EFFECT.

Where complainant and its grantors dedicated land bordering on the sea to a city for street purposes, such dedication operated to merge in the public right complainant's individual right of access to the open navigable waters in front of complainant's remaining land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 93, 94.]

10. NUISANCE—NAVIGABLE WATERS—OBSTRUCTIONS TO ACCESS—INJUNCTION.

One who has been divested of littoral rights cannot maintain a suit to enjoin obstructions to his access to navigable waters in front of his land, under the rule that individuals are not entitled to redress against a public nuisance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 163.]

11. APPEAL—REVIEW—INJUNCTION—ERRONEOUS THEORY.

A decree awarding an injunction will not be disturbed on appeal, though based on an erroneous theory, if the pleadings and proof present any tenable ground on which it might be sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3406.]

12. NAVIGABLE WATERS—LITTORAL RIGHTS—POSSESSION OF LAND.

Act Cong. May 17, 1884, c. 53, 23 Stat. 24, providing a civil government for Alaska, declares that the Indians or other persons in the district should not be disturbed in the possession of any land actually in their use or occupation or then claimed by them; but that the terms under which such persons might acquire title were reserved for future congressional legislation. *Held* that, the protection of such statute never having been withdrawn, complainant and its grantors, having claimed possession and the right to possess all tide lands in front of their property prior and subsequent to such enactment, except so far as they had conceded to the public use of a street and sidewalk along the shore, were entitled to protect such possession of the tide land between the roadway and the line of low tide by appropriate suit or action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 241-244.]

13. EQUITY—ADEQUATE REMEDY AT LAW—WAIVER.

Where, in a suit to enjoin a trespass on tide land, no objection was interposed by demurrer or answer on the ground that complainant had an adequate remedy at law, such objection was waived.

Appeal from the District Court of the United States for the First Division of the District of Alaska.

J. A. Hellenthal and Lorenzo S. B. Sawyer, for appellant.

Lewis P. Shackleford and Geo. W. Towle, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The appeal in this case is taken from an order of the court below granting a temporary injunction upon a bill in equity, the answer thereto, and the testimony and proofs of the

respective parties. The bill was brought to enjoin the appellant from erecting a structure on tide lands in front of property of the appellee, fronting on Gastineaux Channel, an arm of the North Pacific Ocean in Alaska, the appellee alleging that, as a littoral owner of lands abutting the shore of the sea, it was entitled to free access to and from the navigable waters fronting thereon. The appellant in his answer denied that the appellee is a littoral owner on the seashore, and alleged facts to show that by the dedication and grant of a sidewalk and street in front of its land the appellee had parted with all littoral rights. The court below held that the appellee possessed the littoral right of access to the water in front of its land, and on that ground awarded the injunction.

The common law has, by act of Congress, been declared to be in force in the territory of Alaska. By the common law of England, the King was the owner of the bed of the ocean and of everything below the line of ordinary high tide, and the littoral owner held only to the line of ordinary high tide, but he had the right of access to the navigable waters of the ocean in front of his land and of every part thereof. In *Gould on Waters*, § 149, it is said:

"But a littoral proprietor, like a riparian proprietor, has a right to the water frontage belonging by nature to his land, although the only practical advantage of it may consist in the access thereby afforded him to the water for the purpose of using the right of navigation. It is distinct from the public right of navigation, and an interruption of it is an encroachment upon private right, whether caused by a public nuisance or authorized by the Legislature."

In *Shively v. Bowlby*, 152 U. S. 9, 14 Sup. Ct. 548, 38 L. Ed. 331, upon an exhaustive consideration of the authorities, it was held that the common law of England is the common law of this country, except where it has been modified by the Constitution, statutes, or usages of the different states, or by the Constitution or laws of the United States. The court said:

"It is equally well settled that a grant from the sovereign of land bounded by the sea or by any navigable tide water does not pass any title below high-water mark, unless either the language of the grant or long usage under it clearly indicates that such was the intention."

After reviewing the English decisions, the Supreme Court continued:

"It has been established in England that the owner of land fronting on a navigable river in which the tide ebbs and flows has a right of access from his land to the river; and may recover compensation for the cutting off of that access by the construction of public works authorized by an act of Parliament." "The right thus recognized, however, is not a title in the soil below high-water mark, nor a right to build thereon, but a right of access only, analogous to that of an abutter upon a highway."

So in *Weber v. Harbor Commissioners*, 18 Wall. 57-65 (21 L. Ed. 798), it was said:

"By that law, the title to the shore of the sea, and of the arms of the sea, and in the soils under tide waters is in England in the King, and in this country in the state. Any erection thereon, without license, is therefore deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a purpresture, which he may remove at pleasure, whether it tend to obstruct navigation or otherwise."

There can be no doubt, therefore, that the appellee, while it had not the right to wharf out on the tide lands in front of its property, was, if its land abutted the shore, entitled to free access to the navigable waters at all points in front thereof, and was entitled to an injunction against the erection of any structure on the tide lands, or in the water in front thereof, which would interfere with such access. *Gould on Waters*, § 547; *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; *Shirley v. Bishop*, 67 Cal. 543, 8 Pac. 82; *San Francisco Savings Union v. P. G. R. Petroleum, etc., Co.*, 144 Cal. 134, 77 Pac. 823, 66 L. R. A. 242, 103 Am. St. Rep. 72.

But we do not find that the appellee is in fact a littoral owner and possessed of an individual right, as distinguished from the public right, of access to the navigable waters in front of its land. On March 6, 1881, M. W. Murray located a tract of land 600 feet square, in which is included blocks O, P, and Q, as now marked and designated on the plat of Juneau. The location was partly upon upland and partly upon tide lands, with its waterward boundary at low-water mark on Gastineaux Channel. There was then no civil government in Alaska, and Murray's location was protected and recognized solely by the common consent of the miners of the mining district in which it was made. In the year 1881, Murray built a wharf on the tide lands in front of his location, southerly from the point occupied by the appellant, and from that time until 1896 the wharf was continuously used as the only public dock. During that period, all vessels which carried merchandise and passengers to and from the town of Juneau landed at that dock. During all that period, and up to the present time, the tide land from the dock northward into the town of Juneau and in front of the appellee's land has been continuously used as an open public thoroughfare, and at the same time a strip of five feet in width along the bank above high-water mark in front of blocks O, P, and Q has been in continuous public use as a sidewalk. On September 13, 1893, entry was made of the townsite of Juneau under the provisions of section 2387 of the Revised Statutes (U. S. Comp. St. 1901, p. 1457), and the trustee of the townsite caused a survey of the same to be made in order to fix the exterior boundaries and subdivide the town into lots, blocks, and streets and alleys according to the rules and regulations of the Interior Department. The map so made was forwarded to the Interior Department, and was duly approved and adopted as the official plat of the townsite, and later a patent was issued to the trustee. In the map the strip of land five feet wide was marked and designated as a sidewalk along the entire water front of the town of Juneau. On March 21, 1898, Thomas R. Lyons, who had become the successor of the original townsite trustee, as such trustee, executed a deed to the appellee's grantors, in which, after describing and designating as the conveyed property lots in blocks O, P, and Q, the grantor proceeded to convey by metes and bounds the whole tract 600 feet square, originally located by Murray. By virtue of that deed, the appellee claims title, not only to the land covered by the sidewalk above the high-tide line, but to the tide land in front of blocks O, P, and Q as far as low-water mark. But it is obvious that the grantees

could take thereby nothing below the high-tide line, for the government had not parted with its title to the tide lands. Notwithstanding this deed, there was no interruption or interference on the part of the appellee or any one with the public use of the sidewalk above high-tide line on the water front of Juneau, and the public use of a plank roadway 20 feet in width immediately below the high-tide line. But on April 3, 1905, the appellee, in consideration of the sum of \$374, quit-claimed to the city of Juneau, then a municipal corporation, "a right of way for the maintenance of a public street as now located and occupied on, over, and across the following described strip of land," the description being of a strip 20 feet wide below high-tide line along the entire front of blocks O, P, and Q, and the deed provided for reversion to the grantor of the easement so granted whenever the city should cease to maintain the street.

The appellee denies the power of the trustee, by the map which he filed with the town-site entry, to dedicate to public use the five-foot strip along the front of its blocks, and it is to be conceded that the trustee had no such power. An entry of a town site, under the provisions of section 2387, is made for the several use and benefit of the occupants thereof. On the trustee is imposed a double trust, one for the individual occupants of the town, the other for the occupants collectively as a community. *City of Denver v. Kent*, 1 Colo. 336; *Martin v. Hoff*, 7 Ariz. 247, 64 Pac. 443, 448. The legal title is vested in the trustee in his official and public capacity, and, simultaneously with the entry, there is vested in the beneficiaries an absolute right in the trust. *Winfield Town Co. v. Maris*, 11 Kan. 128, 151; *Pascoe v. Green*, 18 Colo. 326, 32 Pac. 824. The streets contemplated by the act, and as to which a public right attaches, are those which in fact existed at the time of the entry, either by actual use or by dedication, and the trustee cannot, by any act of his own, dedicate a street. *Bingham v. City of Walla Walla*, 3 Wash. T. 68, 13 Pac. 408; *Aleman v. City of Petaluma*, 38 Cal. 553; *Pueblo v. Budd*, 19 Colo. 579, 36 Pac. 599; *Village of Buffalo v. Harling*, 50 Minn. 551, 52 N. W. 931. But, at the time when the entry of the town site of Juneau was made, the sidewalk above high-tide line, and the roadway below the same had been in continuous public use for more than 12 years, and over them had passed all traffic and travel to and from the outer world. In conformity with this public use the trustee caused the map to designate the sidewalk as a public walk. This consent and acquiescence in such use on the part of the occupants of the adjacent property would, if they had possessed the title, present strong evidence of a dedication thereof to public use, for a dedication may be without writing, by acts in pais, as well as by deed (13 Cyc. 454, 473, 478; *Barclay v. Howell*, 6 Pet. 513, 8 L. Ed. 477); and a claimant under the town-site law may, before his right to a deed is established, by his acts make a common-law dedication binding as to him, and such as will operate as an estoppel in pais. *Village of Mankato v. Willard*, 13 Minn. 13 (Gil. 1) 97 Am. Dec. 208. But whether or not such public use and acquiescence therein prior to the date of the town-site entry estop the appellee to deny dedication, we are of the

opinion that the subsequent acts and acquiescence of the appellee's grantors are sufficient to show dedication. They made no objection to the map of the town site or to the continuous use of the sidewalk thereon designated as such. As late as five years after the date of the entry, they accepted deeds from the trustee in which the property conveyed was described as lots and blocks which abutted upon said sidewalk, in accordance with the map, and in the deeds it was recited that the trustee had entered the land in trust for the several use and benefit of the occupants thereof, according to their respective interests, "and has made survey thereof into lots, blocks, squares, streets, and alleys." The trustee in making the town-site entry acted as well on behalf of the appellee's grantors as on behalf of the other occupants of the town. Said the court in *Ashby v. Hall*, 119 U. S. 526, 7 Sup. Ct. 308, 30 L. Ed. 469:

"The very notion of land settled upon and occupied as a town site implies the existence of streets, alleys, lots, and blocks; and, for the possession of the lots and their convenient use and enjoyment, there must of necessity be appurtenant to them a right of way over adjacent streets and alleys. The entry of the land carried with it such a right of way."

In *Parcher v. Ashby*, 5 Mont. 86, 1 Pac. 207, it was said:

"Disposing of the lands covered by a town to the occupants, according to their several rights and interests, could not be done except the streets and alleys then in public use were reserved to the public."

In *Jones v. The City of Petaluma*, 36 Cal. 230, the court said that the effect of the statute was "to ratify and confirm the use to which the land had been put by cities and towns for the purposes of streets, squares, and alleys, and to permit such use in the future by providing for the sale of lots only. It was a dedication to public use of so much of the public land as had theretofore been appropriated to streets, squares, and alleys."

The road on the tide land in front of the appellee's blocks was not designated as a street on the town-site map. The public right to its use rests on a continuous user for more than 20 years, as well as upon the relinquishment made by the deed of the appellee to the city of Juneau on April 3, 1905, whereby it quitclaimed it to the city an easement for public use as a street in the roadway then "occupied and used" in front of its land, for while the appellee had no title to the tide land it had, as we shall see, a right of possession protected under the act of Congress of May 17, 1884. The deed may properly be adverted to as affording additional evidence of the appellee's intention to release to the public its littoral right of access to the waters of the channel.

The acts of dedication by the appellee and its grantors operated to relinquish to the public, and to merge in the public right, their individual right of access to the open navigable waters in front of their land. In *Barclay v. Howell's Lessee*, 6 Pet. 498, 512, 8 L. Ed. 477, it is declared that, if a street as laid out is bounded by a navigable river, it is limited on that side only by the public right:

"To contend that between its boundary and the public right a private and hostile right could exist would not only be unreasonable, but against law."

In *Potomac Steamboat Co. v. Upper Pot. S. Co.*, 109 U. S. 672, 683, 3 Sup. Ct. 445, 27 L. Ed. 1070, the court quoted with approval from *Rowan's Ex'rs v. Portland*, 8 B. Mon. (Ky.) 232, as follows:

"The riparian right is the result of that full dominion which every one has over his own land, by which he is authorized to keep all others from coming upon it except upon his own terms;" and from *Stockport Water Works Co. v. Potter*, 3 Hurl. & Colt, 300, 326, in which Pollock, C. B., said "that the rights which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river. If he grants away a portion of his land so abutting, then the grantee becomes a riparian proprietor and has similar rights."

And the court proceeded:

"No inference in such a case arises against the riparian right of the grantee, because the land has been granted for a street. On the contrary, as was said in *Barney v. Keokuk*, 94 U. S. 324-340 (24 L. Ed. 224); 'a street bordering on the river as this did, according to the plan of the town adopted by the decree of partition, must be regarded as intended to be used for the purposes of access to the river and the usual accommodations of navigation in such a connection.'"

In *Village of Pewaukee v. Savoy*, 103 Wis. 271, 79 N. W. 436, 50 L. R. A. 836, 74 Am. St. Rep. 859, it was held that, if a public street exists so that its boundary line and the waters of a navigable lake meet, the riparian rights incident to the land composing the street belong to the public, and there is no zone of private right between the street and the lake, but the public right is continuous from the street to the waters of the lake. Said the court:

"In such situations the wharfing privileges and other incidents of the shore are appurtenant to the public right in the street, leaving no line of paramount private right between the street and the water."

In *Rowan's Ex'rs v. Portland*, 8 B. Mon. 232, it was held that, if the street line and the line of a navigable stream coincide, the wharfing privileges are in the public to the exclusion of any private right of that nature in the proprietor on the landward side of the street. Of similar import are *Backus v. Detroit*, 49 Mich. 110, 13 N. W. 380, 43 Am. Rep. 447; *Godfrey v. The City of Alton*, 12 Ill. 29, 52 Am. Dec. 476; *Turner v. People's Ferry Co. (C. C.)* 21 Fed. 90; *The Schools v. Risley*, 10 Wall. 91, 19 L. Ed. 850; *Torne Institute v. Crothers*, 87 Md. 569, 583, 40 Atl. 261; *Smith v. St. Louis Public Schools*, 30 Mo. 290.

The doctrine so affirmed rests upon the theory that the private right of access has been merged in a public right which is inconsistent with its exercise, and, in the application of the doctrine, it is immaterial whether the title to the intervening street is vested in the public or remains in the adjacent owner. *Barney v. Keokuk*, 94 U. S. 339, 24 L. Ed. 224. In *Backus v. Detroit*, 49 Mich. 115, 13 N. W. 382 (43 Am. Rep. 447), Judge Cooley said:

"The common law of dedication would be sufficient to estop the owner from setting up any claim, or asserting any right to the prejudice of the easement."

One who has been divested of such littoral rights cannot maintain a suit to enjoin obstruction to his access to navigable waters in front of his land, the case coming within the general rule that

individuals are not entitled to redress against a public nuisance. Gould on Waters, § 122, and cases there cited.

But notwithstanding that the theory upon which the court below awarded its injunction may have been erroneous, the injunction must not be disturbed if in the pleadings and the proofs we may discover any tenable ground upon which it may be sustained. We find such ground in the fact which is shown by the bill and in the proofs that the appellee's grantors at the date when the act of Congress of May 17, 1884, c. 53, 23 Stat. 24, was enacted, claimed the possession and the right of possession of all the tide lands in front of their property, and have ever since maintained such claim except so far as they have conceded the public use of the street and sidewalk. That act of Congress provided a civil government for Alaska, and, among other things, enacted "that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which said persons may acquire title to said land is reserved for future legislation by Congress." There has been no subsequent legislation affecting the right of possession thus recognized, and the protection thus afforded by the statute has not as yet been withdrawn. The appellee having this right of possession of the tide land between the roadway and the line of low tide could protect such possession by any appropriate suit or action. Conceding that it had an adequate remedy at law against the intrusion of the appellant upon its possession, it nevertheless appears from the record that no objection to the relief sought by the bill was interposed, either by demurrer or answer, on the ground that the appellee had an adequate remedy at law. This being the case, it must be held that such objection is waived, for the case is not one over which equity could have no jurisdiction, since under proper averments trespass may in exceptional cases be enjoined. Where it is competent for a court of equity to grant the relief prayed for, and it has jurisdiction of the subject-matter, the objection that the complainant has an adequate remedy at law must be taken at the earliest opportunity; otherwise, it is waived. *Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 10 Sup. Ct. 604, 33 L. Ed. 1021.

The order is affirmed.

ROSS, Circuit Judge (concurring). I concur in the judgment on the ground that the case made before the court below, from whose order granting a preliminary injunction this appeal comes, shows that the appellee's grantor took possession of the tide lands in controversy in the year 1881, since which time the appellee and his grantors have held the continuous and exclusive possession until the driving of the piles by the appellant complained of. That possession existing, the court below was right in protecting it by its preliminary injunction. *Heckman v. Sutter*, 119 Fed. 83, 55 C. C. A. 635; *Id.*, 128 Fed. 393, 63 C. C. A. 135. The present being

an appeal from an order granting a preliminary injunction only, I do not think the merits of the case should be decided in advance of a trial upon the merits in the court below.

OHEATHAM et al. v. EVANS et al. SAME v. ADAMS. SAME v. EDGEFIELD MFG. CO.

(Circuit Court of Appeals, Fourth Circuit. March 10, 1908.)

Nos. 721-723.

1. LIMITATION OF ACTIONS—DECISION OF PLEA—NECESSITY OF FINDING OF FACTS.

Where, on the argument of a plea of the statute of limitations, the parties made an agreed statement of facts, setting forth every fact necessary to the determination of such plea, which was taken under advisement until the whole case should be heard, it was not error for the court to then determine such plea, upon the agreed statement without making a special finding of facts.

2. COURTS—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

The courts of the United States follow the construction of the Constitution and laws of a state placed upon them by its highest court except in cases wherein the laws of a state are in conflict with some provision of the federal Constitution or a federal statute passed in pursuance of the same, or a rule of commercial law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 957.

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

3. SAME—STATE STATUTES OF LIMITATION.

The courts of the United States, in the absence of legislation on the subject by Congress, recognize the statutes of limitation of the several states, and give them the same construction and effect as given by the local tribunals.

4. LIMITATION OF ACTIONS—ACTION TO RECOVER REAL PROPERTY—LAW OF SOUTH CAROLINA.

Code Civ. Proc. S. C. 1872, § 111, as amended in 1873 (15 St. at Large, p. 497), provided that actions for the recovery of real property must be commenced within 10 years, but in case the plaintiff was a minor he was given 5 years after his disability ceased. The law was again amended by Code Civ. Proc. 1882, § 108, by changing the 10-year period to 20 years and the 5-year period to 10 years. Section 93 of the latter Code, which is a part of the same title, provides that "the provisions of this title shall not extend to actions already commenced, or to cases where the right of action has already accrued; but the statutes now in force shall be applicable to such cases." Held that, under such statutes as construed by the Supreme Court of the state, an action in a federal court by the devisees of a testator who died in 1874, at which time the plaintiffs were infants, to recover lands sold as a part of the estate of the testator in 1875 and 1876, since which time they had been in the possession of the purchasers and their grantees, was governed by the law of 1873, although plaintiffs did not attain their majority until after 1882, and that the action was barred in five years after their disability ceased.

In Error to the Circuit Court of the United States for the District of South Carolina, at Charleston.

See 131 Fed. 118.

J. P. K. Bryan, for plaintiffs in error.

N. G. Evans, John C. Sheppard, and Arthur S. Tompkins, for defendants in error.

Before PRITCHARD, Circuit Judge, and MORRIS and WAD-DILL, District Judges.

PRITCHARD, Circuit Judge. These are three actions brought in the Circuit Court of the United States for the District of South Carolina by the same plaintiffs, Charles Augustus Cheatham and John Oscar Cheatham, citizens of the state of Florida, against Mrs. A. Victoria Evans and Miss Lou P. Gary, citizens of the state of South Carolina, defendants in the first action, and against W. W. Adams, a citizen of the state of South Carolina, defendant in the second action, and also against the Edgefield Manufacturing Company, a corporation of the state of South Carolina, defendant in the third action. These actions are for the recovery of the real estate described in each of the complaints. All of these actions were commenced by personal service of the summons and complaint on all the defendants on the 22d day of April, 1904. In each of these actions the title of the plaintiffs is alleged to be derived through and under the will of Charles A. Cheatham, the father of these plaintiffs. On the 22d day of March, 1874, Charles A. Cheatham, a citizen of Edgefield county, S. C., died, leaving his widow Mrs. Emily Cheatham, and the plaintiffs herein, Charles Augustus Cheatham and John Oscar Cheatham, as his only children. The elder brother, Charles, was born February 16, 1871. John Oscar was born April 24, 1873. The younger of the plaintiffs therefore came of age April 24, 1894, and five years thereafter expired April 24, 1899. These suits were instituted April 22, 1904, so that, if the South Carolina statute of limitations applicable is five years, the bar of the statute was complete long before these suits were instituted. Charles A. Cheatham, the deceased, made a will which was admitted to probate shortly after his death by the judge of probate on the 21st day of April, 1874, in which the testator devised the property in dispute to his said widow and two sons, who are the plaintiffs in this action, and appointed his brother, Oscar F. Cheatham, and his cousin, John C. Cheatham, his executors, but only Oscar F. Cheatham qualified and acted as executor. At the time of his death, the said testator had the legal title to the lands involved in these suits. The tract now belonging to the Edgefield Manufacturing Company was the tract known as "Tract No. 4," the "Sam Brooks woods," and was purchased by C. A. Cheatham, the testator, from Mrs. Catherin R. Chase on the 18th day of September, 1872, and contained then 100 acres, purchase price \$2,000, and on the same day, the 18th day of September, 1872, the testator Cheatham made a mortgage to Mrs. Chase on this tract of land for a portion of the purchase money in the sum of \$800. After the death of the testator, C. A. Cheatham, who died insolvent, James Richardson, sheriff of Edgefield county, executed a deed dated 25th day of January, 1876, to Fannie Clisby, which recites the existence of a suit in the court of common pleas for Edgefield county, S. C., as the suit of Oscar F. Cheatham, as executor

of C. A. Cheatham, v. Emily Cheatham, C. Augustus Cheatham, and others, in consideration of \$1,600, deeding this Chase land to Mrs. Fannie Clisby. On the 16th day of November, 1881, Fannie Clisby, in consideration of \$3,000, deeded this tract of land, containing 82 acres, to Dr. J. W. Hill. On the 26th day of September, 1900, Dr. Hill, in consideration of \$3,815, deeded this tract, containing 76.3 acres, to the Edgefield Manufacturing Company, who are now the owners of the same. The defendants, Mrs. A. V. Evans and Miss Lou P. Gary, claim title through M. W. Gary by virtue of a will made by said M. W. Gary under the clause of said will which devised his real estate to L. P. Gary, A. V. Evans, and A. F. Hodges, the three sisters of said M. W. Gary.

The real estate of said M. W. Gary was partitioned and sold by order of said court by the master in chancery for Edgefield county, and the defendants, Victoria Evans and Lou P. Gary, purchased the property mentioned and described in complaint of plaintiffs herein, and have been in possession of the same ever since the death of the said M. W. Gary, and the said M. W. Gary had been in possession of said lands since January 4, 1875, the date of the deed from W. H. Wall, the then sheriff of the county of Edgefield, conveying to him the lands described in said complaint, and continuously up to the time of his death, April 9, 1881, and the defendants are now in possession. On the 7th day of November, 1871, Charles Cheatham, the father of the plaintiffs to this action, purchased from W. H. Frazier and W. A. Sanders, executors, the property for which plaintiffs brought their action. On the same day Charles Cheatham executed a mortgage to W. H. Frazier and W. A. Sanders, executors, to secure the credit portion of the purchase money for this land. This mortgage had not been paid nor satisfied at the death of the said Charles Cheatham, the father of these plaintiffs, and was included in an inventory of the debts of the said Cheatham. The real property claimed by the plaintiff and now in the possession of W. W. Adams, was conveyed by Sheriff Hardy Wall, of Edgefield county, to M. A. Markert on the 4th day of January, 1875, the sale of the premises was made pursuant to a mortgage executed by C. A. Cheatham to Leila W. Addison October 15, 1872, to secure the balance due on the purchase price of the premises from the said Leila W. Addison. M. A. Markert held this tract continuously from January 4, 1875, to January 4, 1897, when it was sold in a proceeding for the settlement of his estate and bought by the above-named defendant, a deed being executed to the defendant by W. F. Roath, master.

There are many questions raised by the assignments of error in this case, but we deem it only necessary to consider those presented in the first, second, third, fourth, and fifth exceptions. These exceptions relate to the ruling of the court in regard to the statute of limitations, the first and third exceptions being as follows:

"Exception 1. The plaintiffs except to the judgment of this court rendered on the 6th day of June, 1906, on the ground that, if the same be a special finding on the defense of the statute of limitations, the same is void in not finding the facts which in law would make the plea or defense of the statute of limitations in each of the said cases a bar to the said actions respectively."

"Exception 3. The court erred in holding as follows: 'Under the laws of South Carolina, and decisions of its Supreme Court, which are controlling upon us, the statute of limitations is a bar to this action.'"

It is insisted by counsel for plaintiffs in error that the court did not make any special findings on the defense of the statute of limitations. Before the introduction of evidence the plaintiffs and defendants below entered into the following stipulations of record as to the defense of the statute of limitations:

"In these three cases it is stipulated and agreed by counsel that for the purposes of hearing any decision upon the question of the statute of limitations as a preliminary question it is stipulated and agreed as follows: (1) That Charles A. Cheatham, the father of the plaintiffs, under whom the plaintiffs claim, died on the 20th of April, 1874; that the plaintiffs were born as follows: Charles Augustus Cheatham on the 16th of February, 1871, John Oscar Cheatham on the 24th of April, 1873." "(3) These three present actions were commenced by service of summons on the 22d of April, 1904. (4) The defendants claim title under the following deeds, namely: A. Victoria Evans et al., under deed of conveyance from Hardy Wall, sheriff, made 4th of January, 1875; W. W. Adams under deed of conveyance from Hardy Wall, sheriff, made 4th of January, 1875; the Edgefield Manufacturing Company under deed of conveyance from James A. Richardson, sheriff, dated 25th of January, 1876. (5) The grantees under the foregoing deeds at once took possession under them at the dates thereof, and such possession has continued in the first grantees named in the deeds, and their successive grantees, until now, when it is in the present defendants. (6) Plaintiffs are brothers and cotenants claiming under the same rule.

"Defendants make a motion to bar these cases, under the statute of limitations. After hearing argument on both sides, the court states that it is not prepared to decide this question at this time, but will reserve its decision on this point, and will hear the whole case, and will render its opinion on this question when the whole case is before it. Mr. Bryan: The three cases involve practically the same question; the case of Cheatham against Evans does not involve the same question; all of the general evidence which may be produced is applicable hereto, except the deeds which refer to the several cases and distinguish the cases, but the questions that are in issue are all involved in all three cases except the Evans case, which involves a further question, which will appear in the testimony. The court upon argument on both sides on the defense of the statute of limitations stated it is not prepared to decide the question at this time, but will reserve its decision on his point and will hear the whole case and will render its decision on this question when the whole case is before it. The court then directed the trial of the case to proceed."

From the foregoing stipulations, it appears that there was an agreed statement of such facts as were necessary to a determination of the question of the statute of limitations which was submitted to the court below for its judgment, and it appears from the record that at the time such statement was submitted to the court the court stated that it would reserve final decision upon such question until the conclusion of the trial. Considerable evidence was offered as to the proceedings in the state court under which these lands, or a portion of them, were sold, and a number of witnesses testified as to certain records in said causes that had been lost or destroyed, but we do not deem it necessary to consider the same as bearing upon the plea of the statute of limitations, inasmuch as the record shows that the court based its decision as to the statute of limitations upon the agreed statement of facts as hereinbefore stated, and for the further reason that there is nothing

contained in the evidence offered which materially affects the statement of facts as agreed upon. At the conclusion of the evidence the court made the following statement as to his conclusions in regard to the plea of the statute of limitations based upon the agreed statement of facts hereinbefore set forth:

"These cases were heard together, and by stipulation of parties a jury was dispensed with. Upon the threshold argument was heard upon the plea of the statute of limitations, at the conclusion of which I stated that my impression was against the proponents of the plea, but that I would reserve final decision thereon, and the case proceeded to trial. I am now of opinion, after a further examination and consideration, that under the law of South Carolina and the decisions of its Supreme Court, which are controlling upon this court, the statute of limitations is a bar to these actions, and accordingly it is ordered and adjudged that the plea be sustained, and that judgment be entered for the defendants.

"June 6, 1906.

Wm. H. Brawley, U. S. Judge."

"Memo. by Presiding Judge.

"As to Exception No. 1: No special finding of fact was made in the judgment on the statute of limitations as argument was heard upon an agreed statement of facts which will be found in the record, and this exception is brought to the court's attention on this November 28th, 1906.

"Wm. H. Brawley, U. S. Dist. Judge."

In considering the record in this case, the first question presented is as to whether the court erred in passing judgment upon the plea of the statute of limitations upon the agreed statement of facts. We have considered the case of *United States v. Ferguson*, 78 Fed. 102, 103, 24 C. C. A. 1, relied upon by plaintiffs in error, and find nothing therein to sustain the contention that the lower court erred in passing upon the agreed statement of facts in this case. Here we have an agreed statement of facts which fully sets forth every fact necessary to the determination of the questions presented.

The next question for consideration is as to whether the court erred in holding that the statute of limitations was a bar to this action. It is well settled that the courts of the United States follow the construction of the Constitution and laws of a state placed upon them by its Supreme Court, except in cases wherein the laws of a state are in conflict with some provision of the federal Constitution or a federal statute passed in pursuance of the same, or a rule of commercial law. *Stutsman County v. Wallace*, 142 U. S. 293, 12 Sup. Ct. 227, 35 L. Ed. 1018. In the case of *Amy v. Dubuque*, 98 U. S. 470, 25 L. Ed. 228, Justice Harlan says:

"It is not to be questioned that laws limiting the time of bringing suits constitute a part of the *lex fori* of any country; they are laws for administering justice, one of the most sacred and important of sovereign rights. It is as little to be questioned that the courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several states, and give them the same construction and effect which are given by local tribunals."

Also, in the case of *Bauserman, Administrator, v. Blunt*, 147 U. S. at page 654, 13 Sup. Ct. at page 469 (37 L. Ed. 316), the court holds:

"The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several states.

and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the thirty-fourth section of the judicial act of Sept. 24, 1789, c. 20, 1 Stat. 92. The construction given to the statute of a state by the highest judicial tribunal of such state is regarded as part of the statute, and is as binding upon the courts of the United States as the text. If the highest judicial tribunal of a state adopts new views as to the proper construction of such a statute, and reverse its former decision, this court will follow the latest settled adjudications."

These and numerous other decisions show that it is the well-settled policy of the courts of the United States to adopt the decisions of the state courts in their construction of statutes of limitations. However, in order that we may be able to fully appreciate the reasons which actuated the court below in sustaining the plea of the statute of limitations, it becomes first necessary to consider the statute of limitations of South Carolina.

Section 96 of the original Code of Procedure of that state is as follows:

"The provisions of this title shall not extend to actions already commenced, or to cases where the right of action has already accrued; but the statute now in force shall be applicable to such cases, according to the subject of the action, and without regard to form."

Section 111 provides as follows:

"If a person entitled to commence any action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the same be, at the time such title shall first descend or accrue, either (1) within the age of twenty-one (21) years; or (2) insane; or (3) imprisoned on a criminal charge, or in execution upon conviction of a criminal offense for a term less than life; the time during which such disability shall continue shall not be deemed any portion of the time in this chapter limited for the commencement of such action, or the making of such entry or defense; but such action may be commenced, or entry or defense made, after the period of twenty (20) years, and within ten years after the disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced, or entry or defense made, after that period."

This provision of the Code remained in force until the 25th day of November, 1873, at which time an act was passed by the General Assembly of that state entitled "An Act to Alter and Amend the Code of Procedure. Being Title Five, Part Three, of the General Statutes." 15 St. at Large, p. 497. This act amends section 111 of the Code by striking out 20 years and inserting 10 years in lieu thereof, and by striking out 10 years and inserting in lieu thereof 5 years. Thus the original Code was amended so, that whereas, under that Code, a party had 20 years within which to bring a suit, after the passage of the act of 1873 he had 10 years; and instead of having 10 years under the original Code within which to bring his action he only had 5 years. The act of 1873 remained in force until 1882. The Legislature at its session of that year amended the act of 1873 as to the time within which such actions might be brought by restoring the provisions of section 111 of the original Code. Therefore we are confronted with the proposition as to whether the provisions of the act of 1873 or the general statutes of 1882 govern in determining the questions presented for our consideration.

The court below held that plaintiffs' cause of action accrued while the act of 1873 was in force, and that therefore the plaintiffs were required by said act to bring their suit within 5 years after they attained the age of 21 years. Section 96 provides in express terms that the provisions of that title "shall not extend to actions already commenced or to cases where the right of action has already accrued, but the statute now in force shall be applicable to such cases, according to the subject of the action, and without regard to form." This provision of the Code has never been amended, and is still a part of the law bearing upon this question. In view of this provision, if the right of the plaintiffs existed prior to the adoption of the general statute of 1882, it necessarily follows that the provisions of the act of 1882 do not apply. In other words, the plaintiffs' right of action accrued while the provisions of the act of 1873 were in force, to wit, upon the sale of the lands by the sheriff of Edgefield county, on the 4th day of January, 1875. The Supreme Court of South Carolina has passed upon this question in a recent decision in a case in which the facts are almost identical with those of the case at bar, and applying the rules of construction adopted by the Supreme Court of the United States with respect to the decisions of the highest court of a state, we think the decision of the Supreme Court of South Carolina is conclusive.

In the case of *Glover v. Floyd*, 76 S. C. 292, 57 S. E. 25, the Supreme Court of South Carolina rendered an opinion by its Chief Justice on the 13th day of March, 1907. We quote the entire opinion, which reads as follows:

"On the 2d of February, 1906, this plaintiff brought action for the recovery, as the owner, of one-sixth interest, or one-fourth of two-thirds of 165 acres of land as described in the complaint, from the defendant. The answer of the defendant denied the ownership of said lands by the plaintiff. Several grounds for this denial were pleaded by the defendant. By agreement of the parties the only ground for such denial which came on for trial before Judge Memminger was that, even if the plaintiff had any claim to any interest in the tract of land in dispute, he was barred of any such claim by the statute of limitations. Judge Memminger, by his decree, rendered the 20th of October, 1906, sustained the plea of the statute of limitations and dismissed the complaint.

"By the statement of facts, it was agreed that the father of the plaintiff died intestate on the 19th day of April, 1875, leaving a widow and three infant children as his heirs at law. That the plaintiff was born on the 15th day of January, 1876, being a posthumous child of said M. O. Glover, then deceased. That letters of administration upon the estate of M. O. Glover were granted by the probate court of Edgefield county, unto one J. P. Wells, who applied on the 6th of October, 1875, by his suit in said probate court of Edgefield county, for the sale of the real estate of said M. O. Glover, deceased, to pay his debts. That on the 8th of November, 1877, the administrator, J. P. Wells, filed his supplemental complaint, again praying leave to sell the land in dispute for the payment of the debts of said M. O. Glover, deceased, and that under such pleading the land in dispute was sold on the 23d of April, 1878, and purchased by Mrs. F. E. Wells, who took immediate possession thereof, and from her the defendant purchased said lands.

"From Judge Memminger's decree the plaintiff appealed on the following grounds: 'First. That his honor the Circuit Judge was in error in sustaining the plea of the statute of limitations and dismissing the complaint, because the record showed that the plaintiff brought this action within ten years after he reached the age of twenty-one and his disability had been removed. Second. That his honor the Circuit Judge was in error in ruling that the plaintiff

should have brought his action within five years instead of ten years after the plaintiff had become twenty-one years of age.'

"The correctness of the ruling of his honor Judge Memminger depends upon when the cause of action accrued to the plaintiff, M. O. Glover, as against the defendant, Sherman Floyd, for the land in contention. Upon the death of M. O. Glover, intestate, his lands vested in fee simple in his heirs at law. The title thus vested remained there until the heirs at law were dispossessed by a sale thereof by creditors and the possession under the title of said sale. If for any legal cause the title of the purchaser failed, the title of the said lands still remained in the heirs at law. To the purchaser of said lands in 1878, no question is made by any heirs at law of M. O. Glover, deceased, except the posthumous child, the plaintiff herein. The possession by the defendant of the tract of land in question has never been disturbed, and to all the heirs at law who were *sui juris* the statute of limitations has ripened the title after the lapse of ten years.

"But the plaintiff insists that such statute of limitations was no bar to his rights of part ownership because he says that he was under the disability of infancy. All these things are admitted by both parties to this contention. The plaintiff, however, admits his rights as a part owner were destroyed if the period of his disability is limited to five years after he attained his majority, but he claims that he has ten years, after such disability is removed, to bring suit. In 1787 the law of this state (5 St. at Large, p. 77) was that after five years from the period of disability of infancy the statute would bar a recovery. But in 1870 the law (14 St. at Large, p. 446) was changed to ten years instead of five years. In 1873 (15 St. at Large, p. 497) the law was again changed to five years instead of ten years. In 1882 (section 108, Code Civ. Proc.) the law was again changed from five years to ten years. So the question is now presented squarely in this case whether the disability of infancy ceased from five years after the plaintiff became twenty-one years of age, to-wit, five years from the 15th of January, 1897—this suit being begun on 2d day of February, 1906.

"We agree with the circuit judge that the plaintiff's action was barred by the statute of limitations for these reasons: When the possession of the land in question of the heirs at law of M. O. Glover, deceased, was taken by the defendant in April, 1878, a right of action accrued to them. Of course the plaintiff was one of those heirs at law. He might personally have sued the defendant for the recovery of the possession subject to the right of the defendant to plead plaintiff's infancy, or an action might have been preferred by a guardian ad litem of plaintiff (this latter was never attempted). It thus appears that the plaintiff at the time had a right of action. The law of this state at that time was that the plaintiff should have five years after his majority to bring this action.

"Section 93 of the Code of Procedure, 1882, provides as follows: 'The provisions of this title shall not extend to actions already commenced, or to cases where the right of action has already accrued; but the statutes now in force shall be applicable to such cases, according to the subject of the action, and without regard to the form.'

"Clearly, therefore, under this section the right of action was in the plaintiff in 1878 subject to the disability. Such being the case, the plaintiff is bound thereby. The 111th section of the Code on the 25th day of November, 1873 (15 St. at Large, p. 497), continued in force until 1882, and was as follows:

"If a person entitled to commence any action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents or services out of the same, be, at the time such action shall first descend or accrue, either (1) within the age of twenty-one (21) years; or (2) insane; or (3) imprisoned on a criminal charge, or in execution upon conviction of a criminal offense for a term less than life; the time during which such disability shall continue shall not be deemed any portion of the time in this chapter limited for the commencement of such action or the making of such entry or defense; but such action, may be commenced, or entry or defense made, after the period of ten years, and within five years after the disability shall cease, or after the death of the person entitled who shall

die under such disability; but such action shall not be commenced or entry or defense made after that period.'

"But in 1882 this was changed by inserting ten years instead of five. The decisions of our court hold that, when a right of action or cause of action has accrued, the law is fixed; that no change of the statutes of limitations shall be wrought by any legislation afterwards fixing a different period. *Rehkopf v. Kuhland*, 30 S. C. 235, 9 S. E. 99; *Lyles v. Roach*, 30 S. C. 291, 9 S. E. 334; *Fricks v. Lewis*, 26 S. C. 237, 1 S. E. 884; *Stoddard v. Owings*, 42 S. C. 89, 20 S. E. 25.

"In *Rehkopf v. Kuhland*, supra, this court held as follows: 'Now, as in this case, the right of action had already accrued when the amendment was adopted, such amendment could not extend to this case, but the statute in force at the time the right of action accrued * * * was applicable. *Nichols v. Briggs*, 18 S. C. 473.'

"In *Fricks v. Lewis*, supra, this court held: 'The action in this case having been commenced neither within six years after the accrual of the cause of action, nor within one year after the disabilities of the plaintiff was removed, we are of the opinion that the plea of the statute of limitations should have been sustained.' This answers the only question here presented.

"We are of opinion that the judgment of the Circuit Court be, and it is hereby, affirmed."

It is insisted by counsel for plaintiffs in error that "each of the defendants herein committed a trespass by taking possession of the land as against the plaintiffs at the time when they purchased it," and that, in considering the plea of the statute of limitations, the statute only begins to run from the date when the present defendants took possession of the land. This position is untenable.

In the case of *Lyles v. Roach*, 30 S. C. 295, 9 S. E. 334, the court says:

"It may be stated generally, and with reference to all statutes of limitations, both as to actions arising on contracts and also upon torts, trespasses, etc., that the currency of the statute commences when the cause of action accrues, or, as Judge Evans said in *Bugg v. Summer*: 'Whenever there is a plaintiff who can sue, and a defendant who can be sued, the statute begins to run. A right of action has accrued.' *Bugg v. Summer*, 1 McMul. 333; and the limitation in force at the accrual of the right is the limitation which must govern. This theory is sustained in our recent case of *Nichols v. Briggs*, 18 S. C. 478, where the limitation of force at the time the note fell due was applied, and not the one when the action was brought. And this was not because the subject-matter rested on contract, but because the accrual of a right of action sets the statute in motion, and this was the case whether the cause of action was assumpsit, trespass, trover, debt, or whatever else it might be. Respondents' counsel contends ingeniously that title founded upon adverse possession is nothing but a right or title growing out of a continuous daily trespass submitted to for the statutory period, and if the defendants can show such continuous daily trespass since the act of 1873, submitted to for 10 years by the plaintiff, then they are protected, their trespass having ripened into a right. But it will be observed that the action of the plaintiff is for the recovery of the possession of the land, and the right of action for such possession accrued first when he was illegally deprived of possession, and, if that deprivation has continued, there has not been a second cause created thereby, but the first has continued, and the currency of the statute being set in motion by the accrual of the first, the time must be estimated from that period and according to the provisions of the act of the assembly then in force."

In view of the decisions of the Supreme Court of South Carolina, the court below was clearly right in holding that the five-years statute applied in this case.

For the reasons herein stated, we are of opinion that the assignments of error are without merit, and the judgment of the Circuit Court is affirmed.

ELMIRA MECHANICS' SOCIETY OF NEW YORK v. STANCHFIELD et al.

(Circuit Court of Appeals, Eighth Circuit. March 18, 1908.)

No. 2,636.

1. MORTGAGES—FORECLOSURE—RIGHT TO RECEIVER UNDER COLORADO STATUTE.

Mills' Ann. Code Colo. § 261, which provides that "a mortgage on real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale," as construed by the Supreme Court of the state, does not deprive a mortgagee of the right, under the established rule of equity jurisprudence, where the mortgagor has become insolvent and defaulted in making payments of interest and taxes, and the security is inadequate, and the property exposed to waste and deterioration, to the appointment of a receiver in a suit to foreclose to collect the rents, pay the taxes and insurance, and keep the property properly repaired.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1374, 1375.

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

2. SAME—RECEIVER—APPLICATION OF RENTS—RIGHT OF ASSIGNEE.

Where a mortgagee, in a suit to foreclose, on a showing of the insufficiency of the security, the insolvency of the mortgagor, and his failure to pay taxes and insurance on the property or to keep it in repair, secures the appointment of a receiver to collect the rents and apply them to such purposes, a prior assignee of the rents from the mortgagor who had notice of the mortgage, although not chargeable with notice of the facts on which the appointment of the receiver was based, holds the assignment subject to the right of the receiver to apply the rents to such purposes, which include an expenditure necessary to keep a building on the property in rentable condition by protecting it from the effect of an excavation on an adjoining lot.

3. SAME—RIGHTS OF PURCHASER AT FORECLOSURE SALE—TAX LIENS ON THE PROPERTY.

A purchaser of real estate at foreclosure sale, "subject to all incumbrances of record," takes subject to taxes which are a lien on the property at the time of the sale, and cannot insist on their payment by a receiver from the rents of the property to which such purchaser is not entitled, until the expiration of the statutory period of redemption, although the taxes became due and payable before that time.

Appeal from the Circuit Court of the United States for the District of Colorado.

In January, 1901, Edward E. Stanchfield, of Denver, Colo., borrowed \$7,500 from the appellant, Elmira Mechanics' Society of New York (hereinafter called the complainant), for which he and his wife executed a note due January 15, 1906, with 6 per cent. interest, payable semiannually. To secure this debt, they executed to the complainant a mortgage on various lots of ground in the city of Denver, and in Arapahoe county, Colo. Three of the lots were subject to a prior mortgage of \$8,500, which would mature about the 1st of April, 1906, other lots were subject to a prior mortgage of \$2,050, and one of the lots was subject to a prior mortgage of \$1,000. Some of the lots embraced in the complainant's mortgage were unincumbered, but of comparatively small value. On April 15, 1903, the complainant, at Stanchfield's request, re-

leased its mortgages on the lots in East Denver (which will hereinafter be called "the Flint-Lomax Lots"), on which, at that time, was a matured prior mortgage of \$8,500. This was done to permit Stanchfield, through the Brooklyn Realty & Investment Company, organized by him, to place a new first mortgage for said sum on the lots; the complainant then taking a second mortgage from said Brooklyn Realty & Investment Company for its said debt of \$7,500. In and by this arrangement the complainant released one S. S. Kennedy, who had assumed the \$7,500 mortgage, and by that release it placed the Flint-Lomax five-year lease on the property ahead of the complainant's mortgage. After Stanchfield had thus obtained said money from the complainant and induced it to postpone its mortgages to others on his assurance of the amplitude of the security, he evidently became much embarrassed financially, and became the active promoter and organizer of various corporations, to wit, the Highland Foundry Company, the Pittsburg Foundry Company, the Brooklyn Realty & Investment Company, the Quaker City Investment Company, and the Highland Park, Inn & Sanitarium Company. The legal title of Stanchfield in the property in question was conveyed to the first of these corporations and by each of the corporations successively to the subsequent organization. The Brooklyn Realty & Investment Company, as a part consideration of the conveyance to it, assumed to pay the antecedent mortgages thereon, and in the deed from the Quaker City Investment Company to the Highland Park, Inn & Sanitarium Company, the latter assumed the payment of said indebtedness. Neither Stanchfield, nor said grantee corporations kept the taxes on the property paid, but suffered them to become delinquent, and part of it sold for taxes. To protect the complainant's junior mortgage, it had to redeem from said taxes. After Stanchfield fell behind in the payment of the accruing interest on his debt to the complainant, and failed to keep the taxes paid, he was urged and pressed by the complainant to make payment of these arrears and protect the property against the overlying mortgages. By deceitful arts and persuasion, he lulled the complainant into indulgence and inactivity by assurances that he was about to effect arrangements by which he could discharge the debt. Failing in this, he dismantled part of the buildings on some of the property of fixtures and appurtenances to the amount of over \$1,300, which he sold and pocketed the proceeds. In order to render whatever apparent interest the grantee corporation had in said property available, he negotiated with one William B. Felker, defendant herein, for the purchase of an automobile at the price of \$1,650, in the name of the last grantee company, and executed to Felker its note therefor; and to secure the same, on the ——— day of December, 1905, the company executed to him a deed of assignment of the rentals of said Flint-Lomax lots until said note should be paid. In January, 1906, the complainant instituted this suit to foreclose its mortgage, alleging the facts aforesaid, charging that said Stanchfield and companies were insolvent; that the property was an inadequate security for the debts; that the same was being wasted, etc.; and prayed for a receiver to take charge of the property and administer it under the court for the protection of the interests of the parties concerned. A receiver was appointed, took charge of the property, collected the rents therefrom, and applied the same toward the payment of insurance and taxes through the year 1906. There was a decree of foreclosure and sale, at which the complainant became the purchaser, and afterward obtained a deficiency judgment against said Stanchfield for something over \$1,200. The order of sale was confirmed December 5, 1906. The deficiency judgment was rendered March 27, 1907. On the 26th day of March, 1907, the complainant presented its petition to the court for rule on the receiver to pay the taxes, insurance, and to make certain repairs on the building. It was also, by this application, represented and shown to the court that, by reason of an excavation being made on the lots adjoining the Flint-Lomax property, for the purpose of erecting a building thereon, the foundation and building on the Flint-Lomax property was seriously endangered, and, unless protected, the building would be exposed to destruction, etc. Notice had been given to the receiver pursuant to the provisions of an ordinance of the city to make said repairs forthwith. The prayer was that the receiver be required to pay therefor the sum of \$500, the reasonable cost of the work. This application showed that there

was then in the hands of the receiver the sum of \$900. A few days after this application was made, to wit, April 15, 1907, the receiver presented his report, with his resignation, which report was approved, and the receiver was discharged. But the court continued the receivership as to the other property by appointing another receiver therefor. It covered into the registry of the court the unexpended amount of rentals collected by the first receiver; and in its final decree directed the payment of the balance of said rentals to said Felker. From this action of the court, the complainant appealed.

Thomas H. Hood, for appellant.

William L. Dayton, for appellee.

Before HOOK and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge (after stating the facts as above). Two questions are presented for decision on this appeal: (1) Whether the complainant, the mortgagee, under its deficiency judgment against the insolvent mortgagor, under the facts of this case, is entitled to have the rentals of the property in question applied to the payment of the taxes assessed against it and to the payment of the deficiency judgment until possession of the property is obtained by the complainant under the deed of foreclosure; and (2) whether sufficient of the income from the rental of the property under the receivership should have been applied by the court to making the necessary repair on the property to prevent it from destruction or injury.

The statute of Colorado (Mills' Ann. Code Colo. § 261) declares that:

"A mortgage on real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale."

The statute also accords to the mortgagor the right of redemption for a period of nine months after foreclosure sale. The recent decision of the Supreme Court of Colorado in *Moncrieff v. Hare*, reported in 38 Colo. 221, 87 Pac. 1082, 7 L. R. A. (N. S.) 1001, settles, so far as this court is concerned, the right of the complainant to have a receiver appointed in said foreclosure suit. While conceding, under the said provision of the Colorado statute, that notwithstanding the general grant of the rents and profits in the mortgage deed to the complainant, the mortgagor was entitled to remain in possession of the rents and profits of the premises until foreclosure sale and expiration of the redemption period, yet the court held that said statute would not be so construed as to suspend the better established rule in equity jurisprudence under such a mortgage as this, where the mortgagor has become insolvent, defaulted in making payments of interest and taxes, the security becomes inadequate, and the property exposed to waste and deterioration, on a bill of foreclosure alleging such facts, praying for the appointment of a receiver, for a court of equity to place the property in the custody of a receiver to collect the rents, pay the taxes and insurance, and keep the property properly repaired. The court followed the ruling in such equity procedure, recognized by the Supreme Court of the United States. *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. Ed. 415; *Kountze v. Omaha Hotel Com-*

pany, 107 U. S. 378, 2 Sup. Ct. 911, 27 L. Ed. 609; *Grant v. Phoenix Life Insurance Co.*, 121 U. S. 105, 116, 7 Sup. Ct. 841, 30 L. Ed. 905; *U. S. Trust Co. v. Wabash Railway Company*, 150 U. S. 287, 14 Sup. Ct. 86, 37 L. Ed. 1085; *McGahan v. National Bank of Rondout*, 156 U. S. 218, 15 Sup. Ct. 347, 39 L. Ed. 403.

In the course of its opinion, the court made reference to the case of *American National Bank v. Northwest Insurance Company*, 89 Fed. 610, 32 C. C. A. 275, invoked by the respondent. After suggesting that anything said in that opinion, to the effect that such rents under the receivership might not be applied to the payment of the principal debt, was a mere dictum, the court expressly said it would follow the ruling of the Supreme Court of the United States, as indicated in the cases *supra*. As this is a construction placed by the Supreme Court of the state on the state statute, and the procedure in a foreclosure suit affecting real property, this court is bound to follow that ruling in a case in *pari materia*.

That the facts existing at the time of the institution of the foreclosure suit warranted the appointment of the receiver, directing the application of the rentals collected by him to the payment of the taxes and insurance, does not admit of serious question. Mrs. Stanchfield, one of the makers of the note, had left the state and taken up her residence on Catalina Island, Cal., about as far from process of the court in Colorado as she could get. High, in his work on Receivers, § 666, says that it is only necessary for the mortgagee to show, *inter alia*, "that the mortgagor or other person who is personally liable for the payment is insolvent, or beyond the jurisdiction of the court, or of such doubtful responsibility that an execution against him for the deficiency would prove unavailing." See, also, *Southern B. & L. Association v. Carey*, 114 Fed. 288, 52 C. C. A. 174.

Neither Stanchfield nor any of the corporations of which he was the principal organizer paid the interest on the mortgage debts, but suffered the taxes to become delinquent, and stood by while Stanchfield dismantled a portion of the property, covered by the antecedent mortgages, of fixtures, diminishing the value of the security, taking no steps whatever to prevent defaults in the payment of the debts, nor the proper protection of the property against taxes. After Stanchfield, by false assurances and bad faith, had gotten all he could by way of loans on the property and stripping part of it of its fixtures and the like, he decamped to California, and wrote back to the representative of the complainant that he had no further interest in the property. One of the holding corporations went into bankruptcy; and there were some small judgments rendered against the Brooklyn Realty Company and other subsequent corporations, after they had conveyed the corporation property to another company. These judgments were unsatisfied. The fact that there was lack of proof of execution and return of *nulla bona* but indicates the practical fact that this company had assumed the payment of all these antecedent debts upon this property. And as all the shares of stock, with the exception of barely sufficient to qualify other parties as directors, was in the name of Mrs. Stanchfield, the situation would certainly indicate that the Brooklyn Realty Company

was "of doubtful responsibility." In *Terry v. Tubman*, 92 U. S. 160, loc. cit. (23 L. Ed. 537) the court said that while a judgment and execution unsatisfied are only evidences of insolvency, it added, "the fact may be established as well by other evidence and in other modes, by an assignment, and continued suspension of business, or other notorious indications." And it is recognized in commercial law that the failure of a corporation to pay its debts, or obligations as they mature and after judgment, is suggestive of insolvency. *New Britain Nat'l Bank v. A. B. Cleveland Co.*, 91 Hun (N. Y.) 454, 36 N. Y. Supp. 387.

The Brooklyn Realty & Investment Company conveyed the Flint-Lomax lots to the Quaker City Company by deed January 11, 1904, and by separate deed January 11, 1904, it conveyed the other mortgaged property to the Quaker City Company. The Quaker City Company conveyed all the property outside of the Flint-Lomax lots to the Highland Park, Inn & Sanitarium Company by deed April 11, 1905. There were three judgments rendered against it after these conveyances, one May 6, 1905, for \$258.28 and costs; another of January 16, 1906, for \$171.15, and executions were returned unsatisfied; and a third judgment of January 25, for \$314.90 and costs. It is true, it still retained the title to the Flint-Lomax property, but the creditors were advised by record that there was a blanket mortgage on this property for \$14,486, and that it was subject to prior incumbrances of \$49,200. The history of the Highland Park, Inn & Sanitarium Company is as follows: It was first organized as the Highland Company, which seems to have never done anything but incur debts and fail to pay taxes; and as its business enterprise was a failure, its managers sought to organize it into a sanitarium company, against which the neighboring property owners protested, and it was put out of business under a city ordinance. The Highland Park, Inn & Sanitarium Company never filed its corporation articles with the recorder of the county.

This brings us to the crucial question presented by this appeal. As shown in the statement of facts, on October 23, 1905, Stanchfield negotiated with Felker for the purchase of the automobile in the name of the Quaker City Investment Company. As security for the debt it assigned the rents of the Flint-Lomax property. At that time, this grantor company was entitled to the possession of the property and the enjoyment of the rentals thereof until that possession should be legally divested. In taking said assignment, the rights and equities of the assignee must be viewed as matters then appeared of record. Felker's testimony was that while he knew this property was "much mixed up," he employed competent counsel to examine into the right of the company to make the assignment, and relied upon his advice. Said attorney testified that he examined the records, and discovered the various mortgages and deeds of conveyance touching this property; and in good faith advised Felker that the assignment of the rents to him as security would be good under the statute of the state. What then was the extent of the notice and information Felker had through his attorney? The general rule is that notice of facts and circumstances which puts a man of ordinary business intelligence and prudence on inquiry is equivalent to knowledge of all the facts a reasonable pursuit would disclose; and whatever is notice sufficient to

excite attention and put a party on his guard, inviting inquiry, is regarded as notice of everything to which a reasonable prosecution of such inquiry will develop. But in the absence of proof of some fact aliunde to excite such inquiry, where the title affecting real property is a matter of record in the registry of the county, an attorney is not required to look beyond the record to see what the chain of title is to discover how the interest or estate of the grantor might be affected. It is to be conceded to the complainant that said attorney had notice of the provisions of the first mortgage on the property for \$8,500, which held precedence over the complainant's mortgage. That prior mortgage not only pledged the "rents, issues, and profits" of the premises to the holder of the mortgage note after default, but it expressly provided that upon default, a receiver might be appointed "and all rents, issues, and profits, income and revenue of said property shall be applied by said receiver according to law upon the orders and directions of the court." Unquestionably, had foreclosure proceedings been instituted after default under this mortgage, the receiver appointed therein would have been entitled to apply the accruing rents, not only to the payment of taxes, insurance, and repairs, but to the debt itself. While, in order to protect its junior mortgage, the complainant, in December, 1905, paid of matured interest coupons on said first mortgage to the amount of \$530.57, and in April, 1906, paid off said first mortgage debt, and might have taken an assignment of the note and mortgage, or been subrogated to the rights of the mortgagee thereunder, yet it brought suit alone upon its junior mortgage in January, 1906, without even amending its bill to seek relief under the provisions of the first mortgage. It can, therefore, obtain no other relief than such as rightfully comes through the predicate of the suit brought.

The other notice conveyed to Felker, through his attorney by the record examined, was the conveyances in question, and the assumption of the mortgage debts by some of the grantees. If it be conceded that at the time of the institution of suit, the assuming grantees were in fact insolvent, it would be predicated in part of evidence in pais, and of unsatisfied judgments in justices' courts, one of which was filed in the clerk's office of the district court, most of which were subsequent to the deed of assignment to Felker. The insolvency of the corporation was not imparted by the record in the register's office; and as the attorney was not required to carry his investigation through all the records of the nisi and other courts of the county, or make inquiries in pais, and without evidence that he knew of the nonresidence, or the insolvency of Mrs. Stanchfield, we must hold that the evidence of insolvency of all the parties bound upon the debt at the time of the assignment to Felker was insufficient to affect him with the requisite notice. However, as the appointment of the receiver and the foreclosure proceedings, on the allegations of the bill and the facts as they then stood were proper, the application of the rentals to the payment of insurance and taxes under the receivership cannot be gainsaid by Felker, nor their application to keeping the premises in proper repair to be habitable in order to produce rent.

In *American National Bank v. Northwestern Mut. Life Ins. Co.*, supra, Judge Shiras said:

"When the receiver was appointed, the mortgagors could well claim that, as they had been thus prevented from receiving the rentals of the property, they would be excused in equity from any further personal liability to pay the taxes and insurance, and that the obligation to thus protect the property was assumed by the receiver, to the extent of the rentals by him received. The receiver was appointed by the court for the purpose of protecting the property in the interest of all who held a title thereto or a lien thereon, and the proper protecting of the property required that it should be kept insured; that the taxes thereon should be paid; that the building should be kept in repair, and in condition to assure its occupancy; and, if the receiver was justified in making the outlay necessary to thus protect the property, he certainly must be protected in applying the rental in his hands to the payment of the cost thereof."

In respect to the taxes claimed in the application made to the court for an order on the receiver to pay, it is sufficient to say, those taxes were not due and payable under the statute until about the 1st of February, 1907. As such, they constituted only a lien on the property at the time of the foreclosure sale, which occurred the latter part of 1906. The sale was made "subject to all incumbrances of record" and therefore the complainant, as purchaser, took it cum onere as to the taxes of 1906. *Traer v. Fowler*, 144 Fed. 810, 814, 75 C. C. A. 540; *Davis v. Dale*, 150 Ill. 239, 37 N. E. 215; *Stevens v. Hadfield*, 90 Ill. App. 405; 2 *Wiltzie on Mortgage Foreclosures*, p. 361. But the court erred in refusing to direct the receiver to apply of the rental money in his hands the sum of \$500 to the shoring up and protection of the property against the lateral excavation being made. By ordinance of the city, it was made the duty of the owner of the endangered property, on notice, to take steps to safeguard his foundation and supports. This is but expressive of the common law which declares that the owner has the right to the lateral support for his own from his neighbor's land in its natural condition, but he has no such right to support for buildings or other structures upon it, and the burden is imposed upon the owner of protecting his building against excavations which the adjoining proprietor may make on his own land in a proper manner. 18 *Am. & Eng. Enc. Law*, 542, 552. Instead of the receiver, when notified, taking this action, as if acting in the interest of Felker, he resigned his receivership. But as the court had the money arising from the rentals in its control, it should have applied the amount, which the evidence showed was \$500, for that purpose. Of what avail would the right of the assignee to the rentals be, unless the property were so protected as to keep it inhabited that rentals might come therefrom? As Felker did not propose to care for the matter, and the question having been tried out before the court on the application as to the extent of the damages to the freehold, that amount should be awarded to the complainant out of the fund in the registry of the court.

The appeal in this respect is therefore sustained, the decree below entered April 15, 1907, is reversed, and the case is remanded to the Circuit Court with directions to set aside its order denying the application for the appropriation of the said sum of \$500, and order

that sum paid to the complainant out of the funds in the registry of the court, with interest thereon at the rate of 6 per cent. per annum from the 15th day of April, 1907, when the application was made and the money should have been paid.

UNITED STATES v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1908.)

No. 2,545

1. PUBLIC LANDS—SWAMP LAND GRANT—SELECTION OF LANDS.

The swamp land grant to the states of September 28, 1850 (9 Stat. 519, c. 84), did not attach to any particular lands until they had been identified as swamp lands by the Secretary of the Interior or other competent authority of the United States.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 186.]

2. SAME—RESERVATION OF LAND FROM GRANT—UNRECOGNIZED CLAIM BY THIRD PARTY.

The mere assertion of a claim to public land, not recognized by the Land Department of the United States in any manner, does not operate to reserve or segregate such land from the public domain so as to prevent it from passing under a grant by Congress.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 44.]

3. SAME—RAILROAD GRANT—EXCEPTION OF LANDS RESERVED.

The action of the state of Iowa, and its counties acting under state authority, in causing lists of lands claimed by the state under the swamp land grant of September 28, 1850 (9 Stat. 519, c. 84), to be made and filed with the Land Department subsequent to Act March 3, 1857, c. 117, 11 Stat. 251, which approved prior selections, did not prevent the passing of lands shown on such lists under the grant of May 12, 1864 (13 Stat. 72, c. 84), for the benefit of the McGregor Western Railroad Company, which excepted lands reserved by the United States "for any purpose whatever," where, at the time of such grant and the filing of the map of definite location of the road by which the place limits of the grant were determined, no action had been taken by the Land Department with respect to such lists, but they were subsequently acted upon and rejected, and the land was patented under the railroad grant.

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

For opinion below, see 148 Fed. 884.

F. F. Faville (J. A. Rogers, on the brief), for appellant.

Charles E. Vroman (W. J. Knight, on the brief), for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was an action in equity, brought by the United States pursuant to the provisions of Act March 3, 1887, c. 376, 24 Stat. 556 (U. S. Comp. St. 1901, p. 1595), and Act March 2, 1896, c. 39, 29 Stat. 42 (U. S. Comp. St. 1901, p. 1603), and section 2357 of the Revised Statutes (U. S. Comp. St. 1901, p. 1444), against the defendant railway company for an accounting, and to recover the value of certain lands situated in Kossuth, Palo Alto,

and Dickinson counties, in the state of Iowa, alleged to have been erroneously patented to and afterwards sold by the railway company. The lands are conceded to have been within the grant to the state of Iowa for the benefit of the McGregor Western Railroad Company and its lawfully constituted successor, the defendant railway company, by Act May 12, 1864, c. 84, 13 Stat. 72, and to have been lawfully and properly patented to the state, and by it to the railway company, unless the same had been, prior thereto, reserved by the United States for some other purpose within the meaning of the act of 1864. That act, after granting every alternate odd section of land for 10 sections in width on each side of the road as it should be located, provides that in case it shall appear, when the lines or routes of said roads are definitely located, that the United States have "sold any section or any part thereof granted as aforesaid or that the right of pre-emption or homestead settlement has attached to the same or that the same has been reserved by the United States for any purpose whatever," then selections might be made, within certain fixed indemnity limits, to make up for such lost lands. To emphasize this general language the act contains the following specific provision:

"Provided further, that any and all lands heretofore reserved to the United States by any act of Congress or in any other manner by competent authority for the purpose of aiding in any object of internal improvement or other purpose whatever, be and the same are hereby reserved and excepted from the operation of this act."

The map of definite location of defendant's railroad was filed August 30, 1864. There is no claim that the lands in controversy had been sold by the United States, or that the rights of any pre-emptor or homestead settler had attached to them before the grant of 1864, but it is claimed by the United States that the lands had been so reserved by proceedings taken under Act Sept. 28, 1850, c. 84, 9 Stat. 519, known as the "Swamp Land Act," as to segregate them from the public domain, and withdraw them from sale; and, accordingly, that in view of such proceedings title to these lands never passed to the state for the benefit of the railroad company by that grant.

Did the act of September 28, 1850, and proceedings taken under it in Iowa amount to a reservation of the lands in controversy from sale? The swamp land act of 1850 was enacted primarily for the benefit of the state of Arkansas, but section 4 extended its provisions to and for the benefit of any other state in which swamp and overflowed lands were situated, and this extension, it is conceded, covered the state of Iowa. The act granted to the different states all swamp and overflowed lands unfit for cultivation, to enable them to construct levees and drains and to reclaim them. Section 2 of the act imposed the duty upon the Secretary of the Interior, as soon as practicable after the passage of the act, to make out an accurate list and plat of such swamp and overflowed lands, and transmit the same to the Governor of the state in which they were located, and at the request of the Governor to cause a patent to be issued to the state therefor; and it was provided that, upon the issue of such patent, the fee-simple title thereto should vest in the state.

This act has been the subject of much litigation, and its meaning

has now become firmly fixed by the decisions of the Supreme Court of the United States. It was a present grant, *proprio vigore*, of all lands which were in fact swamp and overflowed lands and unfit for cultivation. But the lands had first to be identified as such before title to any particular lands passed out of the United States. After that identification was made, and not before, the title vested; but it then vested by relation as of the date of the granting act. *Rogers Locomotive Works v. Emigrant Co.*, 164 U. S. 559, 570, 17 Sup. Ct. 188, 41 L. Ed. 552; *Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 591, 18 Sup. Ct. 208, 42 L. Ed. 591; *Brown v. Hitchcock*, 173 U. S. 473, 476, 19 Sup. Ct. 485, 43 L. Ed. 772. The prerequisite identification was intrusted to the Secretary of the Interior as the head of the department in control of the public lands, and until that tribunal acted, the lands remained subject to its jurisdiction, and the grant did not take effect upon any particular lands so as to vest title in the state. *French v. Fyan*, 93 U. S. 169, 171, 23 L. Ed. 812; *Rogers Locomotive Works v. Emigrant Co.*, *supra*; *Michigan Land & Lumber Co. v. Rust*, *supra*.

The second section of the act of 1850 created a tribunal to hear and determine what lands fell within the terms of the grant. Whether any given lands were swamp and overflowed lands and thereby unfit for cultivation was left to the arbitrament of the Secretary of the Interior as the head of the Land Department. Mr. Justice Miller speaking for the Supreme Court in *French v. Fyan*, *supra*, said:

"We are of opinion that this section [2] devolved upon the Secretary, as the head of the department which administered the affairs of the public lands, the duty, and conferred on him the power, of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was to be controlling."

It is conceded, for the purposes of this case, that on October 31, 1876, the Commissioner of the General Land Office, who by law acted for and under the direction of the Secretary of the Interior, after due notice and as a result of a public hearing held and adjudged that the lands in controversy in Kossuth, Palo Alto, and Dickinson counties were not in fact swamp and overflowed lands, and were not embraced in the act of 1850, that the state of Iowa and the counties mentioned were never entitled to the lands or any portion of them, and that patents subsequently issued therefor to the state for the benefit of the railway company. The decision of the Land Commissioner so made was never appealed from, reversed, or modified, and there is now no pretense either that there was any mistake of law or misapprehension of the facts brought about by fraud or gross mistake. That decision and the issue of the patents accordingly constitute a binding adjudication upon the parties to this suit that the lands in question were never granted to the state by the swamp land act of 1850. *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985, 30 L. Ed. 1039; *Barden v. Northern Pac. Railroad*, 154 U. S. 288, 327, 14 Sup. Ct. 1030, 38 L. Ed. 992, and cases cited.

This is not seriously questioned, but the contention of the United States is that the steps taken, in the way of asserting title to the lands by the state, so segregated them from the public domain, while the

inquiry as to their character was being made, that they were not subject to sale in 1864, and for that reason did not pass by the grant in question of that year. What were those steps? No directions were given to the Secretary of the Interior concerning his method of procedure in the identification of lands within the contemplation of the act of 1850. That seems to have been left to his own discretion. Accordingly, a consideration of the acts done and left undone by him in the exercise of that discretion, as well as the acts and doings of the state in the assertion of its claim, require consideration.

The Commissioner of the General Land Office soon after the act was passed, on November 21, 1850, instructed the United States surveyor general for the state of Iowa to make out lists of all lands claimed to be granted to the state by that act, and in his letter of instruction said:

"The only data in your possession from which these lists can be made are the field notes of the surveyor on file in your office, and if the authorities of the state are willing to adopt these as the basis of these lists, you will so regard them. If not, and these authorities furnish you satisfactory evidence that any lands are of the character embraced in the grant, you will report them."

It does not appear that the state authorities were willing to or did adopt the showing made by the field notes to determine their right to the lands. On the contrary, it does appear that the state undertook to demonstrate its right by other satisfactory evidence.

The Legislature of Iowa, by section 1, of the act of January 13, 1853 (Laws Iowa 1852-53, p. 29, c. 13; Revision 1860, p. 148, § 925), granted to its several counties the swamp lands situated within their respective boundaries, and by section 3 of the same act provided that:

"In all those counties where the county surveyor has made no examinations and reports of the swamp lands within his county, in compliance with the instructions from the Governor, the county court shall at the next regular term thereof, after the taking effect of this act, appoint some competent person, who shall as soon as may be thereafter, after having been duly sworn for that purpose, proceed to examine said lands, and make due report, and plats, upon which the topography of the country shall be carefully noted, and the places where drains or levees ought to be made, marked on the said plats, to the county courts respectively, which courts shall transmit to the proper officers, lists of all said swamp lands in each of the counties in order to procure the proper recognition of the same, on the part of the United States, which lists, after an acknowledgment of the same by the general government shall be recorded in a well-bound book provided for that purpose, and filed among the records of the county court."

Apparently acting under this legislative authority, the county court of Kossuth county appointed two men to select and make a list for that county of what they claimed to be swamp and overflowed lands within the meaning of the act of 1850. They filed their list, duly verified, in the office of the surveyor general for Iowa, and on August 2, 1859, that functionary transmitted a true and correct copy thereof to the General Land Office, where it was duly received and filed. The county court of Palo Alto county appointed one man to act for that county. He made a like list for his county, and filed it in the office of the surveyor general for Iowa, who later, on March 27, 1860, transmitted a

true and correct copy thereof to the General Land Office, where in due time it was received and filed. The county court of Dickinson county appointed one man to act for that county. He made a like list and verified it on July 13, 1860, but for some reason, unexplained in the record, it did not find its way to the General Land Office until 1872.

On June 23, 1860, the Commissioner of the General Land Office wrote the surveyor general of Iowa the following letter :

"Referring to your letter of the 15th inst., asking to be advised as to your duty in reporting swamp selections in Iowa, and in view of the act of the 12th of March last, a copy of which was furnished you in my letter of the 21st ult., I will here set forth the principles, which you are to apply to any selections now on your files and to all others, also, which may hereafter be reported to you by the agents of the state: First. As the grant contemplates the inundation of extensive regions of country by such natural arteries as the Mississippi river, the lands evidently intended to be granted as swamp are those only which, by reason of their swampy character, and liability to overflow, are worthless in their natural condition, and whereon crops cannot be raised without reclamation by levees and drains. An overflow or inundation from casual cause, merely temporary in its effects, does not bring the land within the grant, and cannot be said, in any proper sense, to render them 'unfit for cultivation.' The law contemplates such long-continued overflow or freshets only as would totally destroy crops, and prevent the raising of them without artificial means by levees, etc., such as are found on the Mississippi river. Second. Bodies of land covered by shallow lakes or ponds, which may become dry by evaporation, or other natural causes, do not come within the meaning of the swamp grant. Third. Testimony now, after the lapse of 9 years, to be available, must be explicit, resting upon the personal and exact knowledge of the localities claimed, and must relate to each quarter, quarter section, or other equivalent legal subdivision. This testimony must be made by parties having no interest, present or prospective, direct or indirect, and must state the name of the river or water course whereby the lands are submerged and rendered useless for arable purposes in their natural condition. Fourth. I inclose herewith a blank form of proof which you will require from the state authorities, and if lists of lands of this class are furnished you, accompanied with such evidence, you will report them to this office, in the manner set forth in form B herewith, after making a careful examination of said proof, and rendering your own decision thereon, as to whether the several tracts are swamp or not, within the meaning of the grant. Fifth. You will, as soon as your report is arranged and prepared for transmission to this office, send simultaneously a copy thereof to the local offices of the proper land districts, with instructions to them to enter the tracts in the usual form in their books, and to withhold them from sale or other disposition, unless otherwise especially directed by this office. Be pleased to acknowledge the receipt thereof."

At the time this letter was written the original lists made out by the agents of Kossuth and Palo Alto counties were on file in the office of the surveyor general of Iowa, and had not been acted upon at all by the Secretary of the Interior. The letter makes no direct reference to the copies of the lists, which before that time had been sent to the General Land Office, but it seems to carry intrinsic evidence of disapproval of the perfunctory showing made by the agents of the counties just referred to. Whether in the light of this showing, or for other reasons, it clearly appears that the land commissioner desired explicit evidence of persons possessing exact knowledge of the character of each particular tract claimed to be swamp and overflowed, before he would take action.

The record discloses no action taken after the writing of this last letter of instruction until 1872. Not only is there no evidence of any action taken by the Land Department, but it is stipulated of record that the swamp land selections for Kossuth, Palo Alto, and Dickinson counties "were never adopted, ratified, or confirmed in any manner by the Interior or Land Department of the government, but remained pending and undetermined therein down to the year 1876," when after a full hearing they were disapproved, and the lands found and adjudged not to have been swamp or overflowed lands, and not to have passed to the state by the act of 1850. In view of these facts, which conclusively show that the state never took any title to the lands in question, and that they, in fact, belonged to the railway company by virtue of its grant in 1864, the United States must rely exclusively upon the action of the county courts of Iowa in appointing agents to select and make lists of the lands claimed to be swamp and overflowed lands, the filing of those lists with the surveyor general for the state, and the transmission by him of certified copies thereof to the General Land Office at Washington, to work a segregation of the lands from the public domain, and a withdrawal of them from sale pending an inquiry into the merits of the state's claim.

Were they withdrawn from sale by reason of the acts just recited? Counsel for the United States maintain the affirmative of this question, upon the authority of several cases called to our attention, notably *Newhall v. Sanger*, 92 U. S. 761, 23 L. Ed. 769; *Kansas Pacific Railroad Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122; *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985, 30 L. Ed. 1039; *Hastings, etc., Railroad Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363; *Whitney v. Taylor*, 158 U. S. 85, 15 Sup. Ct. 796, 39 L. Ed. 906; *Southern Pacific Railroad Co. v. United States*, 200 U. S. 354, 26 Sup. Ct. 298, 50 L. Ed. 512; *Michigan Land & Lumber Co. v. Rust*, *supra*. In *Newhall v. Sanger* it was held that lands, claimed under a Mexican or Spanish grant, the right to which was secured by treaty stipulation with Mexico, and which were under consideration by a commission, created by our government to determine the validity of such claims, were thereby segregated from the public domain, and did not pass by a railroad grant. Here was obviously involved a claim recognized by our government, and one which was then actually sub judice. To the same effect is *Southern Pacific Railroad Co. v. United States*. In *Kansas Pacific Railroad Co. v. Dunmeyer* it was held that a homestead entry, made by a settler on the public lands and recognized by the proper land office before the filing of a map of definite location by a railroad company, which was the beneficiary of a grant, segregated the land entered upon from the public domain, so that it did not pass by the grant, even though the entry was abandoned after the filing of the map of definite location by the railroad company. *Wright v. Roseberry* discloses that the authorities of the state of California selected and designated the swamp lands there involved on a plat of a township made by the surveyor general of the United States; that the same was forwarded to the General Land Office pursuant to a requirement of a statute specially applicable, and was approved by the commissioner. Even with that recognition of the state's claim, which,

according to the authorities, at least amounted to a segregation of the land, it was held that the issue of a patent to a third party under the pre-emption laws of the United States on a claim initiated subsequent to the swamp land act was not necessarily void. The right of the parties was made to depend upon the question whether the lands were in fact swamp lands at the date of the act of 1850, and that issue was authorized to be submitted to a jury. The court said:

"If they are proved to have been such lands at that date, they were not afterwards subject to a pre-emption by settlers."

In *Hastings, etc., Railroad Co. v. Whitney* it was held that a homestead entry, which had been allowed to be made by the register and receiver of a land office, although it turned out to be void, segregated the land from the public domain. In that case the fees were paid by the entryman, and the entry was properly noted on the tractbooks of the land office. The recognition of the claim of the settler by the land office was held to constitute a segregation from the public domain, so as to exclude the land entered upon from a subsequent land grant in aid of a railroad. In *Whitney v. Taylor* it was held that a pre-emption entry, in which the claimant had filed a declaratory statement, paid the fees required by law in such cases, and secured a notation of the statement in the tractbooks of the proper land office, operated, though the entry was afterwards canceled, to prevent passing of title by a grant subsequently made to a railroad company. It was held that the land was effectually segregated from the public domain, by the recognition of the entry as made, by the land office. *Michigan Land & Lumber Co. v. Rust* discloses a recognition by the Land Department of certain surveys, which were relied upon by the state as determining its right to certain swamp and overflowed lands. It there appears that a list of those lands had been made out according to a certain resurvey which had been ordered, made, and approved by the Secretary of the Interior, and that patents had issued accordingly. It was held that this amounted to a final adjustment of the grant on the terms of the new survey.

The foregoing cases fairly represent the authorities relied on by the United States in support of their contention that the lands in question were, by reason of the claim made by the state to them, segregated from the public domain before the land grant of 1864 took effect, and therefore did not pass by that grant. These cases, in our opinion, fail to sustain that contention. They all disclose an assertion of a right to certain land by claimants which was recognized in some manner by the Land Department. We understand the crucial test of segregation is found in such recognition. The right or claim, in order to constitute a segregation, must be such as in some manner either by receipt of fees for entry, permission to file upon the land, noting the filing upon tractbooks, submission to a commission under treaty obligation or other like affirmative action of the Land Department, discloses a recognition of the claim, or discloses some privity between the claimant and the United States. This court has heretofore held that an equitable right to land can prevail over the legal title only—

"when the former had either been recognized by the United States by a grant or an entry of the land or by the acceptance of payment for it, so that the equitable owner was in privity with the government, or the equitable right had been initiated before the claim which went to patent by a settlement or improvement of the land, under a law which gave the settler or improver a right to be preferred in its acquisition." *Deweese v. Reinhard*, 61 Fed. 777, 781, 10 C. C. A. 55; *Hartman v. Warren*, 76 Fed. 157, 160, 22 C. C. A. 30; *New Dunderberg Min. Co. v. Old*, 79 Fed. 598, 603, 25 C. C. A. 116; *James v. Germania Iron Co.*, 107 Fed. 597, 603, 46 C. C. A. 476.

In view of the foregoing authorities we think the mere assertion of a claim to land, unrecognized by the Land Department of the government in any manner, cannot operate to reserve or segregate it from the public domain so as to prevent disposition of it by the United States. The consequence of any other doctrine condemns it. If a state can claim any land, and by the mere fact of claiming it prevent any subsequent disposition of it, it could claim all lands, and thereby prevent disposition of any and all the public domain. The improbability of such conduct on the part of a state does not withdraw its possibility from legitimate consideration. We are not prepared to give our sanction to a rule that would permit this blockade upon settlement and enterprise.

This case, we think, is clearly brought within the rule just stated. It involves a claim by the state, to which the Land Department had given no sanction. The method of giving such sanction, specially provided by section 2 of the swamp land act as interpreted by the Supreme Court, was by judicially determining the fact that the lands claimed were swamp and overflowed lands. This was never done. On the contrary it was finally and conclusively decided they were not of that character. The surveyor general of Iowa had received lists of lands claimed to be swamp lands by agents of the several counties interested, and had forwarded copies of them to the Land Department for its information only. These lists had obviously been deposited with the surveyor by the state's agents as a step to secure the "proper recognition" of them by the Land Department, acknowledged to be necessary by the Iowa act of 1853. But the surveyor had no judicial function to discharge in the matter. He could only forward the pretensions of the state to the head of the Land Department which alone had power to act in the premises. *Barden v. Northern Pacific Railroad*, *supra*.

The act of March 3, 1857 (11 Stat. 251, c. 117), cannot be invoked to give force or effect to the selection of lands made by the state in this case. That was an act inspired by the inaction of the Secretary of the Interior in making out lists of swamp and overflowed lands, and it was obviously intended to aid the states in securing a recognition of selections which they might have made before then. It provided that any selection "heretofore made and reported to the Commissioner of the General Land Office" be confirmed and approved, etc. As no steps had been taken by the state to make selection of the lands in controversy until after the act in question took effect, it can have no bearing on this case, and no further consideration of it is required.

Conceding, without admitting, that there might have been a technical segregation of the lands in question pending an inquiry into the merits of the state's claim, we are impressed with the want of equity in favor

of the United States in this case. The lands in question, not having been swamp and overflowed lands in fact, as was finally and conclusively established by the Secretary of the Interior, passed by the terms of the grant of 1864 to the railway company and its grantees. They belonged to them in equity, if not at law. If they in contemplation of law were reserved from sale, the right of selection of other lands in lieu of them was conferred by the act. The right of selection was intended to be of equal value to the right lost by the supposed reservation. The right of selection never having been exercised, the United States lost nothing by issuing patents of the land in controversy to the state for the benefit of the railway company. This was done in 1880 and 1881. Since then most, if not all, of the lands have been sold and conveyed to numerous purchasers of small tracts, who bought them in good faith and for value. Twenty-five years or more of quiet enjoyment of the land in question have now elapsed. No fraud or unfair practices in any stage of the proceedings leading up to the final patents are charged against the railway company or any persons acting for it. In such circumstances, it would, in our opinion, be inequitable and conducive of no good results to grant the relief sought by this bill.

The decree of the circuit court dismissing the bill of complaint was correct, and is accordingly affirmed.

CHICAGO, M. & ST. P. RY. CO. v. DONOVAN.

(Circuit Court of Appeals, Eighth Circuit. February 27, 1908.)

No. 2,589.

1. RAILROADS—INJURIES AT STREET CROSSINGS IN RAILROAD YARDS—REASONABLE WARNINGS.

Independently of any statute or ordinance upon the subject, it is the duty of a railroad company, when about to send a car over a recognized street crossing in its yards, to exercise ordinary care for the protection of persons who may be using, or about to use, the crossing as a place of travel by giving some reasonable warning of the approach of the car.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 988-1005.]

2. SAME—PERSONS TO WHOM WARNING IS DUE.

The duty just stated is one which the railroad company owes to all persons thus using the crossing, as a place of travel, or about to do so, whether they be strangers or employes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1014-1016.]

3. MASTER AND SERVANT—MASTER'S RESPONSIBILITY FOR SERVANT'S ACT DONE IN ACCORDANCE WITH RECOGNIZED, BUT NEGLIGENT, PRACTICE IN MASTER'S SERVICE.

When a negligent practice obtains such a recognized and long-established footing in the master's service that the conclusion is unavoidable that he either has knowledge thereof and acquiesces therein or has not exercised a reasonable supervision over the work of his servants, and one of them is injured by the act of another done in accordance with that practice, the master cannot avoid responsibility on the ground that the negligent act was merely that of a fellow servant.

4. SAME—ASSUMPTION OF RISK—DISTINCTION BETWEEN ORDINARY AND EXTRAORDINARY RISKS.

The rule that a servant assumes all the ordinary risks of the service in which he engages presupposes that the master will perform all the duties cast upon him for the servant's protection, and therefore embraces such risks as are incident to the service where those duties are performed, and not such as arise out of the master's negligence. The latter are deemed extraordinary risks, and, under a recognized exception to the rule, are assumed by the servant, if the master's negligence is actually known to him, or is so plainly observable that he may be reasonably presumed to know of it, and he then voluntarily enters or remains in the service.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 547, 584-585.

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

Riner, District Judge, dissenting.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Minnesota.

Charles B. Keeler and F. W. Root, for plaintiff in error.

C. D. O'Brien (R. D. O'Brien, on the brief), for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

VAN DEVANTER, Circuit Judge. This was an action by Matthew Donovan against the Chicago, Milwaukee & St. Paul Railway Company to recover for personal injuries sustained by him in a collision with a freight car at a recognized grade crossing in the company's yard in the western suburbs of Chicago. The yard contained 10 or more parallel tracks extending east and west across a public street, and numbered consecutively from north to south. One of the company's freight trains, upon which Donovan was head brakeman, entered the yard in the early morning, while it was yet dark, and was backed in on track 6. To make the street clear for travel, the train was cut or parted at the crossing, the caboose and one or two cars being put on the east side and the other cars on the west side. The movement of the train was then at an end, but Donovan, before quitting the yard, was required to report at the caboose, which was 1,500 to 1,700 feet from his post at the head of the train. He was an experienced railroad operative, but had not been in that yard before. Whether there was a reasonably safe route to the caboose on the south side of the train, and whether it was reasonably open to him to walk along the north side between the train and track 5, are matters in respect of which the record is silent, save as he testified that some switching in the west or top end of the yard "blocked us so I had to walk down between tracks 2 and 3" on the north side. At all events, he took the north side, crossed over tracks 5, 4, and 3, then walked east between tracks 3 and 2 to the street, and then turned south along the street toward track 6 upon which the caboose was standing. The center of the street was planked, and he followed the planking. On track 4, from two to five car lengths west of the street, was an engine with a bright headlight facing the street, but that part of the yard was not otherwise

lighted. The engine was about to move, or was moving, a car on track 5 toward the street by the process of staking, which, as there employed, is described in this way: An engine, with a stake attached at one end to its tender or tank, advances alongside the car, when the free end of the stake is swung outwardly into a socket in the rear corner of the car; the engine moves forward and pushes the car along by means of the stake, until the car attains sufficient momentum to carry it to its destination; then the engine stops, the pole drops to its side and the car continues on alone. While they are moving together, the front line of the car is about four feet in advance of the engine. As Donovan turned into the street and walked south he saw the engine and appreciated that it was about to move forward, or was doing so, but he could not see the car, because it was back of the diverging rays of the headlight; and for the same reason he could not see a switchman who was standing upon the rear end of the car. No flagman was at the crossing, no guard or signal light was on the front end of the car, and no effort was made to give a timely warning of its approach to persons who might be passing in the street, but in these respects the work was being done according to the usual and regular practice in that yard. One of the staking crew, who was corroborated and not contradicted, testified:

"There was no signal either by whistle or lantern or in any other way, or any notice given of that car going over the street. There never is. There was no watchman there at that time. * * * The engineer is watching towards the stakeholder back of the engine. * * * He is looking for a sign to know how far he is going to kick the car. His attention is towards the rear. * * * This work we were doing there at this time was done in the usual way, and we have done it that way all the time I have worked there. This stake that is used there is about six feet long. The car does not extend in front of the engine far enough so that the flare of the headlight would strike the corner or the head end of it. The front end of the car would be back of the flare of the headlight."

And another member of the crew testified:

"A man standing on that crossing looking towards the engine with its headlight burning could not see the car. * * * This car that was being staked would make a noise running down, but wouldn't overcome the noise of the engine. The engine would make a greater noise."

Donovan had never met with a practice of staking cars over a public street without giving some reasonable warning to persons who might be passing therein, did not know that such was the practice in that yard, and did not know, or have any reason to believe, that the engine on track 4 was engaged in staking cars. Thinking that the engine might be drawing a long train which would obstruct his approach to the caboose, unless he crossed to the other side, and believing that he could safely take chances on crossing in front of the engine, he hastened along and passed over track 4 in safety, but when he stepped on track 5 he was struck and injured by the car which was being staked, then moving about 12 miles an hour. After he passed in front of the engine, one of the staking crew observed his perilous situation and called out a warning, but it came too late to be of any avail.

Such was the case made by the evidence, when the conflicts therein and in the inferences to be reasonably drawn from different parts of

it are resolved in favor of the party prevailing at the trial. Of the complaint it is sufficient to say that it charged, in substance, that the plaintiff was lawfully passing along the street in going from one part of the yard to another, that he did not and could not see the car or perceive its movement, that the defendant negligently ran it across the street at a high rate of speed without giving any warning of its approach, and that this negligence was the cause of his injuries.

At the conclusion of the evidence the defendant requested the court to direct a verdict in its favor on the grounds, first, that there was no evidence of actionable negligence on its part, and, second, that the evidence conclusively established contributory negligence on the part of the plaintiff. The request was denied, and the court, in the course of its charge, said to the jury, in substance, that it was the duty of the defendant, when about to stake the car over the street, to exercise ordinary care for the protection of persons who might be passing therein by giving some reasonable warning of the approach of the car; that the plaintiff, while passing along the street in going from one part of the yard to another, was as much entitled to this measure of protection as other travelers; and that, if his injuries were caused by a failure on the part of the defendant to exercise ordinary care by giving some reasonable warning of the approach of the car, and there was no contributory negligence on his part, he was entitled to recover. The jury returned a verdict for the plaintiff, judgment was entered thereon, and the defendant now assigns error upon the refusal of its request for a directed verdict, and upon that portion of the charge which declared that the plaintiff, while so using the street, was entitled to the same measure of protection, in the way of a reasonable warning, as other travelers.

At the outset it must be conceded that if the plaintiff, after seeing the engine, observing its proximity to the street, and appreciating that it was about to move toward the crossing, or was doing so, had been injured in attempting to pass in front of it, he would not be entitled to recover. And it must be conceded, also, that if the exercise of ordinary care on his part as he advanced along the street would have necessarily disclosed to him the presence and movement of the car, as was the situation in *Chicago, Milwaukee & St. Paul Railway Co. v. Clarkson*, 147 Fed. 403, 77 C. C. A. 575, and he had then been injured in attempting to pass in front of it, he would not be entitled to recover. In either event he would have been guilty of negligence directly contributing to his injuries. But neither concession covers this case. The plaintiff was not injured in attempting to pass in front of the engine; he could not see or hear the car which was advancing on the next track; and he did not otherwise have reason to believe that the engine was staking a car at the time. Or, stating the whole of it, he successfully avoided the only danger which was discoverable by a reasonable use of his senses, and sustained injuries from a danger which was not thus discoverable, and which he did not otherwise have reason to expect. Plainly, therefore, the evidence did not conclusively establish contributory negligence on his part. *Chicago, Rock Island & Pacific R. Co. v. Sharp*, 63 Fed. 532, 11 C. C. A. 337; *Texas & Pacific Ry. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186.

Several contentions are advanced in support of the assertion that there was no evidence of actionable negligence on the part of the defendant, one of them being also the basis of the exception to the instruction before mentioned. Independently of any statute or ordinance upon the subject, it was the duty of the defendant, when about to stake the car over the public street, to exercise ordinary care for the protection of persons who might be passing therein by giving some reasonable warning of the approach of the car. *Chicago, Rock Island & Pacific Ry. Co. v. Sharp*, *supra*; *Harty v. Central Railroad Co.*, 42 N. Y. 468; *Brown v. N. Y. C. R. Co.*, 32 N. Y. 597, 88 Am. Dec. 353; *Illinois Central R. R. Co. v. Baches*, 55 Ill. 379, 384; *Dick v. Railroad Co.*, 38 Ohio St. 389, 396; *Delaware, etc., Co. v. Converse*, 139 U. S. 469, 473, 11 Sup. Ct. 569, 35 L. Ed. 213; 3 *Elliott on Railroads*, §§ 1156, 1158. The existence of this duty and its nonperformance are not seriously questioned, but the contention is made that it was a duty which the defendant owed to the ordinary traveling public, and not to one in its service, like the plaintiff. Some color is given to the contention by several cases in which there are general expressions seemingly making such a distinction between the ordinary traveling public and employes, but when these expressions are read in the light of the questions necessarily presented for determination, the cases in which they are found do not do more than to establish that crossing signals, however required, are designed for the protection of persons using or about to use the crossing as a place of travel, and not of those who are neither so using it nor about to do so, such as a man driving a team along a street parallel to the railroad, or an employé working on or near the track some distance from the crossing. There are also cases which seemingly reject such a distinction between the ordinary traveling public and employes (see *Illinois Central R. Co. v. Gilbert*, 157 Ill. 354, 367, 41 N. E. 724; *St. Louis, etc., Co. v. Eggmann*, 161 Ill. 156, 159, 43 N. E. 620; *East St. Louis, etc., Co. v. Eggmann*, 170 Ill. 538, 48 N. E. 981, 62 Am. St. Rep. 400; *Pittsburgh, etc., Co. v. Moore*, 152 Ind. 345, 350, 53 N. E. 290, 44 L. R. A. 638; *Baltimore & O. S. W. Ry. Co. v. Peterson*, 156 Ind. 364, 59 N. E. 1044; *Bluedorn v. Missouri Pacific Ry. Co.*, 108 Mo. 439, 446, 18 S. W. 1103, 32 Am. St. Rep. 615; *Louisville, etc., Co. v. Martin*, 113 Tenn. 266, 87 S. W. 418, 422); but independently of that, we are of opinion that the duty before stated was one which the defendant owed to all persons using or about to use the crossing as a place of travel, whether they were strangers or employes. And this conclusion is, as we think, sustained by these considerations: The crossing was part of a public street, and therefore was a recognized place of travel. One person had the same right to use it as another. The safety of one user was of the same public concern as that of another. And the danger to be avoided threatened all users alike. In short, the reasons for safeguarding travel in the street applied with equal force to all travelers therein.

It is next contended that, as to the plaintiff, the failure to give a reasonable warning was solely the negligence of his fellow servants who were staking the car. But the contention is not well taken. The failure to give such a warning was not peculiar to that occasion, or merely a casual neglect of duty on the part of those who were staking the car,

but was of frequent occurrence at the crossings in that yard, and was in accordance with what counsel for the defendant concede was "a recognized and long-established practice there." One of two conclusions is, therefore, unavoidable. Either the defendant knew of that practice and acquiesced therein, or it neglected to exercise a reasonable supervision over the work of its servants in that yard. In either case its responsibility for the continued existence of that practice is so plain that the acts of its servants done in accordance therewith must, in legal contemplation, be regarded as if done with its sanction.

It is further contended that, as it was the recognized and long-established practice in that yard to stake cars over the street without giving some reasonable warning to persons passing therein, the plaintiff's injuries resulted from an assumed risk. But this contention is also untenable. The rule that a servant assumes all the ordinary risks of the service in which he engages presupposes that the master will perform all the duties cast upon him for the servant's protection, and therefore embraces such risks as are incident to the service where those duties are performed, and not such as arise out of the master's negligence. The latter are deemed extraordinary risks, and, under a recognized exception to the rule, are assumed by the servant, if the master's negligence is actually known to him, or is so plainly observable that he may be reasonably presumed to know of it, and he then voluntarily enters or remains in the service. *Texas & Pacific Ry. Co. v. Archibald*, 170 U. S. 665, 672, 18 Sup. Ct. 777, 42 L. Ed. 1188; *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96; *Texas & Pacific Ry. Co. v. Swearingen*, 196 U. S. 51, 62, 25 Sup. Ct. 164, 49 L. Ed. 382. When the rule and its exception are applied to the case made by the evidence, as before recited, it is plain that the risk which resulted in the plaintiff's injuries was not assumed as an ordinary incident of the service, because it arose out of the defendant's negligence, and was not assumed as an extraordinary risk, because that negligence was neither known to the plaintiff nor plainly observable by him during the short time intervening between his entrance into the yard and the collision.

We think the motion for a directed verdict was rightly denied.

As the exception taken to a portion of the court's charge, before mentioned, merely presents in another form the contention that the plaintiff was not one of those to whom the defendant owed the duty of giving some reasonable warning of the approach of the car, it is sufficiently disposed of by what has already been said on that subject.

The judgment of the Circuit Court is affirmed.

RINER, District Judge, dissents.

RICHMOND STANDARD STEEL SPIKE & IRON CO. v. CHESTERFIELD COAL CO.

(Circuit Court of Appeals, Fourth Circuit. January 18, 1908.)

No. 750.

FRAUDS, STATUTE OF—REQUISITES OF WRITING—SIGNATURE.

A writing purporting to be a contract between two corporations for the sale and purchase of coal, signed by one and having the name of the other typewritten at the end by the draftsman, without authority, with a blank following it for the signature of the officer executing the same, but which blank was never filled, is not a signed contract effectual to avoid the Virginia statute of frauds, nor does it become such because the corporation not signing made deliveries of coal in accordance with its terms, where it subsequently refused to make further deliveries.

In Error to the Circuit Court of the United States for the Eastern District of Virginia, at Richmond.

William L. Royall, for plaintiff in error.

John Pickrell and William Crump Tucker, for defendant in error.

Before PRITCHARD, Circuit Judge, and PURNELL and BOYD, District Judges.

PER CURIAM. This is an action of trespass on the case in assumpsit in the Circuit Court of the United States for the Eastern District of Virginia, at Richmond, in which the plaintiff below, the Richmond Standard Steel Spike & Iron Company, which is the plaintiff in error here, sought to recover damages of the defendant below, the Chesterfield Coal Company, the defendant in error here, for an alleged breach of contract for a year's supply of coal to be used at the manufacturing establishment of the plaintiff in error at Richmond. Both parties are corporations.

The cause of action of the plaintiff is an alleged contract in writing signed by the parties, bearing date the 20th day of May, 1902, in which it was agreed that the party of the first part, the Chesterfield Coal Company of New York, should furnish and deliver to the party of the second part on board cars at Winterpock, Va., car load Clover Hill R. O. M. coal, same quality as sample sent, which the party of the second part, the Richmond Standard Steel Spike & Iron Company, would need from the day of the alleged contract until May 31, 1903, approximating the quantity at about 2,500 tons, more or less, the same to be shipped in quantities and at such time as party of the second part might direct during the continuance of the contract, at the price of \$2 per ton of 2,240 pounds, f. o. b. at the mines. The defendant denied the execution of the contract, and interposed the plea of *res adjudicata*, because of the fact, as alleged, that in a suit in the state court of Virginia the same cause of action between practically the same parties had been considered, passed upon, and determined, and a further defense that the contract in its terms was not to be performed within a year from its date, and that the same was not in writing and signed by the parties as required by the Virginia statute of frauds, and was therefore invalid. On the trial of the cause in the Circuit

Court, a trial by jury was duly waived, and the issues of fact arising upon the pleadings, together with questions of law involved, were submitted to the presiding judge. After hearing the evidence, a decision was rendered by the court in favor of the defendant, and judgment accordingly entered. Several exceptions were taken and are presented for our consideration, but we deem it necessary in disposing of the case to consider only one, which was taken and is relied upon by the plaintiff in error.

The point primarily involved, and which if adverse to the plaintiff in error is decisive of the controversy, is whether a contract signed by one of the parties sought to be bound thereby, with the name of the other party written in type by the draftsman without authority at the time, can, by subsequent action of the party whose name was signed in type, become by adoption a signed contract so as to be effectual to avoid the Virginia statute of frauds, which requires a contract not to be performed within a year to be in writing and signed by the contracting parties. The paper writing claimed by the plaintiff in error in this case to be a contract in compliance with the Virginia statute setting out the terms of the contract and signed by the parties was typewritten in the office of John S. Lear & Co., coal brokers, in Richmond, Va. The name of the Chesterfield Coal Company was typewritten at the time of drafting this paper at the bottom of the draft by the typewriter, and immediately, in this condition, sent to the plaintiff in error and properly signed in its name by the vice president and general manager of the company. The paper thus signed was then transmitted to the office of the defendant in error in New York, where it remained without further signature or signing by the defendant.

The correspondence in regard to furnishing coal to the plaintiff in error by the defendant had commenced in November, 1901. A man by the name of Jewett, who was a member of the firm of Jno. S. Lear & Co., being the active person in the correspondence, and there were a number of communications between Jewett and the defendant company in New York, and also between Jewett and the plaintiff in error, relating to a contract for the furnishing of coal to the plaintiff by the defendant, all of which will be found in the record. Subsequent to November, 1901, to wit, beginning in the year 1902, other correspondence of like character appears in the record; and it further appears that shortly before the draft of the alleged contract the defendant shipped to the plaintiff a car of sample coal, and a little later on two cars of sample coal at the plaintiff's request; that these samples proved satisfactory, and, thereupon, as stated, the contract was drafted in the office of Lear & Co., was presented to the plaintiff and signed as before stated. After the contract was signed by plaintiff and had been transmitted to New York with the name of the defendant company thereto written in type, there is evidence tending to show that the defendant company commenced to ship cargoes of coal to plaintiff in quantities and at prices as set out in the terms of the said draft, and thus continued until about July 21, 1902, when plaintiff complained to defendant that the coal being shipped was not of the character and quality required by the contract. Thereupon the defendant refused

further to ship coal to plaintiff on the ground that it had made no contract with plaintiff as claimed.

The contention of the plaintiff in this case is that although the Chesterfield Coal Company did not actually sign the contract in the first instance, and that the name of the Chesterfield Coal Company was placed there by the typewriter without authority, yet, after the plaintiff had executed the paper as a contract and the same had gone into the possession of the defendant and was held by it, the defendant had in the meantime proceeded to supply the plaintiff with coal precisely as set out in the terms of the draft; that the defendant thus accepted the contract, recognized the signing as its act, became bound by the terms of the draft, and thereby adopted the name which had theretofore been typewritten as the name and signature of the said company; and that the typewritten draft then became a written contract signed by the parties so as to be effectual to avoid the Virginia statute of frauds.

A careful consideration of the facts disclosed by the record shows that there might have been a meeting of the minds of the parties to such an extent as to constitute a parol contract capable of enforcement. However, that is a question raised by the assignment of error before us. It is admitted by the plaintiff in error that unless it can be shown that the contract in this instance was reduced to writing and signed by the parties the cause of action is barred by the statute of frauds. It may be taken for granted, and there are strong circumstances to sustain the conclusion, that the parties in the outset intended to enter into a contract so executed as to meet the requirements of the Virginia statute, and the plaintiff in error, through its vice president, signed the blank under its name that had been attached by the typewriter. But the contract in this condition was only partially executed, and could not be treated as completed until the president or other properly authorized officer or agent of the defendant had signed also in the blank left by the typewriter for that purpose. It cannot therefore, in our opinion, be reasonably insisted that the contract was in writing and signed by the parties as required by the laws of the state of Virginia. The paper relied upon here as a contract when presented to the defendant company did not even contain what purported to be the signature of the company—there were only the four typewritten words, "The Chesterfield Coal Company." If the draft had contained not only the name of the company, but also the name of its president or other officer or agent authorized to sign the corporate name of the company, thus complying with the requirements necessary to bind a corporation in the execution of a contract, and in this condition the president or other authorized officer or agent of the defendant had accepted the paper, and by words or action had given recognition to the same by admitting the signing and signature as the act of the company for the purpose of binding it, then there would be much force in the contention of counsel for the plaintiff in error that, although the signing and signature was unauthorized in the outset, there was a subsequent adoption which rendered the contract complete. But the facts and circumstances in connection with the alleged contract, which is the basis of this action, are not sufficient in our opinion to lay the foundation for that view.

We are confronted by a further question in this case, and that is that in the trial below it became the duty of the trial judge to discharge the functions both of the jury and of the judge. In assuming the province of the jury he had necessarily to pass upon the testimony, the weight, the character, and effect of the testimony pro and con in determining the issues of fact, and when he rendered his decision it was in its relation to the issues of fact a verdict of the same legal import as if it had been rendered by a jury duly sworn and impaneled in the case, and is subject to be reviewed to the extent only that an appellate court has the right under the law to review the findings of a jury. One of the findings of fact is that the contract in question had not been put in writing and signed by the parties as required by law in order to avoid the operation of the statute of frauds. The finding of the court in this respect being as follows:

"That the contract alleged in the declaration was not to be performed within a year, was not in writing, signed by the defendant or its duly authorized agent in that behalf, and hence under the statute of frauds no recovery could be had thereon."

We do not feel that we would be justified under the circumstances of this case in interfering with this finding of fact. We might enlarge upon the question presented by discussing the difference between the rules which should be applied to individual liability accruing from subsequent adoption of a signing or signature to an obligation and that of a corporation. An individual acts for himself and upon his own responsibility, and he is at liberty to recognize or adopt a signature as his own, and thereby bind himself by the terms of the paper or instrument to which it is attached. But corporations act through their legally constituted agents or instrumentalities, and therefore, in order to bind the latter under the principle of adoption, it would, in our opinion at least, be necessary that the formal method required in execution of written obligations by a corporation should in the outset be observed. That was not done in the case here.

For the reasons herein assigned the judgment of the Circuit Court is affirmed.

JACOB TOME INSTITUTE v. WHITCOMB.

(Circuit Court of Appeals, Fourth Circuit. February 25, 1908. On Rehearing. May 28, 1908.)

No. 691.

1. COURTS—CONCURRENT JURISDICTION—FEDERAL AND STATE COURTS.

An ex parte proceeding in a state court for the foreclosure of a mortgage on a leasehold against the original mortgagor under a local statute applicable to the foreclosure of mortgages, to which complainant, a grantee of the leasehold interest subject to the mortgage and a nonresident, was not a party, did not affect the jurisdiction of the federal court of a suit brought by complainant against the mortgagee for an accounting of the proceeds of certain insurance policies which it had collected, and for damages for the mortgagee's settlement of such claim for less than the amount due thereon against complainant's protest.

2. MORTGAGES—INSURANCE—SETTLEMENT OF LOSS BY MORTGAGEE—ACCOUNTING.

Where a mortgagee settled an insurance loss under policies payable to it as its interest in the mortgaged premises might appear, for the amount fixed by an award of arbitrators which was not binding without the consent of the owner of the mortgaged premises, but the preponderance of the evidence indicated that the amount allowed was the reasonable value of the loss sustained, and the owner did not make a bona fide effort to carry out the arbitration, the mortgagee was not liable to account to the owner for the difference between the amount received and the amount of the loss as claimed by the owner.

3. SAME—DEDUCTION FOR ATTORNEY'S FEES.

Where, after arbitration of the amount of loss on certain mortgaged premises payable to the mortgagee, the insurance companies paid the amount of the award into court, and the property mortgaged was worth more than twice the amount of the mortgage, the mortgagee was not entitled to deduct an attorney's fee from the amount of the award which it accepted in full settlement of the loss, against the protest of the owner of the premises.

Cross-Appeals from the Circuit Court of the United States for the District of Maryland.

Joseph R. Gunther (L. Marshall Haines, on the brief), for the Jacob Tome Institute.

John E. Semmes and Charles F. Carusi, for James A. Whitcomb.

Before PRITCHARD, Circuit Judge, and WADDILL and McDOWELL, District Judges.

PER CURIAM. These are cross-appeals from a decree of the United States Circuit Court for the District of Maryland, entered on the 15th day of May, 1906, in a cause in equity therein pending, wherein James A. Whitcomb was complainant, and the Jacob Tome Institute was defendant, and arose out of facts briefly stated as follows:

The complainant, James A. Whitcomb, was the owner of a certain leasehold estate in a lot of land, with the improvements thereon, on the west side of St. Paul street, near Lexington street, in the city of Baltimore, known as the "Condor Building," shortly theretofore purchased by him from Edward I. Clark, subject to a mortgage in favor of the Jacob Tome Institute, for \$20,000, the payment of which Whitcomb assumed. The buildings were insured for \$20,000, loss, if any, payable to the holder of the mortgage as its interest should appear, and the same were burned during the conflagration in Baltimore, in the month of February, 1904. Shortly after the fire, the mortgage being in arrears, the Jacob Tome Institute instituted a statutory foreclosure proceeding against the mortgagor, Clark, in circuit court No. 2 of the city of Baltimore, and a decree of sale by default was entered on the 9th day of April, 1904. No steps were taken to carry out this decree, but, on the contrary, an arrangement was made to extend the time of payment of the mortgage indebtedness. About this same time, the Jacob Tome Institute, the mortgagee and holder of the policies of insurance above mentioned, made proof of loss thereunder, fixing the same at \$23,324, and the insurer and assured, not being able to agree upon the amount of loss, the former demanded their right to arbitrate the same, pursuant to the provisions of said policies issued to said Whitcomb, and the said Whitcomb and the insurance companies se-

lected each an arbitrator, and an umpire was duly chosen to ascertain the loss. The arbitrators and umpire made ineffectual efforts to meet, and, failing so to do, the arbitrator of the insurance companies, and the umpire chosen by the two arbitrators, assessed the damages, and agreed upon an award of \$17,041.82; in which finding the arbitrator selected by Whitcomb did not join, claiming to have had no opportunity to participate in the ascertainment of the same. Pending these negotiations, the Jacob Tome Institute, at the instance of the complainant, Whitcomb, instituted suit in the Supreme Court of Baltimore City, to recover the full amount of said insurance policies, it being conceded that the insurance companies were not bound by the award; and thereupon the insurance companies tendered the sum of \$17,041.82, the amount of the award, which, under their plea, was paid into court. Against the protest of Whitcomb, the institute, by its vice president, accepted this sum in full settlement of the claim arising under said policies, and applied the same in reduction of the amount due under the mortgage, less the sum of \$852.09 (being 5 per cent. retained by counsel for the institute for making the collection) and asserted a claim for the balance of \$4,777.27 against Whitcomb under the mortgage. Complainant vigorously protested against this settlement, insisting that neither the Jacob Tome Institute nor its counsel had authority to settle the loss due under said policies against his objection, especially as the land covered by the mortgage was ample security for the amount of any balance due thereunder, and indeed was worth more than twice the amount secured by the mortgage. The complainant likewise resisted the right of the institute's counsel to retain the \$852.09 for making the collection; and thereupon filed his bill in equity in this cause, asking for an accounting from the defendant, and that it be charged with the difference between the amount thus received on account of the insurance, and the face value of the policies. The defendant answered, and upon these pleadings issue was duly joined, and considerable evidence adduced by the parties, most of which was taken by deposition, but part orally before the court; whereupon the decree appealed from in this case was entered by the court, rejecting the item of \$852.09, the charge by defendant's counsel for making the collection, and decreeing that the complainant pay to the defendant the sum of \$3,918.18, being the balance due on said mortgage, less the charge for collection above made; from which decree both parties appealed.

A preliminary question was presented as to the jurisdiction of the court, because of the foreclosure proceedings instituted in circuit court No. 2 of Baltimore city against the original mortgagor, Clark, by the Jacob Tome Institute, and the decree in which proceeding remained unexecuted. The lower court took jurisdiction, and we think rightly. The proceeding at most was *ex parte*, to which the complainant, who is a nonresident of the state of Maryland, was not a party, and was instituted in that court under a local statute applicable to the foreclosure of mortgages; and it is quite apparent that the proceedings in the same were not such as to deprive the lower court of its jurisdiction of and concerning the subject-matter of this litigation. The merits of the case turn largely upon questions of fact, as to which there was much conflict in the evidence; and the lower court reached the conclusion

that the defendant, the Jacob Tome Institute, ought not to bear the loss arising from the settlement by its counsel of the insurance claim, against the protest of the complainant; and in this view, after careful consideration, we concur. While there is much in the record to sustain the contention of the complainant that he ought not to be bound by the award, and that the settlement of the loss under the insurance policies, against his consent, at the amount received, was unjust to him, still, upon a full review of all the evidence, we believe it cannot be fairly said that what was allowed by the arbitrators was not the fair value of the property destroyed. The decided preponderance of the evidence is that what was allowed by the award, and accepted by the institute, was the reasonable value of the loss sustained; and while we think there was but little excuse for the institute's counsel accepting this amount at the time he did, against the complainant's protest, we, nevertheless, believe it is as much as would probably have been allowed by a jury, had the trial been proceeded with. In arriving at this conclusion, we think it proper to say that we have not been entirely uninfluenced by the fact that the complainant has failed to satisfy us that he made a bona fide effort to carry out the arbitration between himself and the insurance companies. We entirely agree with the lower court that the defendant's counsel ought not to be allowed to retain the sum of \$852.09 for professional services rendered in making this collection, but, on the contrary, the institute should account for that amount to the complainant in settlement of the mortgage. The services rendered by the defendant's counsel did not inure to the benefit especially of the complainant. He would have received at least the amount of the award as fixed by the insurance company's arbitrator and the umpire, and since the defendant's counsel, according to his own admission, saw fit to settle, instead of prosecute, this suit, as directed by the complainant, he ought not to be allowed to retain anything for his services in connection therewith. The complainant alone, if the litigation had been conducted to a finality, and decided against him, would have been the loser. His interest in the land upon which the mortgage was a lien, was worth more than twice the value of the amount secured by the mortgage, and if he wished to resist the acceptance of the amount of the award, in full settlement of his claim, it was his privilege to do so, certainly as between himself and the mortgagee.

It follows from what has been said that the decree of the lower court should be affirmed, with cost to the appellee, Whitcomb.

Affirmed.

On Petition for Rehearing and Modification.

This cause is now before the court upon a petition for rehearing and modification of the opinion rendered herein on the 25th of February, 1908, respecting the costs in the lower court; the allowance of costs having been one of the subjects of error assigned in the cross-appeal of Whitcomb. After maturely considering the questions presented by such petition, the conclusion reached by the court is that the decision of the lower court should be modified, in so far as the same allows the Jacob Tome Institute its costs in that court against Whit-

comb; and the decision of the lower court, as shown by the opinion heretofore announced herein, is affirmed, with the modification requiring the institute to pay its own costs in the lower court, as well as the costs of this court.

Modified.

ALEXANDRIA NAT. BANK v. WILLIS C. BATES CO.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1908.)

No. 743.

1. REMOVAL OF CAUSES—GROUND OF REMOVAL—PETITION.

In a petition for removal, the plaintiff in the title of the cause was designated as a national bank, but there was nothing in the petition by way of averment to show that it was organized and incorporated as a national bank pursuant to the laws of the United States, and the only allegation of citizenship was that the plaintiff, at the commencement of the suit, was and still is a corporation engaged in the banking business in the city and county of Alexandria and state of Virginia. *Held*, that the petition was fatally defective for failure to aver plaintiff's citizenship, as the title of the cause could not be treated as an averment of the petition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 171.

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

2. SAME—BOND.

Under Removal Act, March 3, 1875, c. 137, § 3, 18 Stat. 470, as amended by Act August 13, 1888, c. 806, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 510], requiring a petition and bond for the removal of a cause to a federal court, a bond capable of being enforced in case of the default of the party executing it is a prerequisite to removal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 184, 185.]

3. SAME—EXECUTION—CORPORATE OFFICERS.

Where a removal bond was signed "Willis C. Bates Company, by Willis C. Bates, Treasurer," but it did not appear that Willis C. Bates as treasurer had any authority to execute the bond, and the corporate seal was not attached, and it was not shown that the person signing the bond had authority to attach the seal, the bond was void.

4. SAME—NAME OF PARTY.

An action was brought against the Willis C. Bates Company, a corporation, whereupon a removal bond was filed reciting "that the Willis C. Bates & Co., undertake," etc., and described the suit as one pending "wherein the Alexandria National Bank is plaintiff and said Willis C. Bates is defendant." *Held*, that the bond was void for failure to properly describe the action.

In Error to the Circuit Court of the United States for the Eastern District of Virginia.

Howard W. Smith and C. C. Carlin, for plaintiff in error.

Clayton E. Emig (Arthur P. French, on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

PRITCHARD, Circuit Judge. Plaintiff in error on the 29th of June, 1905, sued out an attachment in the circuit court of Fauquier county, Va., in pursuance of the Virginia statute, against the defendant in error to recover of the defendant the sum of \$2,752, with interest from the 1st day of June, 1905, and cost. In this proceeding certain property consisting of lumber, ties, etc., was attached. Shortly thereafter a petition was filed in the circuit court of Fauquier county requesting said court to remove the cause to the United States Circuit Court for the Eastern District of Virginia. On the 25th of September an order was entered by the judge of the circuit court of Fauquier county referring the said cause to the corporation court of the said Alexandria City, Va., for the purpose of having the motion for removal determined. This motion was heard in the corporation court of Alexandria and denied, for the reasons set forth in the following order of the court:

"This cause coming on again to be heard upon the petition of the Willis O. Bates Company to remove the same to the United States Circuit Court for the reasons therein set forth, and being argued by counsel, and the court being of opinion that the paper filed in this cause, purporting to be a bond, is not a bond, the court doth therefore find that the said paper is not a bond, and, without further passing upon the matters and questions raised, the court doth retain the cause upon its docket in order to give opportunity to the petitioner to take such further proceedings as he may be advised. And the petitioner asked leave to amend said paper purporting to be a bond, but the court declined to permit any amendment, to which ruling of the court the petitioner excepted."

Whereupon the defendant in error procured from the clerk of the corporation court of Alexandria City a transcript of the record, and filed the same in the United States Circuit Court for the Eastern District of Virginia on December 28, 1905. On the 5th day of July, 1906, the plaintiff in error filed its motion in the United States Circuit Court as aforesaid to remand the cause to the corporation court for Alexandria City, Va., on the ground that:

"This court is without jurisdiction to hear and determine the cause."

This motion was overruled, and an exception to the ruling of the court was taken by the plaintiff in error. The cause came on for hearing on its merits the 11th of January, 1907, and a jury was duly impaneled. The defendant in error pleaded non assumpsit.

The defendant in error moved the court to instruct the jury to return a verdict in its favor, which motion, after argument of counsel, was granted and the jury was so instructed. The following allegation contained in the petition is the only reference upon which defendant in error relies to sustain his contention that there is a proper averment as to citizenship. The allegation in question is as follows:

"The said suit is a controversy between the plaintiff, which, at the time of the commencement of the said suit, was, and still is, a corporation engaged in the banking business in the city and county of Alexandria, and state of Virginia."

While the title of this cause shows that the plaintiff below is designated as a national bank, nevertheless there is nothing in the petition by way of averment to show that it was organized and incorporated as

a national bank in pursuance of the laws of the United States, nor does it appear that it is a citizen of the State of Virginia.

It is contended by the defendant in error that, inasmuch as the law provides that a national bank shall be a citizen of the state where it does business, such provision obviates the necessity of an averment to that effect, it being alleged that it is a corporation engaged in business in the state of Virginia. This provision of the law does not warrant the inference that the plaintiff in error is a citizen of the state of Virginia in the absence of an averment to that effect. It has been repeatedly held that the title of a cause cannot be treated as an averment or allegation in a petition or bill. The only averment contained in the petition as to the citizenship of the plaintiff in error is that it is a corporation doing business in the city of Alexandria, in the state of Virginia.

In the case of *Grace v. American Central Ins. Co.*, 109 U. S. 283, 3 Sup. Ct. 210, 27 L. Ed. 932, the Supreme Court, in discussing this phase of the question, and in referring to the case of *Robertson v. Cease*, 97 U. S. 646, 24 L. Ed. 1057, says:

"In the last case it is said that, 'Where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intentment constitute it, should be distinctly and positively averred in the pleadings, or they should appear affirmatively and with equal distinctness in other parts of the record.' *Railway Co. v. Ramsay*, 22 Wall. 322, 22 L. Ed. 823; *Briges v. Sperry*, 95 U. S. 401, 24 L. Ed. 390. In *Brown v. Keene*, 8 Pet. 112, 8 L. Ed. 885, it is declared not to be sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings; that the averments should be positive."

Section 3, Act March 3, 1875, c. 137, 18 Stat. 470, as amended by section 1, c. 866, of the act approved August 13, 1888, 25 Stat. 433 [U. S. Comp. St. 1901, p. 510], requires that, when a petition is filed to remove a case from a state to a federal court, the petitioner shall "make and file therewith a bond, with good and sufficient surety for his or their entering in such circuit court on the first day of its then, next, session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein." This statute requires that a bond shall be filed as a prerequisite to the removal of a cause. In other words, it is just as essential that a bond should accompany the petition and be filed with it as it is that the petition should be filed in order to entitle the petitioner to have the cause removed.

The state court in refusing to grant the removal of this case from that court held that the paper writing purporting to be a bond was not the kind of a bond required by the statute. In other words, that it was not a valid bond. When a bond is required to be filed, it necessarily follows that it must be a paper writing capable of being enforced in the event that there should be default on the part of the party executing the same. In the first place, while the bond in question is signed "Willis C. Bates Company, by Willis C. Bates, Treasurer," it does not appear that Willis C. Bates as treasurer had any authority to execute the same, nor was the seal of the corporation attached to the bond, or that

the party signing the same had authority to attach the seal of the corporation.

In Lyle's Notes on Private Corporations, p. 78, the author, says:

"It does not follow that an instrument made by a corporation is a sealed instrument from the mere circumstance that it has a corporate seal attached. It must further appear from the paper itself or other evidence allunde that the seal was affixed by a duly authorized person, and with the purpose of making it a sealed instrument."

It appears from an inspection of the bond that it is not the bond of the Willis C. Bates Company. While the Willis C. Bates Company is the corporate name of the defendant below, yet the bond recites that "We, the Willis C. Bates and Company undertake," etc. Therefore, this cannot be construed to be the bond of the parties seeking to remove the case. It also appears that the bond which describes the suit that is pending in the state court uses the following language:

"Whereas, * * * therein pending wherein the Alexandria National Bank is plaintiff and the said Willis C. Bates is defendant."

Thus it appears that the condition of the bond is made dependent upon the removal of a suit which did not exist at the time the bond was executed.

We are of opinion that the paper purporting to be a bond was not a valid bond. The fatal defects contained therein are of such a character as to render it absolutely worthless for the purpose for which it was executed.

For the reasons hereinbefore stated, we are of opinion that the Circuit Court was without jurisdiction and that the court below erred in refusing to remand the cause to the state court. The judgment of the Circuit Court is therefore reversed, and the cause remanded to that court with instructions to remand it to the state court.

Reversed.

UNITED STATES v. NAKASHIMA.

(Circuit Court of Appeals, Ninth Circuit. February 17, 1908.)

No. 1,447.

1. ALIENS—EXCLUSION—CONTAGIOUS DISEASES—RESIDENT ALIENS RETURNING.

Act Cong. March 3, 1903, c. 1012, § 2, 32 Stat. 1214, which provides for the exclusion of "aliens" afflicted with a dangerous contagious disease, substantially re-enacts a corresponding section of Act March 3, 1891, c. 551, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1295], except that it omits the clause "in accordance with existing acts regulating immigration other than those concerning Chinese laborers." The 1903 act contains full legislation, and amends and is a revision of prior laws on the subject of immigration. Section 9 provides a penalty for the importation of afflicted aliens. The 1891 act was uniformly held to apply to alien immigrants only, and not to affect rights of alien residents. Sections 12, 13, 17, and 20 of the 1903 act (32 Stat. 1216-1218), providing for the delivery by masters of vessels of lists of alien passengers, for the examination of such passengers, and for the deportation of aliens unlawfully in the United States, etc., refer to "aliens," rather than "alien immigrants," as used in an amended act. The title of the 1903 act is "An act to regulate the immigration of aliens," etc. Held that, since aliens have always been allowed to reside in the

United States and acquire property here, while retaining their citizenship abroad, and to return to the United States after a temporary absence, the phraseology of the 1903 act is insufficient to show an intent that it should apply to alien residents returning to the United States after a temporary absence.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 299-302; vol. 8, p. 7571.]

2. STATUTES—CONSTRUCTION—TITLE.

Though the title of an act may not be used to extend or restrain any positive provisions in the body thereof, it may be resorted to in a case of doubt to ascertain the meaning of the act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 288.]

3. ALIENS—EXCLUSION—CONTAGIOUS DISEASES—HABEAS CORPUS.

Act Cong. March 3, 1903, c. 1012, § 25, 32 Stat. 1220, gives boards of special inquiry authority to determine whether an alien who has been duly held shall be allowed to land, and provides that the decision of any two members of the board shall be final, but that an appeal may be taken therefrom to the Secretary of the Treasury, whose decision shall then be final. By Act Feb. 14, 1903, c. 552, § 4, 32 Stat. 826 [U. S. Comp. St. Supp. 1907, p. 86], the Secretary of Commerce and Labor succeeded to the powers, etc., of the Secretary of the Treasury relating to the immigration service. Section 10 of the first-named act (32 Stat. 1216) makes the decision of the board of special inquiry final as to the rejection of aliens afflicted with a dangerous contagious disease. An alien, returning to the United States after a temporary absence, was detained before a board, and the questions whether he was afflicted and whether he was one of the class of aliens referred to in section 2 (32 Stat. 1214), providing for the exclusion of aliens afflicted with a dangerous contagious disease, were presented for the board's determination. The board found he was afflicted, and ordered that he be deported, and the Secretary of Commerce and Labor dismissed the alien's appeal, holding that under section 10 no appeal could lie. *Held*, that the appeal was improperly dismissed, since the question whether he was an alien, within section 2, was presented for decision by the Secretary, and that a writ of habeas corpus lies to protect the alien's right to have such question so determined.

Appeal from the District Court of the United States for the Territory of Hawaii.

The appellee, in his petition for a writ of habeas corpus, alleged that he is a subject of the Emperor of Japan, but that he is, and has been for four years and more, a resident of the United States, having in May, 1902, come from the empire of Japan to the territory of Hawaii as an immigrant; that he resided in that territory for about 1½ years, working there as a drayman, and that while there he married; that from Hawaii he and his wife went to San José, in California, where he established a home for himself and wife, and where he remained working at his trade of bricklayer until November, 1904, when he was called upon to return to Japan to serve in the army, as he was a reserve soldier; that he left his wife in San José, went to Japan, served in the army of that empire through the war with Russia, and upon his discharge proceeded to return to his home in San José; that on his way he arrived in Honolulu, where he desired to stop en route to visit a brother and sister who resided there; that he has no other home or place of residence than at San José; that before departing for Japan, as aforesaid, he procured from the Japanese consul at San Francisco a certificate showing that he was a resident of San José, and that his intention was to return there and make his home there. These facts were not denied. In addition thereto an agreed statement of facts was made on the trial had upon the return to the writ, which was in substance as follows: That the appellee arrived at Honolulu on the steamship *Kasato Maru*, having sailed from Kobe on August 28, 1906; that in compliance with the act of Congress approved March 3, 1903, a manifest

of alien passengers was delivered to the United States immigration inspector at Honolulu, which manifest contained the name of the appellee and the statement that he was of Japanese nationality and that he had never before been in the United States; that thereafter the appellee was questioned by an immigration inspector at the port of Honolulu relative to the statements set forth in the manifest, whereupon he stated that his occupation was that of a laborer, and that he had been in San José in 1903 and 1904; that thereupon the manifest was amended accordingly; that on September 19, 1906, an examination of the physical and mental condition of the appellee was made by an officer of the United States Marine Hospital service, located at Honolulu, and upon the completion of such examination that officer certified in writing that the appellee was afflicted with a dangerous contagious disease, to wit, trachoma; that at that time there was at the port of Honolulu a duly appointed, qualified, and acting board of special inquiry, consisting of three persons, to which board the certificate of the medical officer was delivered, the board having been called together for the purpose of giving the appellee a hearing; that such hearing was had, and as the result thereof said board determined that the appellee was afflicted with a dangerous contagious disease, and ordered that he be deported to Japan; that on September 20, 1906, the appellee appealed from the decision of the board, and on October 8, 1906, the Secretary of the Department of Commerce and Labor of the United States dismissed the appeal, holding that no appeal was permissible. Upon the hearing on the return to the writ of habeas corpus the court below held that the provisions of Act Cong. March 3, 1903, c. 1012, 32 Stat. 1213, "An act to regulate the immigration of aliens into the United States," applied to alien immigrants only, and not to aliens domiciled in the United States who may have temporarily gone abroad and are returning thereto.

Robert W. Breckons, U. S. Atty.

Charles F. Clemons, for appellee.

Before GILBERT, Circuit Judge, and DE HAVEN and HUNT, District Judges.

GILBERT, Circuit Judge (after stating the facts as above). The question first presented is whether the appellee is of the class of aliens who are to be denied admission into the United States under Act March 3, 1903, c. 1012, 32 Stat. pt. 1, p. 1213, which excludes from admission all aliens who are afflicted with a dangerous contagious disease. That act is amendatory of Act March 3, 1891, c. 551, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1294], which in its terms is amendatory of prior acts. The act of 1891 had uniformly been held to apply solely to alien immigrants, and not to affect the rights of alien residents. In *re Panzara* (D. C.) 51 Fed. 275; In *re Martorelli* (C. C.) 63 Fed. 487; In *re Maiola* (C. C.) 67 Fed. 114; In *re Ota* (D. C.) 96 Fed. 487; *Moffitt v. United States*, 128 Fed. 375, 63 C. C. A. 117. In the case last cited this court had occasion to construe section 10 of the act of March 3, 1891, requiring the deportation of all aliens who may unlawfully come into the United States, and in the opinion we said:

"This act clearly relates to immigration, and is leveled only against immigrants, although neither of these words is expressly mentioned in section 10 of the act."

It is true that the act of March 3, 1891, is in terms directed against all aliens, and does not, in section 2, which defines the classes of aliens to be excluded from admission, employ the word "immigrant" or "immigration"; nor does it employ those words in section 9, which im-

poses a penalty on any person or transportation company bringing to the United States any alien afflicted with a loathsome or dangerous contagious disease. If the act were unaffected by the prior legislation, of which it is amendatory, there might be ground for saying, from its inclusive language, that it is directed against all aliens coming into the United States; but aliens have always been allowed to reside in the United States and acquire property there, while at the same time maintaining their citizenship in the country from which they came, and their right to return to the United States, after having temporarily left the same with the intention to return, has always been recognized. It is not to be presumed that Congress intended to change the whole trend of its prior legislation in regard to alien residents, construed as that legislation had been by the courts, without expressing that intention in terms so clear as to leave no room for doubt. We find no such change of phraseology as to justify that conclusion. The act of March 3, 1903, is not only amendatory, but it is a revision and collocation of the prior laws. It is true that there is to be found a substitution of the word "alien" for "alien immigrant" in sections 12, 13, 17, and 20; but there is no such substitution of words in section 2, which is a substantial re-enactment of the corresponding section of the act of 1891, with the exception that it omits the clause "in accordance with the existing acts regulating immigration other than those concerning Chinese laborers." But the omission of that clause does not seem to us of significance as indicating a change of policy, for the act of 1903 contains in itself full legislation on the subject with which it deals, and there was no occasion to refer to existing acts regulating immigration.

The title of the act, while it may not be used to extend or restrain any positive provisions found in the body of the act, may be resorted to in a case of doubt for the purpose of ascertaining its meaning. *Old Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550, 12 Sup. Ct. 689, 36 L. Ed. 537. The title of the act of March 3, 1903, is "An act to regulate the immigration of aliens into the United States." That it is directed against alien immigrants, and not against alien residents, has been decided in the following cases: *In re Buchsbaum* (D. C.) 141 Fed. 221; *United States v. Aultman & Co.* (D. C.) 143 Fed. 922; *Rodgers v. United States*, 152 Fed. 346, 81 C. C. A. 454. Our attention has been directed to the case of *Taylor v. United States*, 152 Fed. 1, 81 C. C. A. 197, in which the majority of the Circuit Court of Appeals for the Second Circuit found in the changes incorporated in the act of 1903 evidence of the intention of Congress to amend the act in the direction of more drastic exclusion and to discard the term "alien immigrant" for the broader term "alien," and found evidence of that intention also in the reports of committees and in the debates of Congress while the act was on its passage. In *United States v. Union Pacific R. R. Co.*, 91 U. S. 72, 23 L. Ed. 224, the court said:

"In construing an act of Congress we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety recur to the history

of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it."

And in *Binns v. United States*, 194 U. S. 486, 24 Sup. Ct. 816, 48 L. Ed. 1087, the court held that, while it was generally true that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body, it was proper to examine the reports of committees of either branch of Congress with a view to determine the scope of statutes passed on the strength of such reports. In the reports of the committees we discover no evidence sufficient to show that Congress intended, by the act of 1903, to make a radical change in the existing law; and, as the decision in *Taylor v. United States* has been reversed by the Supreme Court of the United States in the recent case of *United States v. Taylor*, we may infer that the latter court found in these documents no evidence of such an intention.

A second question concerns the finality of the decision of the board of special inquiry. Section 25 of the act of 1903 gives to such boards authority to determine whether an alien who has been duly held shall be allowed to land or be deported, and provides as follows:

"The decision of any two members of a board shall prevail and be final, but either the alien or any dissenting member of said board may appeal through the Commissioner of Immigration at the port of arrival and the Commissioner General of Immigration to the Secretary of the Treasury, whose decision shall then be final; and the taking of such appeal shall operate to stay any action in regard to the final disposition of the alien whose case is so appealed until the receipt by the Commissioner of Immigration at the port of arrival of such decision."

There was an appeal in the present case to the Secretary of Commerce and Labor, who, under the Act Feb. 14, 1903, c. 552, § 4, 32 Stat. 826 [U. S. Comp. St. Supp. 1907, p. 86], succeeded to the powers, duties, and functions of the Secretary of the Treasury relating to the immigration service at large. The appeal was dismissed on the ground that the appellee herein was not entitled to an appeal, since section 10 of the act of March 3, 1903, provides that the decision of the board of special inquiry shall be final as to the rejection of aliens afflicted with a loathsome or with a dangerous contagious disease. The appeal could have been dismissed only on the theory that there was but one question before the board of special inquiry, and that was whether the alien referred to in the certificate of the medical officer was afflicted with a loathsome or a dangerous contagious disease. But the decision of the board was not based solely on the certificate of the medical officer. There was another question involved in its decision and presented on the appeal, and that was whether or not the appellee was one of the class of aliens referred to in the statute. Upon that question evidence had been taken before the immigration officers at Honolulu; for from the record it appears that the appellee claimed to those officers that he had resided in San José, Cal., in the years 1903 and 1904, had returned to Japan for the purpose of participating in the war, had returned therefrom, landing at Honolulu on his way to San José, Cal., where he claimed to have living his wife and child, or

children, and that he was sworn and examined with relation to such residence and intention.

While the statute declares that the decision of the board shall be final, it allows an appeal, and provides that the decision on appeal shall be final. In the present case the dismissal of the appeal was a denial of the right of appeal to the appellee herein. That right having been denied, we find in the record no final decision. If the Secretary of Commerce had entertained the appeal, and had affirmed the decision of the board, a different question would be presented. *Lem Moon Sing v. United States*, 158 U. S. 540, 15 Sup. Ct. 967, 39 L. Ed. 1082; *In re Moses* (C. C.) 83 Fed. 995; *In re Ota* (D. C.) 96 Fed. 487. In the last case cited Judge De Haven, referring to the act of August 18, 1894, said:

"Under this statute, when the executive officers of the government, upon a hearing such as is contemplated by the law, have decided that an alien is not entitled to enter the United States, the courts are without jurisdiction to review that determination upon questions either of law or fact. The finding of these officers that an alien seeking to land is an immigrant is as conclusive upon the court, in a proceeding like this, as their finding in relation to any other fact affecting the right of the alien to land."

We are of the opinion that section 25 of the act of 1903 does not exclude jurisdiction of courts in habeas corpus proceedings, where the alien is denied the right of appeal upon a question affecting his right to land, and upon which he is entitled to be heard. *In re Monaco* (C. C.) 86 Fed. 117; *Rodgers v. United States*, 152 Fed. 346, 81 C. C. A. 454; *Gonzales v. Williams*, 192 U. S. 1, 24 Sup. Ct. 177, 48 L. Ed. 317. In the case last cited, Isabella Gonzales, a citizen and native of Porto Rico, on arriving at a port of the United States, was detained for deportation by a Commissioner of Immigration on the ground that she was an alien to be excluded within the meaning of the act of March 3, 1891. The court said:

"If she was not an alien immigrant within the intent and meaning of Act Cong. * * * March 3, 1891, c. 551, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1294], the commissioner had no power to detain or deport her, and the final order of the Circuit Court must be reversed. * * * And in the present case, as Gonzales did not come within the Act of 1891, the commissioner had no jurisdiction to detain and deport her by deciding a mere question of law to the contrary, and she was not obliged to resort to the superintendent or to the Secretary."

The judgment is affirmed.

THE GARONNE.

(Circuit Court of Appeals, Ninth Circuit. February 10, 1908.)

1. MARITIME LIENS—CONTRACTS CREATING LIENS—OWNER PRO HAC VICE.

The owner of a vessel who delivers her to a purchaser under a contract of sale makes such purchaser the owner pro hac vice, and must be deemed to have assented to his creating liens on the vessel as security for the performance of contracts of affreightment and for maritime service.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Maritime Liens, § 26.]

2. SAME—CONTRACT FOR MARITIME SERVICE—LIGHTERAGE.

A contract with the owner for the lighterage of cargo and passengers from a vessel moored at a distance from the land is essentially one for a maritime service, for a breach of which the lighterage contractor is entitled to a lien on the vessel, and such lien is not affected by any private agreement between the owner and the owners of cargo that lighterage should be at the expense and risk of the latter.

8. SAME—CONTRACT OF AFFREIGHTMENT—LIEN FOR BREACH.

There is no lien on a vessel for breach of a contract of affreightment unless the goods are delivered to the ship or to some one authorized to act for her, nor can there be a lien for the cost of making such delivery, although the goods after being received are not carried.

Appeal from the United States District Court, for the District of Alaska, Second Division.

In February, 1904, Frank Waterhouse & Co., owning the steamer Garonne, made a contract with W. H. Ferguson, representing the North Alaska Steamship Company, to sell the steamship to that company for the sum of \$85,000. The purchaser paid \$1,000 cash, and agreed to pay \$14,000 on February 15, 1904, at which time a bill of sale of the vessel was to be given and the vendor was to receive notes for the remainder of the purchase price, secured by a mortgage on the vessel, the insurance thereon, a bond that the purchaser would keep the vessel free of liens until fully paid for, and other collateral security satisfactory to the vendor. The \$14,000 payment was made on February 15th, but the purchaser being unable to furnish the securities called for by the contract, the time for the further performance of the contract was extended to March 15th, and was again extended to June 3, 1904. In the meantime the purchaser was making repairs on the vessel, supplying her for a voyage to Nome, and engaging cargo for the first voyage, which was to begin about June 2d. When the ship was ready for this voyage, the purchaser was still in default, and unable to furnish the securities called for by the contract. It then agreed with the vendor that, if it would allow the first voyage to be made, the purchaser would turn over to it \$18,000 of the passenger and freight money receipts, to be credited on the purchase price, and in payment of certain supply bills, and that the purchaser would, immediately after the departure of the vessel, make full payment from its New York office, of the balance due the vendor, in default of which the latter was to be entitled to take possession of the vessel as soon as the voyage ended. The steamer sailed from Seattle on or about June 3d, but the remainder of the purchase price was not paid, and when the vessel returned from Nome in July, the owner took possession thereof, canceled the contract, and subsequently sold her to the Merchants' & Miners' Steamship Company, the appellant in this case. On May 10, 1904, the North Alaska Steamship Company made a contract with the appellee Jorgenson to carry certain cargo to Nome for him, and engaged him to do certain lighterage for the company at Nome and other points. After the vessel had been transferred to the appellant, the appellee libeled her for alleged breaches of the contract so made between him and the North Alaska Steamship Company. The appellant made claim to the vessel and answered the libel. A decree was entered in the court below in favor of the appellee against the appellant and the sureties on its release bond for the sum of \$3,612.95. From that decree the present appeal is taken.

W. H. Bogle, Charles P. Spooner, Dudley Du Bose, H. Y. Freedman, and Thos. R. Shepard, for appellant.

Ira D. Orton, Geo. A. Schofield, Campbell, Metson, Drew, Oatman & Mackenzie, and E. H. Ryan, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). It is contended that there was error in allowing the appellee the sum of

\$291.65, the first item in the libel adjudged to be due him on the contract of lighterage made on May 16, 1904, and that the amount due on that contract is not a lien against the ship in the hands of the present owner. But the owner allowed the North Alaska Steamship Company to have the entire control, management, and employment of the vessel, and to become the owner pro hac vice. In such a case the general owner must be deemed to consent that the special owner may create liens binding on the former's interest in the vessel as security for the performance of contracts of affreightment and for maritime service. *The Schooner Freeman v. Buckingham et al.*, 18 How. 182, 15 L. Ed. 341. And a contract for the lighterage of freight and passengers from a vessel moored at a distance from the land is essentially a contract for a maritime service. *Thackeray v. The Farmer*, Gilp. 526, Fed. Cas. No. 13,852; *Benedict's Admiralty*, § 158. The appellant denies that there is a lien, for the further reason that the North Alaska Steamship Company contracted with all shippers of cargo on that voyage that their goods should be received by the owners thereof at ship's tackle immediately on arrival at the port of delivery, and that if the consignee were not on hand to receive the goods as discharged, then the carrier might deliver the same to the wharfinger or other person believed by the carrier to be responsible, who should take charge of said property, pay freight on the same, or the same might be kept on board the vessel, or stored in hulks or in lighters by the carrier at the expense and risk of the owner, shipper, or consignee. It is claimed that by virtue of this agreement, so stipulating that lighterage shall be at the expense and risk of the consignees, no duty was imposed on the ship to pay for lighterage, and that therefore the contract of the North Alaska Steamship Company with the appellee was a personal contract made on the credit of that company, for the breach of which there is no lien upon the ship. We cannot see that the contract made between the carrier and the shippers of freight has anything to do with the question of the appellee's lien under his contract of lighterage. That was a maritime contract for a breach of which the appellee had a lien upon the vessel. He was not a party to the agreement between the carrier and the shippers, and his rights are in no way affected by the fact that the carrier saw fit to recoup the expense of lighterage from the owners or consignees of the goods.

The appellant contests the allowance of \$475 and \$150 as sued for in the second and third causes of action. All of these charges arose out of the service of lightering the vessel. \$425 was for lightering at Golovin Bay, a service which was not included in the original contract. But the ship had cargo to deliver there, and the agent of the North Alaska Steamship Company engaged the services of the appellee and promised to furnish him lighters there for the work. He did not have the lighters there. In consequence, the appellee was required to use his steam scow at his own expense, and, upon the evidence in the record, we can discover no error in the allowance of \$425 for that service. In addition to that there was \$20 charged for the detention of the appellee's lighters while lightering lumber which was to go up Solomon river. The agent of the ship had the lumber taken off where the water was too low. The lighters got stranded on the

bar, and, for the resulting delay, the agent agreed to pay the appellee. Thirty dollars was for carrying freight from Nome to a bark at Golovin Bay. The \$150 item was for demurrage for the detention of the appellee's lighters at Lane's Derrick. The ship's agent insisted that the appellee should take the scow into Lane's Derrick while the water was very low, and agreed to pay for demurrage in the sum of \$150 if there was detention of the same. All these items were, according to the testimony, subsequently presented to the agent, and were approved by him. We find no error in their allowance by the court below.

One of the items allowed in the decree is \$250, wharfage paid by libellant to the Chesley Wharf, on the lighter which the North Alaska Steamship Company agreed to carry on the Garonne, and which it did not carry. By the contract of May 16th, the steamship was to carry the lighter, which had been constructed at the Chesley Wharf, and certain knock-down scows which were also lying on that wharf, and it was understood that the steamship was to be brought to that wharf from its dock three-quarters of a mile distant, in order to take said property on board. The steamship could not carry out its part of the agreement, and refused to carry the lighter on that voyage. When this was known, the appellee caused the knock-down scows to be hauled from the Chesley Wharf and delivered to the steamship at her dock, but there was no actual delivery of the lighter to the steamship, or to her master, or to any authorized agent or officer. The testimony of the appellee on that subject is that, in a conversation which he had with Ferguson just before the steamship sailed, the latter promised that he would bring the lighter on the next trip of the Garonne, and in answer to the question as to what was said at that time with reference to taking charge of the lighter, the appellee answered, "He said that Hastings would attend to it—that he would be down there when we left, and he would take charge of her." Hastings was the assistant traffic manager of the North Alaska Steamship Company, and he testified that all he knew about the lighter was that he understood that there was some agreement between Ferguson and the appellee about the delivery of the same, but as to the details of the transaction he was not informed. There was no evidence that he or any agent or officer of the steamship company ever took possession of the lighter. Under the general maritime law, the contract of affreightment of the lighter created no lien on the vessel unless there was a delivery. "The reception of the goods by the master on board of the ship or at a wharf or quay near the ship for the purpose of carriage therein, or by any person authorized by the owner or master so to receive them, or seeming to have this authority by the action or assent of the owners or master, binds the ship to the safe carriage and delivery of the goods." 1 Parsons, Shipping & Admiralty, 183. The evidence fails to show that the appellee ever parted with the possession of the lighter. The promise of Ferguson that he would send Hastings to take charge of her for the purpose of keeping her and sending her on the next voyage of the ship, a promise which was not fulfilled, was not a delivery to the ship. *Guffey v. Alaska & P. S. S. Co.*, 130 Fed. 271, 64 C. C. A. 517, and cases there cited. The item of \$250, therefore, charged for wharfage of the

lighter, and \$1,000 damages for the loss of the use of the same during the season at Nome, can constitute no charge against the ship, and must therefore be disallowed.

As to the material of the knock-down scows, the evidence sustains the finding of the court below that it was delivered to the vessel at its dock. The expense of \$46.40, for hauling the same, however, is no charge upon the ship, and must be disallowed. But we perceive no reason why the ship is not chargeable with the sum of \$446.30 allowed by the court below as damages for the failure of the vessel to carry a portion of said material after receiving the same at its dock.

The decree of the court below will be modified in accordance with the foregoing views, and a decree will be entered for the appellee in the sum of \$2,316.55, and costs allowed by the court below, but without costs in this court.

PUGET SOUND NAVIGATION CO. V. LAVENDER et al.*

(Circuit Court of Appeals, Ninth Circuit. March 2, 1908.)

No. 1,425.

1. PLEADING—SUFFICIENCY OF COMPLAINT.

A complaint based on negligence in the equipment and management of a vessel is not insufficient after verdict because it alleges the ownership and operation of the vessel by defendant in the present tense only, where it further alleges that the negligent acts specified were those of defendant.

2. DEATH—ACTION FOR CAUSING DEATH—EVIDENCE—EARNINGS OF DECEASED.

In an action for wrongful death, it was competent for the wife of the deceased to testify that he was engaged to go upon a voyage and the amount he would have earned by it, based upon his earnings on a like voyage made the previous year.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 88.]

3. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—EVIDENCE.

Permitting a witness to testify to the death of a person by drowning, although the witness was not present and had no personal knowledge of the fact, if error, was harmless, where she stated that her knowledge was from hearsay, and where the fact was proved by others who were eye-witnesses and was undisputed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4170.]

4. SAME.

A statement made by a bystander to the captain of a vessel after the drowning of a member of the crew, giving his opinion that it was due to the fault or negligence of the officers and crew in failing to save the drowning man, was not admissible in evidence as part of the *res gestæ*, but its admission was harmless error, where the jury by special findings placed the liability of the vessel owner for the death on other grounds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4171-4177.]

5. SAME—OPINION EVIDENCE.

Permitting a witness who was not an expert to state what would occur if a person attempted to open a defective port on a vessel was not reversible error, where from his description of the condition of the port the result of such an attempt would be obvious.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4186.]

*Rehearing denied June 10, 1908.

6. SAME—CURE BY INSTRUCTION.

Permitting the testimony of a witness as to a fact to remain in the record subject to objection, although he admitted on cross-examination that his statement was based upon hearsay only, was not reversible error where the jury were expressly instructed that such testimony was incompetent, and should not be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4178-4184.]

7. MASTER AND SERVANT—ACTION FOR CAUSING DEATH—SUFFICIENCY OF EVIDENCE.

Evidence considered, and held sufficient to sustain a verdict finding that the drowning of a member of the crew of a vessel, who was sent to open a port, was due to the defective condition of the port, the gate of which fell out with him when opened.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 959.]

In Error to the Circuit Court of the United States for the Northern Division of the Western District of Washington.

See 156 Fed. 361.

Ira Bronson and D. B. Trefethen, for plaintiff in error.

Byers & Byers, for defendants in error.

Before GILBERT, Circuit Judge, and DE HAVEN and HUNT, District Judges.

GILBERT, Circuit Judge. At a previous term of this court this cause, after a hearing upon the merits, was ordered dismissed for the reason that in the complaint, as shown by the record, there was lack of jurisdictional averments. 156 Fed. 361. Upon a petition for a rehearing it was made to appear that the cause had been removed from a state court to the Circuit Court, and that the petition for such removal had set forth the diversity of citizenship necessary to justify removal and to show jurisdiction in the Circuit Court. On that petition and a supplemental record showing the facts so alleged, the dismissal of the cause ordered by this court was set aside, and the case was reinstated for decision on the merits. The plaintiff in the court below was Mary R. Lavender, the widow of R. O. Lavender. The complaint alleged, in substance, that on November 3, 1904, R. O. Lavender was employed by the plaintiff in error upon the steamer Lydia Thompson in the capacity of watchman; that he was directed by the mate of said vessel to open the port on the port side of said vessel preparatory to making a landing at the wharf at Olga; that the port was so defectively and dangerously constructed and in such poor repair that it was dangerous to one to open the same, and the defects were known to the plaintiff in error, or by ordinary care should have been known to it, and were unknown to the said R. O. Lavender; that, when he attempted to and did open the port, he fell through the opening into the water and was drowned. The complaint also alleged negligence in the failure of the mate to cause an immediate alarm and to promptly lower a boat to rescue said Lavender, and further alleged that the steamer was not properly and sufficiently manned, in that there was no lookout thereon to give an alarm in case of accident. The cause was tried before a jury, and a

verdict rendered for the plaintiff therein in the sum of \$5,500. The jury being requested that, in case they returned a verdict for the plaintiff, to state the specific acts of negligence on the part of the defendant which were the proximate cause of the death of said Lavender, answered: "Defective port and ship not properly manned."

It is assigned as error that the court below permitted a judgment to be based upon a complaint which failed to allege that the plaintiff in error owned or operated the vessel at the time of the accident. The amended complaint, which was filed some seven months after the date of the accident, alleged:

"That the defendant, the Puget Sound Navigation Company, is the owner and operator of a certain steamer called the 'Lydia Thompson.'"

It is argued that this is no allegation that the plaintiff in error owned the steamer at the time of the accident, and therefore it is insufficient to sustain the judgment. It is true that the allegation of the complaint states the ownership of the steamer by the plaintiff in error in the present tense, but in setting forth the accident which occurred to the decedent on November 3, 1904, the complaint directly alleges the same to have been the result of negligence on the part of the plaintiff in error in not having said steamer properly manned, etc.; the plain inference of the pleading being that at that date the plaintiff in error owned and operated the steamer. In the absence of a demurrer or a motion to make the complaint more specific, or objection to the testimony on that ground, the plaintiff in error, after having defended in the court below on the assumption that it owned and operated the steamer at the date of the accident, cannot now in this court avail itself of the alleged defect in the complaint.

It is contended that there was error in allowing Mary R. Lavender to testify on the trial that R. O. Lavender was engaged for a voyage soon to commence, under which he was to have \$50 a month and a percentage of profits in addition thereto, which "would amount to \$1,500 a year or more." This statement, the witness explained, was based upon his earnings under like conditions on a voyage made the previous year. We see no error in admitting the testimony. It was competent for the witness to testify of her own knowledge what the deceased was making, and that was in substance what she testified to.

Error is assigned to the ruling of the court in allowing Mrs. Lavender to testify to the positive fact of the death of R. O. Lavender. It is urged that there was no evidence that she knew that he was dead, and that she could have known nothing thereof of her own knowledge. But she had already testified, without objection, that Lavender was drowned on November 3d. On a repetition of the question the objection was made that she had no knowledge as to his death. The objection was overruled, and she repeated her answer that he was drowned on November 3, 1904. She afterwards admitted that her knowledge was derived from the statements of others. The jury fully understood the nature of her testimony and the source of her knowledge. There was testimony of other witnesses showing the fact of Lavender's death by drowning on that date, and no evidence

whatever was offered to contradict it. If there was error, therefore, in the admission of the testimony so given by the witness, it was harmless.

Error is assigned to the refusal of the court to strike out the testimony of E. J. Glover as to what he said to the captain after the boat had been lowered for the purpose of picking up Lavender, and the effort to rescue him had been abandoned. He testified:

"I turned to the captain, and told him it was a cold-blooded piece of murder, as I thought."

A motion to strike this out as immaterial, irrelevant, and incompetent was overruled. The evidence was permitted to remain in the case not as probative of negligence on the part of the plaintiff in error, but as a part of the *res gestæ*. In regarding it as properly admissible as of the *res gestæ*, we think the court below was in error, for the statement so made by the witness was but the expression of the opinion of a bystander after the event. But we are not convinced that there was reversible error in the ruling of the court. The witness testified fully as to all that he observed concerning the efforts of the officers and crew of the steamer to rescue the watchman from drowning, and the jury, if they credited his testimony, might or might not find negligence therein. It is clear, however, that the jury were not influenced in their verdict by this expression of opinion, because in their special verdict in answer to the question as to what negligence, if any, caused the accident, they specified that it was the defective port and the failure to properly man the ship. The statement of the opinion of the witness Glover was directed solely to the unsuccessful efforts of the officers and men to rescue the watchman from drowning. At the time when he made the remark, which he testifies he did make to the captain, he knew nothing whatever, as the jury well knew, of any defect in the port, and knew nothing whatever about the manning of the ship. It is plain, therefore, that the jury who heard his testimony understood his remark to the captain to refer solely to his opinion as to the handling of the small boat, or delay in getting it out, or the failure to pick up the man whom the witness saw, as he testified, floating in the water near the boat and within reach.

The objection is made that the witness Glover was allowed to testify what the result would be if a man attempted to pull the upper doors of the port around while the lower door of the port was unfastened. It is urged that this testimony was incompetent for the reason that the witness was not a seaman nor an expert. The witness very fully explained to the jury the condition of the doors of the port and their fastenings as he saw them soon after the accident. In the light of that description, it needed no expert to say what would be the result of the attempt to pull the upper doors around. It was a matter of which any one could testify for the result was plain and obvious to any observer.

It is contended that the court below erred in permitting the witness Hohl, who had testified that Lavender fell out through the port, to explain how he knew it if he did not see it. He answered that, when he went below, the fireman told him how Lavender went out. This

answer was taken subject to objection. If there was error in its admission, it was cured by the charge to the jury, in which the court said:

"The jury must base their verdict upon competent and legal evidence. The direct testimony of eyewitnesses is referred to as contradistinguished from proved facts and circumstances which may be equally convincing as the testimony of eyewitnesses—those who saw and heard the actual transaction, but the court does not mean for you to infer that hearsay reports testified to by witnesses on the stand are to take the place of legal evidence. A witness who details to the jury a fact as a fact which he knows only because another person, when not under oath, has told it to him, does not give competent legal evidence. Under the law of the country facts that are put in issue have to be proved on the trial of a case in court by the sworn testimony of witnesses, and the law does not permit an invasion of that rule by allowing a person to make a statement of a fact which he claims to know by reason of being told by some one else, when that some one else has not come into court and sworn to it, and that does not make it sworn evidence or competent evidence, and every statement of that kind detailed by a witness on the trial should be disregarded by the jury."

It is strenuously urged that the court erred in refusing to instruct the jury to return a verdict for the plaintiff in error, and the rule is invoked which was expressed in *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, where it was said:

"A different rule obtains as to an employé. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence."

The further rule is invoked that:

"It is not sufficient for the employé to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

It was impossible for the jury to be in doubt as to what cause produced the death of Lavender. He was a shipmaster of experience, temporarily employed on the steamer, and was making his first voyage thereon. He had never opened the port of the vessel. He was instructed to go below to open the upper portion of the port consisting of two doors meeting in the center, and to prepare for landing at Olga. The lower half of the port consisted of a heavy gate let into the side of the vessel. He went below, and was seen at the port endeavoring to open it, and then disappeared from view. The port stood open. The gate which closed the lower portion of it had gone out. There was proof tending to show that the gate had been fastened at but one end, and that, if one opened the upper doors, the result would be to precipitate him into the water through the yielding of the unfastened lower gate. The proof is convincing that Lavender fell into the water through the port, and was drowned. There is no room for conjecture as to the cause of the accident, if accident it was, and, if it was not an accident, the only other tenable hypothesis is suicide. There was sufficient in the evidence to disprove the theory of suicide. One strong and convincing circumstance was the fact that the gate went out into

the water at the same time that Lavender did. Another is the fact that Lavender was heard calling for help, and that he seemed to be exerting himself to the last and until he finally sank from cold and exhaustion. We are unable to see how, under the evidence in the case, the court properly could have instructed the jury to find a verdict for the plaintiff in error.

We find no error for which the judgment should be reversed. It is therefore affirmed.

WALKER v. SHASTA POWER CO.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1908.)

No. 1,501.

1. EMINENT DOMAIN—"PUBLIC USE"—ELECTRICITY.

The taking of land for a right of way for a ditch and a flume to convey water used in furnishing electricity to the public generally or to all persons within a county or elsewhere in the state for lighting, power, and heating purposes is a public use within Code Civ. Proc. Cal. § 1238, and Civ. Code, § 1001, authorizing the exercise of the right of eminent domain in behalf of certain public uses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 80.

For other definitions, see Words and Phrases, vol. 6, pp. 5825-5837; vol. 8, p. 7774.]

2. SAME—DESIGNATION OF PUBLIC USE—LEGISLATIVE AUTHORITY.

The Legislature cannot make that a public use which is essentially a private use, and the question whether a use is public in its nature is a judicial question; but generally, where it is uncertain whether the use is of a public or private character, the legislative determination of the question is of persuasive force, and the courts will not disturb it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 165-167.]

3. SAME—ARTICLES OF INCORPORATION—EFFECT.

The question whether the exercise of the right of eminent domain is to be denied a corporation is not to be tested solely by the description of the objects and purposes set forth in the articles of incorporation. It may be governed by evidence aliunde showing the actual purposes in view.

4. SAME—PRIVATE AND PUBLIC USES COMBINED—EFFECT ON RIGHT OF EMINENT DOMAIN.

That a corporation purposes to engage in a private use in addition to serving a public use does not deprive it of the right to exercise eminent domain for the public use.

5. SAME—EVIDENCE—ADMISSIBILITY.

In a proceeding to condemn land for a right of way for a ditch and a flume to conduct water to be used in furnishing electricity to the public, defendant could not show that there was no water subject to appropriation by complainant in the creeks from which it purposed to conduct water to the ditch and the flume, where defendant had not put in issue complainant's allegation that it owned 3,000 inches of water, the denial that complainant owned or was entitled to 3,000 miner's inches or any water to be conducted or that could be conducted by the plaintiff by means of its ditch or flume not putting in issue the allegation that complainant owned the water which it claimed to have appropriated, and where the question of the rights of the other appropriators of the water was not before the court, the owners of such rights not being parties to the suit. The use intended to be subserved being a public one, complain-

ant could, if necessary, institute suits to recondemn the rights of other appropriators.

In Error to the Circuit Court of the United States for the Northern District of California.

For opinion below, see 149 Fed. 568.

The defendant in error, a corporation organized under a general corporation act, assumed in its articles the following, among other powers: "To sell, furnish and deal in electric light, heat and power, and to dispose of such portions thereof, as may not be used by the corporation, to cities, towns, villages, public and private corporations, political subdivisions and individuals; to locate, claim, divert, and otherwise acquire water and water rights under the laws of the state of California, and under the laws of any other state or territory of the United States for any and all purposes; to construct, acquire and maintain ditches, dams, pipes, pipe lines, tunnels, levees, viaducts, bridges, embankments, and excavations, to, across, and from any water course, lake, stream, or waterway, and to sell, lease, grant, or otherwise dispose of so much of the water or water rights thus secured, controlled, or appropriated, as may not be used by this corporation, to other persons or corporations by special contracts or otherwise." Prior to the organization of the defendant in error, Joseph A. Rossi had posted and filed notices of the appropriation of waters of Hat creek, Lost creek, and Bear creek, all in Shasta county, Cal., and thereafter Rossi conveyed his rights in said water to the corporation, and the corporation commenced to construct and continued to construct, ditches, flumes, and other works necessary to divert and appropriate the water. A part of the work was the construction of a ditch and flume more than 12 miles long, the line of which crosses a portion of the lands of the plaintiff in error. The defendant in error obtained from the city of Redding, a city of more than 5,000 inhabitants, and from the county of Shasta, licenses to erect poles, stretch wires, and other appliances for the purpose of conducting and transmitting electricity for power, light, and other necessary and useful purposes, over, along, and upon the streets, alleys, and avenues of the city of Redding, and the roads, bridges, and public highways of Shasta county. It constructed a power house and installed therein machinery sufficient to generate electricity by the use of the water to the extent of more than 2,000 horse power, and constructed a pole line about 27 miles in length for the purpose of transmitting the electricity thus generated to a substation which it had constructed in the city of Redding. In the substation it had installed machinery and had extended pole lines therefrom throughout the city of Redding for the purpose of distributing electricity. It commenced the present suit for the purpose of condemning a right of way for its ditch and flume over the lands of the plaintiff in error. It alleged in the bill that its purpose was to supply by means of electricity and electric power the necessary public needs in the county of Shasta and elsewhere in the state of California for light, heat, and power, and to supply a necessary public use as aforesaid; that it would be impossible to utilize its water for said necessary public use except by taking the same out of Bear creek, and conducting the same, by means of its ditch, along its surveyed and established ditch line, over and across the land of the plaintiff in error, and further alleged that a large part of the public in general and a large proportion of the inhabitants and citizens, residents, householders, and freeholders within the county of Shasta and elsewhere in the state of California, are not supplied with electricity or electric current for heat, light, or power, and the supplying of electricity and electric current for heat, light, and power to the public in general, and to the inhabitants, citizens, residents, householders, and freeholders within the county of Shasta and elsewhere in the state of California, is and was at all of the times therein mentioned a public necessity, and that the right of way over the said land of said defendant T. B. Walker sought to be condemned is necessary for said public use. The answer denied on information and belief that the defendant in error was organized for the purpose set forth in the complaint, and denied upon information and belief that its purpose was "to generate or transmit or furnish electricity or electric current to the public in general or to all inhabitants or per-

sons within the county of Shasta or elsewhere in the state of California for the necessary public use or use of light or power or heat," and alleged that the plaintiff in error "believes, and upon information and belief alleges, that it is the purpose of the corporation to sell electricity and electric current to such persons as the board of directors shall deem proper," etc.; "that it is not the purpose of said plaintiff to furnish electricity or electric current to every individual member of the community in the county of Shasta, or any community, who shall demand or request the delivery thereof, but that said corporation only proposes to deliver electricity and electric current which it does not use itself, and to deliver such portions which it does not use itself only to such persons and in such locality and in such manner as the board of directors of said plaintiff shall deem proper." Upon the issues and evidence the court found as facts, among others, that the defendant in error, immediately after its organization in 1904, acquired the right to divert and use 3,000 inches measured under a four-inch pressure of the waters of Hat creek and other creeks in the county of Shasta, and commenced the construction of its ditches as alleged in the bill, and as set forth in the statement of the facts: "that said plaintiff is not engaged in any private business, nor has it for its own private purposes any use for any of said electricity except such as may be necessary for the heat and light of its said works, which are incidental to the said public use aforesaid; that it is necessary for said plaintiff to conduct water by means of said ditches, flumes, and pipe lines at large expense as above found to its said water house, and to use the said water to operate such machinery for the purpose of supplying the public of said Shasta county as hereinbefore found, and for such public uses as hereinbefore found." The court decreed to the defendant in error a right of way for its ditch across the lands of the plaintiff in error upon payment to him of the sum of \$742.30 and the costs of suit.

The final order of condemnation recites: "It is hereby ordered, adjudged, and decreed that the strip of land hereinafter described being the land described in the complaint herein as sought to be taken by the plaintiff be and the same is hereby finally condemned for the use of plaintiff for a right of way for the ditch described in the complaint herein, and for the purpose of construction, maintenance and operation thereon of said ditch and the running of water therein, and for the purpose of using the same by plaintiff in the construction, maintenance of said ditch, and the running of water across the said land of said defendant in the said ditch, solely for the public use described in said complaint and the findings and judgment heretofore made and entered herein." Upon the trial there was no evidence showing, or tending to show, that the defendant in error was engaged in any private business or intended to engage therein. It offered to prove as part of its case that it did not intend to engage in any private business, and it adduced testimony that it had not erected any works or engaged in any private enterprise to use any portion of the power, light, or heat. On the trial, for the purpose of showing that it had deprived itself of the power to engage in the private enterprise permitted by its articles of incorporation, it offered in evidence amended articles of incorporation which it had adopted since the commencement of the suit, in which it had eliminated from its powers the power to engage in any private enterprise whatever. Objection to such evidence was made on the ground that the amendment was made subsequent to the commencement of the suit, and the objection was sustained. The allegations of the bill that a large part of the public in general, and a large portion of the citizens, residents, householders, and freeholders within the county of Shasta and elsewhere in the state of California, were not supplied with electricity or electric current for light, heat or power, and that the supplying of the same for such purposes to the public in general and to the inhabitants, citizens, etc., within the county of Shasta and elsewhere in the state of California, was at all of the times mentioned a public necessity, was denied in the answer.

Reid & Dozier and A. E. Bolton, for plaintiff in error.

Solinsky & Wehe and Brainard & Kimball, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The question first to be determined is whether the use for which condemnation is sought is a public use. Section 1238 of the Code of Civil Procedure of California makes provision for the exercise of the right of eminent domain in behalf of public uses, and enumerates among other public uses the following:

"Canals, reservoirs, dams, ditches, flumes, aqueducts and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for the supply of mines, quarries, railroads, tramways, mills and factories with electric power; and also for the supplying of electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages and towns; and also for furnishing electricity for lighting, heating or power purposes to individuals or corporations, together with lands, buildings and all other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth."

There can be no doubt that within this provision the furnishing of electricity as it is proposed to be furnished by the defendant in error is a use for which the Legislature intended that the right of eminent domain might be exercised. The purpose of the statute is to remove obstacles in the way of development and progress in the state, and it is in harmony with the Constitution and with section 1001 of the Civil Code which gives to any person, without further legislative action, the power to acquire property for any of the uses specified in section 1238, "either by the consent of the owner or by proceedings had under the provisions of title 7, part 3 of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in said title, is an agent of the state or a person in charge of such use within the meaning of these terms as used in such title."

The Legislature cannot by its enactments make that a public use which is essentially a private use, and the question whether the use is public in its nature is a judicial question to be determined by the courts. But it is the general rule that, where it is uncertain and doubtful whether the use to which the property is proposed to be devoted is of a public or a private character, the legislative determination of the question is of persuasive force, and the courts will not undertake to disturb the same. It has been so held in California. *Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; *In re Madera Irrigation District*, 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; *County of San Mateo v. Coburn*, 130 Cal. 631, 63 Pac. 78, 621. And it has been generally held by the courts that the generation of electric power for distribution and sale to the public on equal terms is a public enterprise, and that water used for that purpose is devoted to a public use. *Light & Power Co. v. Hobbs*, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581; *Hollister v. State*, 9 Idaho, 8, 71 Pac. 541; *Grande Ronde Electrical Co. v. Drake*, 46 Or. 243, 78 Pac. 1031; *In re Niagara L. & O. Power Co. (Sup.)* 97 N. Y. Supp. 853; *Minnesota Canal & Power Co. v. Koochiching*, 97 Minn. 429, 107 N. W. 405. In the case last cited the Supreme Court of Minnesota said:

"Electric lighting is universally recognized as a public enterprise, in aid of which the right of eminent domain may be invoked."

In *Light & Power Co. v. Hobbs*, 72 N. H. 531-535, 58 Atl. 46, 66 L. R. A. 581, the court said:

"Like water, electricity exists in nature in some form or state, and becomes useful as an agency of man's industry only when collected and controlled. It requires large capital to collect, store, and distribute it for general use. The cost depends largely upon the location of the power plant. A water power having a location upon tide water reduces the cost materially. It may happen that the business cannot be inaugurated without the aid of the power of eminent domain, or acquisition of necessary land or rights in land. All these considerations tend to show that the use of land for collecting, storing, and distributing electricity for the purposes of supplying power and heat to all who may desire it is a public use similar in character to the use of land for collecting, storing, and distributing water for public needs—a use that is so manifestly public that it has been seldom questioned, and never denied."

But both private purposes and public uses are contemplated in the articles of incorporation of the defendant in error, as those articles stood at the time of the commencement of the suit. On that ground its power to exercise the right of eminent domain for the promotion of the public purposes is challenged, the contention being that, when such purposes are so blended, the want of power to exercise the right of eminent domain for the private purpose excludes its exercise for any public use. But the question whether the exercise of the right of eminent domain is to be denied or withheld is not to be tested solely by the description of the objects and purposes set forth in the articles of incorporation. It may be governed by evidence aliunde showing the actual purpose in view. *Matter of Niagara Falls & Whirlpool R. Co.*, 108 N. Y. 375, 15 N. E. 429. "The fact that the charter powers of a corporation to which the power of eminent domain has been delegated embrace both private purpose and public use does not deprive it of the right of eminent domain in the promotion of the public use." 15 Cyc. 579; *Lake Koen Nav. I. & R. Co. v. Klein*, 63 Kan. 484, 65 Pac. 684; *Cole v. County Commissioners*, 78 Me. 532, 7 Atl. 397; *Brown v. Gerald*, 100 Me. 351, 61 Atl. 785. Cases are cited which are said to hold the contrary; but they are all cases in which there is absence of proof of the actual purpose of the plaintiff in the condemnation proceedings to sever the public use from the private use, and to exercise the right of eminent domain solely for the former. Thus in *Fallsburg Power & Mfg. Co. v. Alexander*, 101 Va. 98, 43 S. E. 194, 61 L. R. A. 129, 99 Am. St. Rep. 855, the corporation was created by a special act of the General Assembly and given authority to manufacture and generate electrical or other power, light, or heat, and utilize and transmit and distribute the same to any place or places for its own use or for the use of other individuals and corporations. The company proceeded to condemn lands and water rights for that purpose "for the company's use or for the use of other individuals or corporations." The court held that since it had power under its charter to devote only a share, or none at all, of its products to public use, the public could not be said to have such a definite right to the use of its product as to render constitutional the provision giving it the right of eminent domain. Said the court:

"In such a case the private benefit too clearly dominates the public necessity to find constitutional authority for the exercise of the power of eminent domain, and it is the equivalent of taking of private property for a private use."

So in *Berrien Springs Water P. Co. v. Berrien Circuit Judge*, 133 Mich. 48, 94 N. W. 379, 103 Am. St. Rep. 438, the plaintiff in the condemnation suit was incorporated under an act which authorized it to acquire water rights and water for private and public purposes. In its petition for condemnation it alleged that it required certain lands "for the purposes of its incorporation, and that the taking thereof is necessary for the public use and benefit." The court denied the right of condemnation, saying:

"After the water power is erected, though it may be used for a public purpose, relator has the option to use it entirely for private purposes."

But in that case the court sustained the doctrine that land can be taken under the power of eminent domain for a legitimate purpose, even though a private purpose will be thereby incidentally served. In *Gaylord v. Sanitary District*, 204 Ill. 576, 68 N. E. 522, 63 L. R. A. 582, 98 Am. St. Rep. 235, the petitioner in condemnation proceedings alleged in his petition that he was about to build a public gristmill under an act of the Legislature authorizing the condemnation of private property for the purpose of public mills and machinery other than public gristmills, and that he was also about to construct other machinery and operate the mill and other public machinery. The court held that, to constitute a public use such as will justify the taking of private property, the contemplated improvement must be one which the public to some extent will have a right to use, and not one which is merely a benefit to the public, and that authority to condemn private property for public use does not justify the taking of such property for a public and also a private use. Of similar import are *Attorney General v. Eau Claire*, 37 Wis. 400, and *State ex rel. Harris v. Superior Court*, 42 Wash. 660, 85 Pac. 666, 5 L. R. A. (N. S.) 672. In the latter case the testimony was to the effect that the condemnation was sought for the purpose of obtaining additional power, "not only for use in operating the light plant and electric car system, but for the purpose of selling power to the different manufactories and for different purposes." The court held that for all these purposes the petitioner was not entitled to exercise the right of eminent domain, since the use was not a public one. We find no case which holds that the bare fact that a corporation has in enumerating its functions expressed a purpose of engaging in a private enterprise as well as serving a public use shall deprive it of the right to exercise eminent domain for the public use. Not only is there no authority for such a proposition, but there is no reason for it. Why should the fact that the defendant in error here was incorporated under articles giving it the power to serve a private use be an obstacle to its condemnation of property necessary, and which it proposes and proves shall be used exclusively for a public service? The fact that it has such power imposes no greater or additional burden or servitude upon the property which it seeks and proposes to take for the public use only.

On the trial the plaintiff in error offered to prove the rights of others to use for irrigation the waters of Hat creek and Lost creek, and to show that under the appropriation of the defendant in error there was no water subject to appropriation. This evidence was excluded as irrelevant and immaterial, and we find no error therein. In the first place, the plaintiff in error had not put in issue the allegation of the bill that the defendant in error was the owner of 3,000 inches of water. The denial was "that the plaintiff in error is the owner, or ever was the owner of, or entitled to, 3,000 miner's inches or any water or waters which are to be conducted by plaintiff, or can be conducted by plaintiff, by means of its ditch or flume or at all into Bear creek." This did not put in issue the allegation that the defendant in error was the owner of the water which it claimed to have appropriated. Again, if an issue had been raised upon that allegation, the question of the rights of other appropriators of the water was not before the court. The owners of such rights were not parties to the suit. The use intended to be subserved through the condemnation proceedings being a public use, the defendant in error could, if necessary, institute further suits for the condemnation of the rights of other appropriators.

We find no error for which the judgment should be reversed. It is accordingly affirmed.

**ALASKA PAC. RY. & TERMINAL CO. v. COPPER RIVER & N. W. RY.
CO. et al.**

(Circuit Court of Appeals, Ninth Circuit. February 3, 1908.)

No. 1,491.

1. PUBLIC LANDS—RAILROADS—RIGHT OF WAY.

Where, prior to a survey, certain oil claims had been located on the public land in controversy in Alaska, such claims, if valid, withdrew the land from entry, so that a railroad company could not obtain a right of way over the same under Act Cong. May 14, 1898, c. 239, § 2, 30 Stat. 409 (U. S. Comp. St. 1901, p. 1575), granting rights of way to railroad companies over public lands in Alaska, etc.

2. INJUNCTION—PRELIMINARY INJUNCTION—CROSSING RAILROADS.

Where a preliminary injunction was sought to restrain one railroad from crossing another on a trestle at grade, both roads being then in process of construction at a point beyond the crossing, and it appeared that the crossing was no obstruction to the work of the complainant in the further extension of its road, and was of no substantial injury to it at the time the injunction was prayed, the injunction was properly denied pending hearing on the merits, under the rule that a preliminary injunction will never be granted unless from the pressure of an urgent necessity, and to prevent damage of an irreparable character.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 305-307.]

3. APPEAL AND ERROR—DISCRETION—PRELIMINARY INJUNCTION—REVIEW.

The granting or withholding of an injunction pendente lite is ordinarily within the sound discretion of the court to which application is made, the ruling of which will not be reversed on appeal unless there has been an

abuse of discretion evidencing a disregard of the facts or the principles of equity applicable to the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3818-3821.]

Appeal from the District Court of the United States for the First Division of the District of Alaska.

The appellant was the complainant in a bill filed on May 9, 1907, in which it alleged its ownership of a certain tract of ground consisting of 40 acres which it designated "Terminal Tract No. 1 B," situated near Katalla, Alaska, which tract it alleged it had acquired for a railway terminal under the act of Congress of May 14, 1898, c. 289, § 2, 30 Stat. 409 (U. S. Comp. St. 1901, p. 1575), granting rights of way to railroad companies over public lands in Alaska, and the right to take public land for station and terminal purposes. The bill alleged that the appellees were threatening to construct a railroad across said terminal tract, against the protest of the complainant, and prayed for an injunction pendente lite restraining the appellees from entering upon said tract, and from erecting thereon any structure for railroad purposes. On June 5, 1907, the appellees appeared to show cause why such injunction should not be issued. On that day the appellant filed an amended bill alleging, in addition to the averments of the original bill, that it owned a right of way 200 feet in width across said terminal tract No. 1 B, and prayed that the appellees be enjoined from crossing said right of way with the railroad which they were constructing, as well as from crossing the said terminal tract. The appellees answered, and upon the issues presented, and the affidavits and exhibits on behalf of the respective parties, the court below denied the application for an injunction pendente lite. From that order the present appeal is taken.

The appellant was incorporated under the laws of the state of Washington in May, 1905. A certified copy of its articles of incorporation was filed in the office of the Secretary of the District of Alaska on May 17, 1905. A certified copy was also tendered for filing with the Secretary of the Interior, but it was ruled that the same could not be filed for the reason that the articles did not comply with the requirements of the act of Congress. The appellant thereafter executed amended articles of incorporation, and filed the same in the office of the Secretary of the State of Washington on February 24, 1906. A certified copy of the amended articles was filed also in the office of the Secretary of the Interior in April, 1906. The appellant is engaged in constructing a railway from Inner Martin Island on Controller Bay, south of the mouth of Copper river in Alaska, northeasterly to the coal fields near Bering Lake and to other points in the interior of the District of Alaska. In June, July, and August, 1905, the appellant caused a survey to be made of Inner Martin Island, and of tract No. 1 B for a terminal yard, and caused to be made a preliminary survey of the first 14 miles of the right of way of its railroad from Inner Martin Island to the coal fields on Bering Lake. Previous to that time, in the month of December, 1904, one Peter F. Byrne had caused a survey to be made by a United States deputy surveyor, under the soldiers' additional homestead scrip act, of a large portion of the grounds subsequently so designated as terminal tract No. 1 B. This survey was approved by the Surveyor General for the District of Alaska, as of nonmineral ground, and prior to the survey of terminal tract No. 1 B the appellant had purchased from said Byrne a relinquishment of all his rights under the said soldiers' additional homestead scrip survey. But some four or five years previous to this time, it appears that a number of notices of location for oil claims, two of which covered the land in controversy, had been filed with the United States Commissioner for record, and remained of record at the time of the hearing in the court below. The appellee, the Copper River & Northwestern Railway Company, is a corporation organized under the laws of the state of Nevada. In its original articles, Valdez is named as its terminus upon the Pacific Ocean. It was subsequently decided to change its terminus to Palm Point, on Controller Bay, about a mile south and east of the appellant's terminus. It is engaged in

constructing a road from that point northerly along the coast line to the valley of Martin river, and up that river to Copper river, and thence to the copper fields in Copper River Valley. It did not show in the court below evidence that it had filed with the proper officials amendments of its articles, showing such change of terminus, and therefore did not present proof of the right of the appellees to construct a line from Palm Point or across the appellant's line or terminal tract.

Harold Preston, Shackelford & Lyons, and F. M. Brown, for appellant.

W. H. Bogle, Charles P. Spooner, and Winn & Burton, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The record here presents a case of two railroad companies, constructing roads over disputed ground. The appellees, if they build their road from Palm Point, must of necessity cross the terminal tract No. 1 B of the appellant, and also the appellant's road. The record shows that, at the time of the application for the injunction, both companies were actively engaged in construction. The appellees had 500 or 600 men at work and a large amount of supplies on the ground. The appellant had constructed 1,000 feet of piling for its track, across which ran the road of the appellees. The court below found the evidence insufficient to sustain the appellant's claim of title to the land in controversy. Upon a careful consideration of the record, we cannot say that there was error in that conclusion. If the mineral locations made upon the ground in 1901 were valid and subsisting, the appellant had neither title to nor right of way over the land in controversy, for it was not public land. The appellant claims under the act of May 14, 1898, and under the rights acquired through the homestead scrip survey of Byrne, but the latter has not ripened into title, and, as to the former, the statute limits the right of the railroad company to public lands. No steps have been taken to cancel the oil locations.

The appellant contends that the appellees can acquire no right to construct a railroad over the land in controversy, and that its survey is of no avail, for the reason that it had not assumed in its articles of incorporation the right to construct a road from Palm Point; citing *Washington & Idaho Railroad Company v. Osburn*, 160 U. S. 103, 16 Sup. Ct. 219, 40 L. Ed. 346. But the principal question here is not what are the rights of the defendant to construct its railroad. It is, rather, what are the rights of the respective parties in and to the particular tract of land in controversy? Has the appellant the title thereto, and is it vested with the exclusive right of possession? If so, the acts of the appellees will be enjoined on the final hearing, and should now be enjoined if the resulting injury is irreparable. But the appellees claim the right of occupation of the tract by reason of mineral locations made in 1901 and not canceled of record. The appellant answers that the mineral locations are void for want of discovery of oil and for want of annual assessment work. The appellees deny this, and contend that the evidence shows both discovery and assessment work. The court below declined to pass upon the question of title, both because of doubt as to the respective rights of the parties,

and because of the doctrine announced in *Cosmos Exploration Co. v. Grey Eagle Oil Co.*, 190 U. S. 301, 24 Sup. Ct. 860, 47 L. Ed. 1064.

It is to be observed also that there is lack of proof of irreparable injury to the appellant in the proposed construction of the appellees' road. The evidence in the record shows that the appellant has constructed its road from its terminus toward the coal fields at Bering Lake, a short distance past the point where the appellees' road crosses its line; that at that point the track is placed upon a trestle some 15 or 20 feet above the surface of the ground. The appellees' road, also upon a trestle of like height, crosses the appellant's road at grade. Such a crossing of the roads is no obstruction to the work of the appellant in the further extension of its road toward the coal fields, and is no substantial injury to it. The appellees' road would be a substantial obstruction, however, to the use of the terminal tract No. 1 B by the appellant if the latter showed any necessity for the immediate use of the same for the construction of its terminal yards. But no such necessity is shown. By the time when the appellant's road shall be extended to the coal fields, and need shall arise for the occupation of the terminal tract, it is probable that the merits of the whole controversy will have been determined on the final hearing, and the appellant's rights conserved by the final decree. The appellees assert that the articles of the Copper River & Northwestern Railway Company have been so amended as to permit the construction of their road from Palm Point. No proof of this fact was presented in the court below, but, if it be true, they will have the opportunity to establish it in the court below. In the meantime, a temporary injunction such as was prayed for in the court below would work serious, if not irreparable, injury to them. In the light of these considerations, we think the injunction was properly denied.

The office of a preliminary injunction is to preserve the subject of the controversy in its present condition, in order to prevent the perpetration of a wrong, or the doing of an act whereby the subject of the controversy may be materially injured or endangered, until a full investigation of the case may be had. "A preliminary injunction will never be granted unless from the pressure of an urgent necessity. The damage threatened, and which it is legitimate to prevent, during the pendency of the suit, must be, in an equitable point of view, of an irreparable character." 16 Am. & Eng. Enc. of Law, 345. And the rule is well settled that the granting or withholding of an injunction pendente lite ordinarily rests in the sound discretion of the court to which the application is made, and that the ruling thereon is not subject to reversal in an appellate court unless there has been abuse of discretion evidenced by a disregard of the facts or of the principles of equity applicable to the case. *Vogel v. Warsing*, 146 Fed. 949, 77 C. C. A. 199, and cases there cited. The order of the court below is affirmed.

PAULY JAIL BLDG. & MFG. CO. et al. v. JEFFERSON COUNTY.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1908.)

No. 1,473.

1. COUNTIES—ACTIONS—PLEADING—ISSUES—MATTERS TO BE PROVED.

Where, in an action on county warrants given for the construction of certain jail cells and not paid for want of funds, the complaints alleged that the warrants were payable out of a fund raised from the sale of bonds, and that though the money raised from the bonds was authorized to be used for other purposes than for the payment of the courthouse and jail, none of it had been paid out in refunding prior indebtedness, the county having denied its possession of any of the money, it would be presumed that it was paid out for other proper purposes, and hence defendant's admission that it had received the money did not shift the burden of proof to defendant to show what disposition had been made thereof.

2. PLEADING—FORM OF DENIAL—CONSTRUCTION.

A general denial followed by a specific denial of the same fact is improper, and, when pleaded, the general denial may be disregarded, or one of the denials stricken on motion, or defendant may be required to elect on which he will stand.

3. SAME—INCONSISTENT ALLEGATIONS.

In an action on county warrants, payable out of the proceeds of county bonds, a specific denial that defendant had on hand the sum mentioned in the complaint from the proceeds of the sale of the bonds was not inconsistent with a general denial of the allegation that it had not applied any part of such amount to the payment of prior indebtedness of the county.

4. COUNTIES—WARRANTS—SPECIAL FUNDS.

Where county warrants drawn for the construction of jail cells directed the treasurer to pay the payee the sum specified out of county funds not otherwise appropriated, the fact that the warrants also contained the words "for jail cells" did not make them payable from a special fund.

5. SAME—ASSENT OF PAYEE.

Where county warrants for jail cells payable out of funds of the county not otherwise appropriated were accepted by the payee with full knowledge of their terms and of the fact that there were no funds to pay them, the payee would be held to have assented, and agreed to look to the general funds of the county for payment.

6. SAME—"COUNTY WARRANT"—DEFINITION.

A "county warrant," under the statute of Washington, is a promise by the county to pay it when money applicable thereto comes into the treasury, its maturity by analogy to a note being the time when the county treasurer gives notice of his readiness to pay it and stop the running of interest.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, p. 1668.]

7. SAME—RIGHT OF ACTION—CONDITION PRECEDENT—DEMAND AND REFUSAL.

Where county warrants payable out of funds not otherwise appropriated were presented for payment, and stamped "not paid for want of funds," and there had been no refusal to pay out of a fund available therefor, the holders were not entitled to judgment against the county, the claim being liquidated, and the holders being entitled to resort to mandamus to compel payment out of funds applicable thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 256.]

In Error to the Circuit Court of the United States for the Northern Division of the Western District of Washington.

On September 19, 1890, a special election was held by the voters of Jefferson county, state of Washington, whereby it was decided that county bonds in the sum of \$225,000 should be issued to provide money to fund the outstanding warrant indebtedness of the county, and to build a courthouse and jail. Between June 23 and December 20, 1891, the county issued and sold the bonds so authorized for the sum of \$232,341.29. On December 2, 1890, The Pauly Jail Building & Manufacturing Company, one of the plaintiffs in error, entered into a contract with Jefferson county, the defendant in error, by which the former was to construct certain steel cells in the basement of the county courthouse, then in the course of construction, for the sum of \$17,278, payable 10 days after the completion of the work and the acceptance of the same by the board of county commissioners. The contract was performed by the company, and on May 4, 1892, the defendant in error issued to said company its warrants for \$17,278. On the same day all of the warrants were presented to the county treasurer of the defendant in error for payment, and that officer indorsed thereon: "Not paid for want of funds." On November 17, 1905, said warrants were again presented for payment, and were not paid for want of funds. Certain of the bonds were transferred to John H. Rausch. The plaintiffs in error brought actions against the defendant in error to recover judgment on said warrants, and the causes were consolidated in the court below and tried as one action. The cases were tried upon the second amended complaints, in which the foregoing facts were set forth, and in addition thereto it was alleged that, under the law of the state of Washington authorizing the issuance of county bonds, it is provided that the money arising from the sale thereof shall be used only for the purpose for which the bonds are issued, and that of the money received by the defendant in error for the sale of said bonds but \$110,873.40 was expended in the construction of the courthouse, "leaving of the proceeds of the said bonds unexpended the sum of \$121,467.89," and it was alleged "that the defendant county never applied any of the money derived from the sale of said bonds to the payment of the county indebtedness existing when the aforesaid special election was called, nor has it expended or paid out any of the money derived from the sale of said bonds for the purpose for which said bonds were issued, excepting the sum of \$110,873.40 as set out in the eighth paragraph of this complaint, and that the defendant has now in its possession the sum of \$121,467.89 of the money derived from the sale of said bonds." "That the defendant county has never called any of said warrants for payment, but that it has always refused to pay the same on the alleged grounds that it has no funds to pay the same or any part thereof."

The answers contained, among other matters, the following: "That the said courthouse cost the said defendant, including extras and plans and specifications, the sum of \$142,462.30, and said defendant specially denies that it has now on hand the sum of \$121,467.89 of the proceeds of the sale of said bonds, and further denies that it has said sum or any sum whatever on hand derived from the sale of said bonds." Replies were filed denying all new matter alleged in the answers. A jury trial was waived, and the cause was tried before the court. No evidence was offered to sustain the allegation that the defendant in error had on hand the sum of \$121,467.89 or any sum of the proceeds of the sales of the bonds, and the court among other findings found that at the times of the presentation of said warrants to the county treasurer on May 4, 1892, and November 17, 1905, and at the commencement of the action and at all times since, the treasurer of said county did not have in his custody or control any of the money derived from the sale of said bonds, and that none of said warrants have ever been called for payment. The court entered a judgment of nonsuit, "for the reason that plaintiff's evidence fails to show that there is in the possession or under the control of the said defendant any money or moneys derived from the sale of said bonds, or any money in the fund upon which the warrants in said suit are drawn to pay said warrants or any of them."

John P. Judson, for plaintiffs in error.

U. D. Gnagey, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). It is contended that the trial court erred in granting the nonsuit, for the reason that the money derived from the sale of the county bonds was a trust fund to which the plaintiffs in error had the right to look for the payment of their warrants, and which could be used only for the purpose for which the bonds were issued, and that the admission of the defendant in error that it received the money shifted the burden of proof as to the disposition made of the same, and bound the defendant in error to account therefor. We do not understand that by the pleadings the burden of proof was ever shifted. The money raised upon the bonds was authorized to be used for other purposes than for the payment for the courthouse and the jail. It was authorized to be used also in payment of outstanding warrants against the county. The defendant in error, having denied its possession of any of the money, the presumption would arise that it paid out the whole thereof for the purposes for which the bonds were authorized to be issued. The complaints, it is true, alleged that none of the money was paid out in refunding prior indebtedness, but the answers denied those averments, and no proof to the contrary was offered on the trial. The plaintiffs in error question the sufficiency of the denials on the ground that there is in each answer a general denial of the allegation combined with a specific denial that the defendant in error now has on hand the sum of \$121,467.89. It is true that such a combination of denials is improper, and that, if an answer contain a general denial and a specific denial of the same fact, the general denial may be disregarded (*Philip Schneider Brewing Co. v. American Ice Mach. Co.*, 77 Fed. 138, 23 C. C. A. 89) or one of the denials may be struck out on motion (*Dennison v. Dennison*, 9 How. Prac. [N. Y.] 246) or the defendant may be required to elect upon which he will stand (*School District v. Holmes*, 16 Neb. 486, 20 N. W. 721). But here the specific denial that the defendant in error has on hand the sum mentioned is not at all inconsistent with the general denial of the allegation that it had not applied any thereof to the payment of the prior indebtedness of the county. The theory of Code pleading is that there shall be brought to the attention of the court the real controversy, and that the parties shall be required to show in their pleadings wherein they agree and wherein they disagree. This was sufficiently done in the present case, and the plaintiffs in error, after going to trial on issues as made, cannot now raise the objection that no denial was made to the allegation that no part of the money raised upon the bonds was applied to the former indebtedness of the county.

But there is other ground on which the judgment is sustainable. It is to be observed that the warrants were not drawn on the special fund realized upon the sale of the bonds. The form of the warrants was as follows:

"State of Washington.

"The treasurer of the county of Jefferson will pay to the Pauly Jail Bldg. & Mnfg. Co., or order, the sum of one thousand dollars, out of the county funds not otherwise appropriated. Witness my hand and official seal this 4th day of May, 1892, for jail cells. James Seavey, Auditor of Jefferson County, Wash., By Newton W. O'Rear, Dep."

The words "for jail cells" do not make the instruments special fund warrants. Those words are appended evidently for the purpose of specifying the debt for the payment of which the warrants were drawn. They do not control the clearly expressed provision that the warrants are payable out of county funds not otherwise appropriated, and *Jones v. Portland*, 35 Or. 512, 58 Pac. 657, cited by the plaintiffs in error, is not an authority to the contrary. The warrant in that case was not made payable out of county funds not otherwise appropriated. The decision of the court was that it was payable out of a special fund, because it contained the recital that it was issued to pay for material furnished for a specific improvement, and because there was no claim that the city intended to pay for such improvement out of any fund except the one to be raised by assessment upon the abutting property. In addition to the expressed terms of the warrants in the present case, the time when, and the circumstances under which, they were issued all tend to indicate that they were not warrants upon a special fund. The money upon the bonds was obtained by the county prior to December 30, 1891. On May 4, 1892, the warrants were issued, and on that date were presented to the treasurer of the county, and indorsed by him: "Not paid for want of funds." Under those circumstances they were accepted by the Pauly Jail Bldg. & Mfg. Co., and having been so accepted, with full knowledge of their expressed terms and of the fact that there were no funds to pay them, the payee must be held to have assented and agreed to look to the general funds of the county for their payment.

The plaintiffs in error cite and rely upon *Potter v. New Whatcom*, 20 Wash. 589, 56 Pac. 394, 72 Am. St. Rep. 135, and *New Orleans v. Warner*, 175 U. S. 120, 20 Sup. Ct. 44, 44 L. Ed. 96. In the first of these cases, the warrant had been drawn on a special street improvement fund. A portion of the fund had been collected by the city treasurer and converted to his own use. The court held that the money paid in on the special assessment was a trust fund which the city was under obligation to preserve, and that it was liable therefore for the payment of the warrant. The object of the suit was to convert the special warrant into a general liability, the city denying all liability. The decision has no bearing upon the present case, for the reason that here the warrants sued on were not drawn against a special fund, and the city had acknowledged its general liability, and had issued its warrants for the same. Nor does the decision in *New Orleans v. Warner* add any light to the questions here involved. In that case the warrant sued upon was given for the purchase of a drainage plant, for which the city had promised to pay out of a fund to be created by drainage assessments. The court held that the city could not abandon its duty to create that fund and take steps to prevent the further collection of such assessments, and plead in defense to the warrants that it had, prior to the purchase of the drainage plant, paid off obligations theretofore created against the fund. It was the decree of the court that an account be taken of the drainage assessment and that there be a pro rata decree against the city if such fund were not sufficient to pay all the warrant holders in full. But it is urged that the plaintiffs in error were entitled to a judgment against the defendant

in error to the end that thereafter mandamus might issue to compel the payment thereof. But this argument ignores the nature of the liability of the defendant upon its warrants under the laws of the state of Washington. In *Cloud v. Town of Sumas*, 9 Wash. 399, 37 Pac. 305, the court said:

"If this action can be maintained upon the warrants which have been issued, then a like suit might be maintained upon the warrants issued in satisfaction of this judgment, and so on without limit. Clearly the law contemplates no such proceedings. The plaintiff already has the town's evidences of indebtedness, issued to him in regular form, and, if the treasurer should refuse to pay them in their regular order, he can resort to a mandamus to compel such payment."

But there has been no refusal to pay the warrants involved in the present suit, nor is any such refusal alleged in the complaints. There can be no refusal until there is a fund available, and the complaints alleged and the trial court found, that since the issuance of the warrants, there has been no fund out of which they could have been paid, and that they have not been paid, only for want of funds. In *Savings Bank & Trust Co. v. Gelbach*, 8 Wash. 497, 36 Pac. 467, it was held that under the statutes of Washington governing the presentation and allowance of claims against counties, and the issuance of warrants for the sums allowed, it was contemplated that the transaction between the claimant and the county was to be merged in the warrant and settled by it "just as fully as is a store account between a merchant and his customer, when the latter gives his note for the balance found due upon the former's books." Said the court:

"A warrant, under our statutes, is a promise to pay it, in its order of issue, when money applicable to it comes into the treasury, and its maturity, by analogy to a note, is the time when the treasurer gives notice of his readiness to pay it, and stops the interest. Respondent says that if a warrant is considered as a contract, it is one which becomes due instantly upon presentation and therefore the interest upon it, like that upon a past due note, is only allowed as damages. But there is this difference, a note can be sued upon, judgment taken, execution issued, and property levied upon and sold, and the debt paid, but no action lies either upon a warrant or the original debt."

In the light of these authorities, we see no escape from the conclusion that the defendant in error was entitled to a nonsuit. The judgment is affirmed.

SHANNON v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1908.)

No. 1,489.

1. WOODS AND FORESTS—RESERVATIONS—GRAZING RIGHTS.

Where defendant drove large bands of cattle into a 320-acre pasture which was inclosed on three sides, but open on the side toward a public forest reserve, knowing that there was no water in the pasture, and that it was insufficient to sustain the cattle, and that they must, of necessity, drift onto the reserve for pasture and water, defendant could not claim freedom from responsibility for the cattle trespassing on the reserve because he at no time drove them there, and because the reserve was not inclosed.

2. SAME—IMPLIED LICENSE OF PASTURE.

The creation of a forest reserve severs the reserved land from the public domain, and appropriates it to public use so that it is no longer subject to the implied license to pasture on public lands.

3. SAME—USE—RULES—REASONABLENESS.

The rules promulgated by the Secretary of the Interior regulating the number of cattle and other live stock that may be pastured on a forest reserve, and the manner in which the owners may obtain permission to use the reservation for that purpose, are reasonable and within the power granted by Act Cong. June 4, 1897, c. 2, 30 Stat. 34 (U. S. Comp. St. 1901, p. 1542), giving the Secretary of the Interior power to make rules and regulations, and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use, and to preserve the forests from destruction.

4. PUBLIC LANDS—CONGRESSIONAL POWER—STATE LEGISLATION.

The federal Constitution delegates to Congress the general power absolutely and without limitation to dispose of and make all needful rules and regulations concerning the public domain independent of the locality of the land, whether situated in a state or territory, the exercise of which power cannot be restricted in any degree by state legislation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 7.]

5. SAME—RELINQUISHMENT—CONGRESSIONAL POWER.

Congress had no power to relinquish any of its jurisdiction over the public domain by a compact with the state of Montana on admission of the state into the Union, nor had the state any power to reserve any such control.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 5-7.]

6. SAME—STATE STATUTES—STOCK AND FENCE LAWS.

Public lands in the state of Montana were not subject to the stock and fence laws of the state which were applicable only to lands subject to the state's dominion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, §§ 5-7.]

7. PUBLIC LANDS—GOVERNMENTAL CONTROL—ACTIONS.

Where the United States brought suit to restrain the trespass of defendant's cattle on a forest reserve, the fact that in such suit it acted in its proprietary capacity, and was subject to the ordinary rules of pleading, practice, and laws applicable to the case, did not operate as a waiver of any of its sovereign rights to the land sought to be protected.

8. INJUNCTION—DEFENSES—BURDEN ON DEFENDANT.

It was no defense to an injunction restraining defendant's use of a United States forest reserve as a pasture that its issuance would impose a grievous burden on him to restrain the cattle in his adjoining close, it also appearing that he could relieve himself of such burden by restoring a fence on one side thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 22.]

Appeal from the Circuit Court of the United States for the District of Montana.

For opinion below, see 151 Fed. 863.

The appellant was the defendant in a suit brought by the United States to enjoin him from driving, conducting, or causing or permitting to be driven or conducted, his live stock on the Little Belt Mountains Forest Reserve, and permitting the same to remain there. The bill alleged that during the month of December, 1904, and at divers times prior thereto, the appellant "wrongfully and unlawfully, and without right or authority, and without the consent and against the wishes of the complainant, the United States of America, and its officers and agents, and without having obtained a permit from the

Secretary of the Interior or the Commissioner of the General Land Office or any officer or agent of complainant, and in violation of law, and in utter disregard of the rules and regulations of the Secretary of the Interior, did drive and conduct, and cause to be driven and conducted, and permitted, suffered, and allowed to go onto and upon the said reserve, three hundred head of cattle," and the bill proceeded to allege that said acts would be continued unless enjoined, and would result in permanent and irreparable damage and injury to said reserve and be destructive of the objects for which the reserve was created. Upon the filing of the bill, a citation was issued requiring the appellant to show cause why an injunction pendente lite should not issue against him. On the hearing a temporary injunction was ordered as prayed for. From that order the present appeal is taken.

The Little Belt Mountains Forest Reserve was created by the proclamation of the President on August 16, 1902. The appellant is in the possession of a tract of 320 acres, which adjoins that part of the reserve known as Lone Tree Park, of which 320 acres he acquired 160 acres under the homestead law, and the remaining 160 acres he holds by a lease from one Peterson, the owner who acquired the same under the desert land act. The grazing privileges on the reserve are divided into districts. Lone Tree Park is in District No. 4. It contains about 1,000 acres. On September 3, 1902, shortly after the reserve had been established, the appellant obtained his lease of Peterson's 160 acres. As soon as he had obtained the lease, he turned from 3,000 to 3,500 head of sheep into the 320-acre tract, and later took them out and turned in cattle. When the appellant leased the land from Peterson, Peterson's land and his own were inclosed, but the appellant made openings in the Peterson fence on the side toward the reservation, for the purpose of letting stock through on the reserve. The evidence shows that the fence was down in 7 places, and that the gaps were from 30 to 90 feet wide. In some places the wires were weighted down with poles, in others with rocks. In other places the wires were raised, and placed on top of posts, so as to enable the stock to pass underneath. The evidence shows, moreover, that if the fence were maintained in good condition, stock could not obtain access to Lone Tree Park, because of the natural barriers which surround it. Every year since 1902, the appellant has thus grazed his cattle upon the reserve, without any permit, and has disregarded the rules governing the use of the reserve, and ignored the notices to keep his cattle off the reserve, given him by the forest ranger. The evidence shows that the appellant's tract of 320 acres would not furnish pasture to more than 50 head of cattle, and that there is no water on it, and that he would turn the cattle into the inclosure, and leave them there to drift over onto the reserve where there was pasture and water.

Ransom Cooper, for appellant.

Carl Rasch, U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The appellant denies that he has at any time driven his cattle upon the reserve, and asserts that if they went there, they did so of their own accord, the reserve not being inclosed by the United States, and that he is not accountable for the acts of the cattle in straying thereupon. We do not so regard the evidence, and we think the injunction issued by the court below may well be sustained on the ground that the evidence shows that the appellant drove his cattle upon the reserve. His home ranch was some 6 to 10 miles distant from the 320 acres inclosed near the reserve. He drove large bands of cattle within the 320 acres, which was inclosed on three sides, but open on the side toward the reserve, and left them there. Of course he knew that they would not and could not remain in the inclosure, for there was no

water there, nor sufficient pasture for so large a herd. They did as he evidently expected them to do. They went through the convenient openings which he had made in his fence for that purpose. In *Lazarus v. Phelps*, 152 U. S. 81-85, 14 Sup. Ct. 477, 478, 38 L. Ed. 363, the court said:

"So, if he lease a section of land, adjoining an uninclosed section of another, and stock his own section with a greater number of cattle than it could properly support, so that, in order to obtain the proper amount of grass, they would be forced to stray over upon the adjoining section, the duty to make compensation would be as plain as though the cattle had been driven there in the first instance. The ordinary rule that a man is bound to contemplate the natural and probable consequences of his own act would apply in such a case."

Counsel for the appellant seek support for their contention in the implied license to pasture on public lands, growing out of the custom by which such use has been permitted from the beginning of the government, and in the decision in *Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618, in which the court recognized such license to use the public lands where they are left open and uninclosed, "and no act of the government forbids their use." But the lands included in a forest reservation are no longer public lands within the purport of that decision, and the act of the government does forbid their use. The creation of such a reservation severs the reserved land from the public domain, disposes of the same, and appropriates it to a public use. *Wilcox v. McConnell*, 13 Pet. 498, 10 L. Ed. 264. In pursuance of its policy of reserving for the public welfare, public lands on which is growing timber or undergrowth, for the preservation of the timber and the water supply, as provided in the act of March 3, 1891, c. 561, 26 Stat. 1103 (U. S. Comp. St. 1901, p. 1537), and, in order to make that act more effective, Congress passed the act of June 4, 1897, c. 2, 30 Stat. 34 (U. S. Comp. St. 1901, p. 1542), whereby it vested in the Secretary of the Interior the power to "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction." It was intended that this statute should be effective, and accomplish the results for which it was enacted. In pursuance of that authority, the Secretary of the Interior has promulgated rules regulating the number of cattle and other live stock that may pasture on the reservation, and the manner in which the owners thereof may obtain permission to use the reservation for that purpose. There can be no doubt that the rules are reasonable and are within the power so granted. In *Dastervignes v. United States*, 122 Fed. 30, 34, 58 C. C. A. 346, 350, this court said:

"Rule 13, promulgated by the Secretary of the Interior, is in accord with the provisions of the act of Congress, and in our opinion was a valid and legitimate exercise of the authority delegated to him to make such rules and regulations as would insure the objects of such reservations. The Secretary, in adopting this rule, acted simply as the arm that carries out the legislative will. He did not invade any of the functions of Congress. He did not make any law, but he exercised the authority given to him, and made rules to preserve the forests on the reserves from destruction. Such rules, within constitutional limits, have the force and effect of law, and it is the duty of courts

to protect and enforce them, in order to uphold the law as enacted by Congress."

But the appellant contends that he was not bound to maintain a fence between his land and the government reservation, nor to keep the fence that was there in repair, that he had the right to destroy or remove a fence which was his own property, and that it was for the appellee, if it desired to exclude live stock from the reservation, to inclose the same, or to take the necessary steps under the statutes of Montana to require adjacent proprietors to join in a division fence, and cites statutes of that state from which it appears that the Legislature has in substance declared that cattle may run at large in Montana, and that all owners who neglect to fence their lands against such stock shall be without remedy against the owners of animals which may trespass thereon, and argues that those laws are binding upon the United States as a landowner to the same extent that they are binding upon the owners of other lands situated within the state, and that the government, although in some positions and under certain defined conditions is a sovereign, it is, nevertheless, in the situation here presented, a mere private landowner, having the same rights, and no others, which are enjoyed by other landowners.

The federal Constitution delegates to Congress, absolutely and without limitations, the general power to dispose of and make all needful rules and regulations concerning the public domain, and this, independently of the locality of the public land, whether it be situated in a state or in a territory. *Irvine v. Marshall*, 20 How. 558, 15 L. Ed. 994; *Jourdan v. Barrett*, 4 How. 169, 11 L. Ed. 924; *United States v. Gratiot*, 14 Pet. 526, 538, 10 L. Ed. 573; *Gibson v. Chouteau*, 13 Wall. 99, 20 L. Ed. 534. The exercise of that power cannot be restricted or embarrassed in any degree by state legislation. This is the effect of the constitutional provision, unaided by the special provision usually incorporated in the compact by which the states are admitted into the Union. The provision in the Constitution of Montana, under which that state was admitted, declares "that the people of the proposed state of Montana do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof." The appellant contends that the portion of the ordinance just quoted is limited by the remainder thereof which follows:

"And to all lands lying within said limits owned or held by any Indian or Indian tribes, and until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."

It is argued that from this latter provision, expressly acknowledging that the Indian land shall remain under the absolute jurisdiction and control of Congress, it was not the intention that other lands should be subject to such jurisdiction and control. But it is wholly unnecessary to enter into a discussion of the construction of this provision of the Constitution of the state of Montana. Congress had not the power to relinquish any of its jurisdiction over the public domain by any compact with that state, nor had that state the power to reserve any such control.

It is true that in *Pollard's Lessee v. Hagan et al.*, 3 How. 212-223, 11 L. Ed. 565, concerning the powers vested in the state of Alabama on her admission into the Union, the following language was used in the opinion of the majority of the court:

"Nothing remained to the United States according to the terms of the agreement, but the public lands. And if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative; because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a state or elsewhere, except in the cases in which it is expressly granted."

But the doctrine so announced that the United States has no general power to take lands within the boundaries of a state by the exercise of the right of eminent domain was expressly denied in the subsequent decision in *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449, and in *Gibson v. Chouteau*, 13 Wall. 92, 99, 20 L. Ed. 534, the court said:

"As legislation of a state can only apply to persons and things over which the state has jurisdiction, the United States are also necessarily excluded from the operation of such statutes. With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions and the mode of transferring this property or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise."

In *Camfield v. United States*, 167 U. S. 519, 525, 17 Sup. Ct. 864, 867, 42 L. Ed. 260, the court said:

"The general government doubtless has a power over its own property, analogous to the police power of the several states, and the extent to which it may go in the exercise of such power, is measured by the exigencies of the particular case. * * * While we do not undertake to say that Congress has the unlimited power to legislate against nuisances with a state which it would have within a territory, we do not think the admission of a territory as a state deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of state legislation."

In the light of these decisions, it is clear that the state of Montana had no dominion over the public lands lying within its borders, and no power to enact legislation directly or indirectly affecting the same. It could not give to the people of that state the right to pasture cattle upon the public domain, or in any way to use the same. Its own laws in regard to fencing and pasturing cattle at large must be held to apply only to land subject to its own dominion. No one within the state can claim any right in the public land by virtue of such a statute. The United States have the unlimited right to control the occupation of the public lands, and no obligation to fence those lands, or to join with others in fencing them for the purpose of protecting its rights can be imposed on it by a state. The rights given by the state statutes to the subjects of the state extend only to the lands of the state. They end at the borders of the government lands. At that border the laws of the United States intervene, and it is within their province to forbid

trespass. Such laws being within the power of Congress, it is not necessary to discuss the question whether it is sovereign power or police power, or what may be its nature, for there is no power vested in the state which can embarrass or interfere with its exercise.

The appellant makes the further point that a court of equity cannot recognize any sovereign right or power in a suitor appearing at its bar, and that the United States, having voluntarily come into court in its proprietary capacity as a landowner, seeking a remedy, must ask and receive equity upon the same terms and conditions that any private person or corporation may. We may concede this to be true. When the United States consents to be sued in a civil court, or resorts thereto for the protection of government property, or redress for injury to the same, it becomes subject to the rules of pleading, practice, and law applicable to the case. But it does not and cannot waive any of its rights in the subject of the controversy, and those rights must be protected by the court. The government does not appear here in a sovereign capacity or otherwise than as other suitors in a court of equity. The question for adjudication is, what are its rights under the averments set forth in the bill, and has the Legislature of Montana the power to enact legislation which shall affect the public lands within the borders of that state, or interfere with the right of the government to protect those lands? In *Cotton v. United States*, 11 How. 229, 13 L. Ed. 675, the court said:

"Although, as a sovereign, the United States may not be sued, yet as a corporation or body politic, they may bring suits to enforce their contracts and protect their property in the state courts or in their own tribunals administering the same laws."

The appellant argues that the maintenance of the injunction will impose a grievous burden upon him. But that objection is answered in the *Camfield Case*, in which the court said:

"The inconvenience, or even damage, to the individual proprietor, does not authorize an act which is in its nature a purpresture of government lands."

And, besides, the appellant may relieve himself of the grievous burden by restoring the Peterson fence.

The order of the Circuit Court is affirmed.

THE ROBERT DOLLAR.

THE TIGER.

(Circuit Court of Appeals, Ninth Circuit. December 2, 1907.)

No. 1,413.

COLLISION—STEAM VESSELS CROSSING—CONTRIBUTORY FAULT.

A steamship navigating San Francisco Bay on a bright moonlight night after exchanging crossing signals of one whistle with a tug with a tow approaching her course ahead from her port side, being the privileged vessel under article 19 of the Inland Navigation Rules, Act June 7, 1897, c. 4, § 1, 30 Stat. 101 (U. S. Comp. St. 1901, p. 2883), was required by article 21 to keep her course and speed, and where she continued porting her helm, and although her master was watching the tug and knew that it did not port in compliance with the signal, and was uncertain as to its intended course, failed to slow down and signal such fact as required by

rule 3 of the pilot rules, she is chargeable with contributory fault for a collision with the tow, although the initial fault was that of the tug.

Appeal from the District Court of the United States for the Northern District of California.

Page, McCutchen & Knight, for appellants.

F. R. Wall and Walter H. Robinson, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

ROSS, Circuit Judge. We think this a plain case. The collision which was the subject of the action occurred between the steamer Robert Dollar and a laden barge at the time in tow of the tug Tiger, on the Bay of San Francisco, between 12 and 1 o'clock of a perfectly bright night—the moon being nearly full. There was a strong ebb tide flowing at the time. The tug was confessedly at fault in more than one particular—first, in not having a lookout; second, in not having any light on the barge; third, in not porting her helm and going to starboard in accordance with the single blast that she gave. The real question in the case is whether the Robert Dollar was also at fault as was held by the court below.

It appears that the steamer left her berth on the northerly side of Steuart Street Wharf at 12:45 a. m. with a cargo for a northern port, and, after turning, headed out into the bay with helm amidships, and moving under a slow bell. About the same time that the Robert Dollar started, the steamer Harold Dollar left her berth on the southerly side of the same wharf, and proceeded out into the bay on the starboard side of the Robert Dollar. The captain of the latter was on the open bridge of that vessel, with the first officer and two men on the forecastle head. "The first officer," said the captain in his testimony, "had instructions from me to keep a good lookout. The two men were up there with him ready to lower the yard down when we got clear of the docks, as we do, but not before we get clear of the docks." The men started to lower the yard under the instruction of the first officer after the steamer had cleared Harrison Street Wharf and before the collision. When the Robert Dollar had cleared the Steuart Street Wharf and was about opposite Harrison Street Wharf, her captain saw two bright lights, one above the other, about half a mile distant and about four points off the Robert Dollar's port bow. He knew that they were the lights of a tug, and with his night glasses "looked plainly to see in what position they were." On leaving the dock he had given the customary "one long whistle" to indicate that his steamer was going out, and when about 1,000 yards from the wharf he heard one whistle from the tug Tiger and answered with one. The testimony of the captain of the Robert Dollar is to the effect that at the time the Tiger gave the one whistle she was from 1,000 to 2,000 yards from his steamer, and the testimony of the captain of the Harold Dollar is that the two vessels in question were then about a third of a mile apart. It is certain that they were a long distance apart, and as the night was so bright and clear, according to the testimony of the captain of the Robert Dollar himself, that he could see all over the bay, and as he further testified that with his night glasses

he steadily watched the movements of the tug and saw that her course was not changed, surely good seamanship on his part should have prevented the collision, notwithstanding the clear and conceded faults on the part of the tug. Since the latter had the Robert Dollar on its starboard side, the rule of the road imposed upon the tug the duty of keeping out of the way of the steamer, and upon the latter the duty of keeping her course and speed. Articles 19 and 21 of Act June 7, 1897, c. 4, 30 Stat. 101 (U. S. Comp. St. 1901, p. 2883); Rule 2 of Supervising Inspectors. That the Robert Dollar did not keep her course is distinctly and repeatedly stated in the testimony of her captain. The fact that he continually ported the helm of the steamer and threw her further to the starboard, from the time the tug gave her one whistle until the danger of collision became immediate and imminent, thinking that in view of the condition of the tide such action would be more apt to avoid the tug, does not change the fact that he violated the rule of the road which required him to keep his course. And since the case shows that the collision barely occurred at it was, it seems highly probable that but for the deviation of the course of the steamer by her captain the collision would not have occurred, notwithstanding the gross faults of the tug. Moreover, it clearly appears from the testimony of the captain of the Robert Dollar that the two vessels were gradually coming together and that notwithstanding the tug had signaled that she would port her helm so as to cross the stern of the steamer, it had not in fact changed its course, for he still saw the two perpendicular lights, and could not see either the red or green light of the tug. During all of this time the captain of the steamer, according to his own testimony, was uncertain as to the course the tug would take. He said: "I expected him (the captain of the tug) to turn at any moment. I knew he was not turning. I was watching him closely with my glass, I could see the barge but not the tug. I could see they were coming close together." Notwithstanding this, the captain of the steamer gave no indication by whistle or otherwise of his uncertainty as to the course or intention of the tug, but continued to deviate from his own course, in further violation of rule 3 of the pilot rules, which provides, among other things, as follows:

"If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerageway until the proper signals are given, answered and understood, or until the vessels shall have passed each other."

It is unnecessary to decide or consider whether there was still other and further fault upon the part of the steamer, as is contended on behalf of the libellant and intervener, as, for the reasons above stated, we are of opinion that the court below was clearly right in finding both vessels in fault.

Accordingly, the judgment is affirmed.

Since the foregoing opinion was prepared, the proctors for the appellant have called our attention to the recent case of *Owners of the*

Albano v. Allan Line Steamship Company, Ltd., decided by the Privy Council of England on appeal from the Supreme Court of Canada (Maritime Law Cases, New Series, October, 1907, 365), in which case it appeared that two steamships—the *Parisian* and the *Albano*—were approaching each other on courses which converged almost at right angles at the point where the collision took place, which point was about the place where each of the vessels expected to pick up a pilot.

The case made on behalf of the owners of the *Parisian*, as stated by the court, was as follows: The *Parisian* was a screw steamship of 3,385 tons net register, and 440 ft. in length, belonging to the Allan Line Steamship Company, Limited, and, whilst bound from Liverpool with passengers and general cargo, was proceeding towards Halifax Harbor on the afternoon of the 25th March, 1905, to pick up a pilot and proceed under his charge into Halifax. The weather was fine and clear, the sea calm, the wind southerly and very light, and there was no perceptible tide. Shortly before 4:40 p. m. the *Parisian* was steering N. W. $\frac{3}{4}$ N. magnetic, and, with engines working at full speed, was making about 14 knots. She was coming in along the western shore in the ordinary and usual way to the pilot station, and was flying flags for a pilot. A good lookout was being kept on board of her. At about 4:40 p. m. those on board of her saw the pilot cutter at the pilot station, just outside the entrance to the harbor. The engines were accordingly rung "stand by" at 4:52, at 4:57 they were reduced at half speed, and 4:58 they were slowed, and at 4:59 they were stopped and remained stopped until 5:6, and the helm was ported a little to bring the *Parisian's* head more on to the pilot cutter. After the engines were stopped the *Parisian* quickly lost headway, and a row boat accordingly left the cutter with a pilot on board for the *Parisian*, and was rowed to her. The *Parisian* was then lying practically stopped in the water with her head about N. by W. magnetic. When the row boat came along the starboard side of the *Parisian* a rope was thrown to her, and the pilot, at about 5:6 was just about to step onto the ladder, which had been put over side for him, to come on board. Whilst the *Parisian* was thus engaged the steamship *Albano*, after mistaking her course for Halifax Harbor and running too far to the eastward on a north by easterly course, had turned around and was approaching the harbor on a westerly and southerly course. Those on board the *Parisian* first saw the smoke from the funnel of *Albano* close to the northeast land, and at 4:45 made out her hull about $5\frac{3}{4}$ miles distant and more to the westward. The *Albano* afterwards approached on the starboard side of the *Parisian* with the *Parisian* and the pilot cutter and the row boat in full view. At about 5:6 p. m., after sounding three short blasts on her whistle, she came on at a high rate of speed, heading for the starboard side of the *Parisian* about amidships, and making a collision unavoidable. The *Parisian*, to avoid being struck in the engine room, promptly put her engines full speed ahead, and about half a minute later was struck by the stem of the *Albano* a very heavy blow on the starboard side aft. The vessels met at about a right angle, and the *Parisian* was cut into so deeply that to avoid sinking in deep water she had to run into Halifax Harbor, where she immediately sank.

The case made on behalf of the owners of the Albano was that the Albano, a screw steamship of 2,423 tons net register, whilst on a voyage from Hamburg to Halifax, was, about 20 minutes before the collision, standing across from the eastward on a course of W. S. W. $\frac{3}{4}$ W. magnetic, towards the pilot station at the entrance to Halifax Harbor, and with engines working at full speed was making about 9 knots. The weather was fine and clear, the wind a moderate southerly breeze, and the tide was flood setting towards the harbor at less than half a knot per hour. In these circumstances those on board the Albano saw the Parisian coming up from the south seven or eight miles distant, and about six points on the port bow. The course was afterwards altered to W. $\frac{1}{4}$ S. for the pilot cutter, and as the Albano approached it the engines were rung "stand by" and afterwards reduced to half speed and slow. When the Albano was distant about five lengths from the Parisian immediate danger of collision first appeared to those on board the Albano, and she at once stopped and reversed her engines full speed, and at the same instant sounded three short blasts of her whistle. The rudder was kept amidships and she kept her course with diminishing momentum. The engines worked full speed astern for two minutes before and up to the time of collision, and the Albano at the time of the collision was almost dead in the water, and the starboard side of the Parisian came in contact with the stem of the Albano.

The regulations in force in the waters where the collision took place, so far as applicable to the case, were as follows:

"Art. 19. When two steam vessels are crossing so as to involve risk of collision the vessel which has the other on her own starboard side shall keep out of the way of the other."

"Art. 21. Whereby any of these rules one of two vessels is to keep out of the way the other shall keep her course and speed."

"Note.—When in consequence of thick weather or other causes such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision."

"Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."

"Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed, or stop or reverse."

"Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

The judgment of their Lordships was that although the Parisian arrived at the point of collision first, and was there almost without motion, the consideration of the situation should be carried back to the time when the two vessels were approaching the spot where the collision took place and the controlling fact considered that "they were, in fact, converging on a spot on courses and at speeds which would probably bring them to that spot so as to present a danger of collision when they reached it, which each of them would do in the course of her navigation," in which circumstances the vessels were vessels crossing so as to involve risk of collision, and that articles 19, 22, and 23 were applicable. It was therefore held that it was the duty of the

Parisian to have kept out of the way of the Albano. But the court also held that the Albano was also bound to comply with article 21, "and to keep her course and speed until she found herself so close to the Parisian that the collision could not be avoided by the action of the latter vessel alone." Upon the facts of the case, however, the Albano was held without blame, the court saying, among other things:

"It must always be a matter of some difficulty for the master of a vessel which has to keep her course and speed with regard to another vessel which has to keep out of her way to determine when the time has arrived for him to take action, for if he act too soon he may disconcert any action which the other vessel may be about to take to avoid his vessel, and might be blamed for so doing, and yet the time may come at which he must take action. Therefore he must keep his course and speed up to some point and then act, but the precise point must necessarily be difficult to determine, and some little latitude has to be allowed to the master in determining this."

In conclusion, the court observed:

"That the regulations are the outcome of experience and of conferences held by representatives of the maritime nations, and if firmly acted on and applied are more likely to obviate the doubts and difficulties by which those navigating vessels may be assailed—for instance, in cases similar to the present case, which may not infrequently arise where vessels are making for the entrance of a port at the same time—than if the actions of those in charge are to be guided by rough estimates of courses and speeds to determine which vessel is slightly ahead of the other, and considered afterwards by the light of conflicting evidence as to whether these estimates were right or wrong."

We think the decision of their Lordships in the case cited in line with our conclusion in the present case that both the tug Tiger and the steamer Robert Dollar were in fault in the particulars hereinbefore indicated.

The judgment is affirmed.

NOTE.—The following is the opinion of De Haven, District Judge:

DE HAVEN, District Judge. The collision between a barge in tow of the tug Tiger and the steamer Robert Dollar, which is the subject of this action, occurred about one o'clock on the morning of July 13, 1905, in the Bay of San Francisco. The night was clear. In view of this fact, it is evident the collision would not have been possible without the fault of one or both of the vessels, and upon consideration of all of the evidence my conclusion is that both were in fault. The Tiger was in fault in having no lookout, and in not going to starboard as indicated by her signal of one whistle, given at the time she was first observed by the Robert Dollar, and while it is true the Tiger was the obligated vessel, having the Robert Dollar on her starboard side, still the Robert Dollar was in fault in continuing to go ahead after her master saw that there was no change of course on the part of the Tiger, and after it ought to have been apparent to him that the strong ebb tide was carrying his vessel so far out of her course that a collision was likely to occur, unless her engines were stopped and reversed; but the order to stop the engines of the Robert Dollar was not given until the collision was inevitable. As both vessels were in fault, the libellant and intervener are entitled to recover against both; the damages to be equally apportioned between them, and any balance of such moiety which the libellant or intervener shall be unable to collect or enforce against either vessel shall be paid by the other vessel or stipulators, to the extent of the stipulated value thereof beyond the moiety due from said vessel. The Alabama and The Gamecock, 92 U. S. 695, 23 L. Ed. 763.

2. On October 21, 1905, the libellant paid to the intervener the sum of \$2,734.80 for its loss under the policy of marine insurance referred to in the libel, and, in consideration of such payment, it was agreed that the said libellant should become "subrogated in full to all of the rights of the insured (the

intervener) in and about the subject-matter of the insurance * * * and to all of the rights of said insured against the wrongdoer causing said loss, in such proportion as the amount of the insurance in said policy bears proportionately to the insured valuation, in said policy, with full privilege and authority to sue in the name of the insurer, but at the expense of the insurer, but in no event to exceed \$3,000."

The libellant is entitled in this action to recover no greater sum, with interest and costs, than is provided for in the agreement just referred to, and the decree will provide that the whole amount of damages recovered in this action shall be divided between the libellant and the intervener in accordance with the terms of such agreement.

Let a decree be entered in favor of the libellant and intervener against the tug Tiger and the steamer Robert Dollar, for damages and costs in accordance with the foregoing opinion. The amount of damages recovered to bear interest from the date of the filing of the libel herein, and the matter will be referred to United States Commissioner Brown, to ascertain and report the damages sustained by the libellant and the intervener.

BABCOCK et al. v. DE MOTT et al.*

(Circuit Court of Appeals, Eighth Circuit. March 10, 1908.)

No. 2,609.

1. PRINCIPAL AND AGENT—EXECUTION OF AGENCY—FRAUD OF AGENT.

An agent for the sale of real estate, who receives a price in excess of that reported and accounted for to his principal, is liable to such principal for the difference.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 130-133.]

2. APPEAL AND ERROR—REVIEW—ISSUES OF FACT.

The decision of a chancellor on an issue of fact is presumptively correct, and will not be disturbed by an appellate court except for a clear and palpable mistake.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3970-3978.]

3. EQUITY—REFERENCE WITHOUT CONSENT.

The reference of a case to a master, without the consent of parties, to make findings of fact, is not error where such findings are treated as advisory only, and the ultimate findings are made by the court.

4. ABATEMENT AND REVIVAL—ANOTHER ACTION PENDING—IDENTITY OF PARTIES.

It is not ground for abatement of a suit in a federal court that a suit between the defendants, involving some of the same issues, is pending in a state court, where the complainants are not parties to such suit, and the court therein has not assumed custody of property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, §§ 73-91.]

Pendency of action in state or federal court as ground for abatement of action in the other, see notes to *Bunker Hill & Sullivan Mining & Concentrating Co. v. Shoshone Min. Co.*, 47 C. C. A. 205; *Barnsdall v. Waltemeyer*, 73 C. C. A. 521.]

Appeal from the Circuit Court of the United States for the District of Kansas.

Milton Brown, for appellants.

A. B. Jetmore and Gardenhire & Jetmore, for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

*Rehearing denied April 17, 1908.

ADAMS, Circuit Judge. This was a bill in equity brought by Anna M. De Mott, Mary E. Justin, and Julia G. Brooks, citizens of New York and New Jersey, against W. P. Taylor and J. E. Taylor, composing the firm of real estate agents known as W. P. Taylor & Son, Ralph L. Maxson, Lewis A. Withers, Henry Schlichting, George E. Babcock, and William Franke, citizens of Kansas and Iowa, for an accounting and other equitable relief. The Circuit Court rendered a decree in favor of the complainants, from which defendants Taylor, Babcock, and Franke alone appeal.

The great features of this case are so prominent and controlling that little consideration is due to the numerous smaller matters to which our attention seems to be seriously directed. The facts found by the trial judge which are abundantly supported by the proof are substantially as follows: In 1901 the complainants, who owned a section of land in Woodson county, Kan., employed Taylor & Son as their agents to sell it for them on an agreed commission for such service. The asking price was fixed at \$9,000, but the agents afterwards induced their principals to accept \$6,000 for the land. Before doing so, they had secured an offer from defendant Babcock of \$8,500, provided they could arrange to procure and carry for him a loan of \$6,500, to be secured by a mortgage on the land. In other words, Babcock offered to pay \$2,000 in cash for the land incumbered by mortgage or mortgages securing loans to the extent of \$6,500. The agents had some misunderstanding with Babcock which will be considered later; but for the present we will assume the foregoing facts to be true.

How to make the sale for \$8,500, appropriate \$2,500 to their own use, and account to complainants for \$6,000, and do these things without exposure, seems to have been the problem confronting the agents. They proceeded in this way: They got complainants to execute a deed to one of their relatives, the defendant Maxson, in which the consideration was stated to be \$6,000. This deed was forwarded to the agents for delivery on receipt by them of the consideration mentioned. After they received the deed, the consideration was changed to read \$12,000, and, as so changed, the deed was delivered to Maxson and recorded in the office of the register of deeds for Woodson county. The agents procured a loan from an insurance company secured by a first mortgage on the land, executed by Maxson, for \$4,500, persuaded Babcock to temporarily advance \$2,000 on his purchase, forwarded \$6,000 less deduction for their agreed commission to the complainants and pocketed \$500 on this initial transaction. They then got Maxson, the owner of record, to execute a second mortgage on the land to secure a promissory note of \$2,000 made by him payable to defendant Withers. Withers had no interest in the matter and acted exclusively for the benefit of the agents. He indorsed this note and delivered it to them, who claim to have subsequently pledged it to defendant Schlichting to secure the payment of some antecedent debt. With these two incumbrances aggregating \$6,500 resting on the land, the agents caused Maxson to convey it to Babcock in execution of the original agreement to sell.

Babcock subsequently conveyed the same to defendant Franke subject to the same incumbrances. The result of the maneuver was that Babcock and his grantee got title to the land incumbered by mortgages securing notes amounting to \$6,500. The complainants got \$6,000, and their agents got \$500 in money and the note of \$2,000.

Defendant Babcock and his grantee set up a special defense to the effect that Taylor & Son had cheated and defrauded Babcock by agreeing to cause the land in question to be conveyed to him upon his paying \$2,000 in cash and assuming the payment of a prior mortgage debt of \$5,000 only. It is claimed that after Babcock had advanced the \$2,000 to the agents, they caused the property to be conveyed to him subject to prior mortgages of \$6,500, instead of \$5,000, as agreed; that he inadvertently accepted a deed to that effect; that he was thereby defrauded out of \$1,500; and that that amount, at least, should be credited upon the \$2,000 note before a lien should be decreed against the land for its payment.

On the foregoing facts the Circuit Court entered a decree divesting Schlichting, Taylor & Son, and all other defendants of title to the note of \$2,000, vesting the same in complainants, establishing a lien for the payment thereof against the land in question, and rendered a personal judgment in favor of the complainants against W. P. and J. E. Taylor for \$500 and interest. The court further decreed that, unless the note of \$2,000 be paid within a time fixed, the land should be sold subject to the lien of the first mortgage, for the purpose of raising a fund to pay the note.

The facts of this case clearly warranted the decree so far as the Taylors are concerned. They, while acting for and in the name of their principals, secured not only the \$6,000 for which they accounted, but also \$2,500 more for which they did not account. No justification is attempted to be made or can be made of their conduct. They were perfidious and false to their principals, took advantage of their confidential relation to secure personal benefits, and must, on most familiar principles of equity, be held responsible for all they personally acquired by their perfidy. 1 Perry on Trusts, § 206; Bent v. Priest, 86 Mo. 475. No principle of equity is better settled than this, and none should command a more vigorous or effective enforcement at the hands of this or any other court.

As no appeal is taken by Schlichting or any other claimant of the note in question, all that remains for our consideration is the special defense set up by Babcock and his grantee. Babcock contends and testifies that his contract with the Taylors was to pay \$2,000 in cash for the land subject to incumbrances securing the payment of \$5,000 only instead of \$6,500 as it turned out to be when the deed was delivered to him. In other words, he contends that his agreement was to pay \$7,000 for the land, instead of \$8,500, and that he was overreached by leaving it in the power of the Taylors to fix the amount of incumbrances after they had received the cash payment of \$2,000 and before the deed was finally executed. If this contention is correct, the land should not be charged with a lien of \$2,000, but with a lien of \$500 only, and complainants' recovery

should be reduced accordingly. If, on the other hand, Babcock agreed to pay \$8,500, \$2,000 in cash and \$6,500 in assumption of prior mortgage debts, as found by the trial court, the decree below is right and should not be disturbed. This presents a single issue of fact for determination. We have examined the proof on this issue with much care, with the result that we are satisfied with the conclusion reached below. Under well-recognized practice the conclusion of the chancellor on an issue of fact is presumptively correct and ought not to be disturbed except for a clear and palpable mistake. No such mistake appears in this case.

The trial court, without consent of the parties, referred the case to a special master to read and examine the evidence as taken and report the facts to the court. There was no reversible error in this, because there was no abdication of the judicial function by the trial judge. *Mastin v. Noble* (C. C. A.) 157 Fed. 506. His opinion affirmatively shows that he found the facts as a result of a personal consideration of the proof filed in the case.

The fact that Babcock had commenced a suit in the state court of Kansas to secure a reformation of his deed from Maxson and a cancellation of the Withers mortgage to secure the payment of the note for \$2,000, and that such suit was pending and undetermined when this suit was instituted, afforded no ground of defense or abatement of this suit, for the reason that complainants were not a party to it, and custody or dominion of specific property was not sought or taken in it. *City of Mankato v. Barber Asphalt Paving Co.*, 73 C. C. A. 439, 142 Fed. 329, 340, and cases cited.

The numerous other assignments of error have been sufficiently considered to convince us that nothing was done or left undone in the trial below which prejudicially affected the result reached.

The decree of the Circuit Court was clearly right, and is affirmed.

NOTE.—The following is the decision of Pollock, District Judge, on exceptions to report of special master:

POLLOCK, District Judge. The material facts in this case, as gathered from the proofs, are as follows:

In May, 1901, complainants, the owners of a section of land in Woodson county, this state, placed it in the hands of defendants W. P. Taylor and son, J. E. Taylor, partners as Taylor & Son, for sale at the price of \$9,000. Taylor & Son were unfaithful to the trust reposed in them by complainants and commenced scheming to make a profit to themselves by a sale of the property over and above the commission which they agreed to receive from complainants for making the sale, and in the execution of this scheme proceeded in this manner:

They opened negotiations for the sale of the land to defendant Geo. E. Babcock, a citizen of Iowa, and having learned he would pay much more than \$6,000 for the land, they knowingly and falsely represented to complainants that said sum of \$6,000 was all the land was worth, and all they could procure for the same, and on the strength of these false representations induced complainants to part with title to the land for the sum of \$6,000, less their commission for the making of the sale. The manner in which this was carried into effect was this: They caused the deed from complainants to be executed to defendant Ralph L. Maxson, a relative who at no time had any interest in the transaction, for their benefit. The true consideration of \$6,000 expressed in the conveyance from complainants to Maxson, when it left the hands of complainants, was changed by Taylor & Son, or at their instance,

to \$12,000, and the purchase price of \$6,000 agreed to be paid complainants was procured by Taylor & Son in this manner: Under an arrangement by which defendant Babcock was to secure the land, they induced him to advance \$2,000 of the purchase money, and caused Maxson to execute a first mortgage on the land to secure the payment of a present loan of \$4,500, secured from the Union Central Life Insurance Company. Also, causing Maxson to execute a second mortgage on the land to secure a promissory note made to one Lewis A. Withers for their benefit, Withers at no time having any interest in the transaction, and then causing Maxson to convey the land to Babcock in consideration of the \$2,000 he had paid subject to the two mortgages made by Maxson thereon, aggregating \$6,500, which mortgages, according to the terms of the conveyance, Babcock assumed and agreed to pay.

Of the \$4,500 loan secured from the life insurance company, Taylor & Son put \$500 in their pocket and forwarded the remaining \$4,000 and the \$2,000 secured from Babcock, less their commission charged complainants for making the sale, to complainants, and then procured Withers to indorse and deliver to them the note of \$2,000 secured by the second mortgage on the land, and then pledged this note with defendant, Henry Schlichting, to secure the payment of a pre-existing debt owed by Taylor & Son. The conveyance made by Maxson to Babcock was caused to be recorded by Taylor & Son and then forwarded to Babcock at his post office address in the state of Iowa. When Babcock received this conveyance, not being satisfied with it, because, as he claimed, he was to have a conveyance direct from complainants and was to pay only \$7,000 as the purchase price of the land, he came to Kansas, took possession of the property, commenced an action in the state court to cancel the second mortgage placed on the land by Maxson, and to cancel his contract of assumption of this mortgage in the conveyance to him.

Complainants having learned their unfaithful agents, Taylor & Son, had secured the sum of \$8,500 in the sale of their land, and not the sum of \$6,500 as represented by their unfaithful agents, commenced this suit for an accounting with Taylor & Son, and prayed for recovery of the sum of \$500 appropriated by Taylor & Son from the purchase price, and also a decree declaring the promissory note of \$2,000 and the second mortgage executed by Maxson, now held by defendant Schlichting to secure a pre-existing debt, to be their property, because received by Taylor & Son as part of the purchase price for their land, and to have said mortgage foreclosed subject to the rights of the Union Central Life Insurance Company in the land.

Babcock defends in this suit on the theory and claims that under his oral agreement with Taylor & Son he was to pay but \$2,000 in cash and accept a conveyance for the land subject to a mortgage of only \$5,000. Before this suit was commenced, Babcock, in recognition of his title to the property, sold and conveyed it to defendant William Franke, who now owns the land. The master found from all the proofs that Babcock agreed to pay \$8,500 for the land, \$2,000 in cash and accept a conveyance subject to mortgages thereon aggregating \$6,500, all as expressed in the conveyance from Maxson to him, and not the sum of \$7,000, as contended by Babcock. To this finding Babcock excepts, and this is the only question of merit arising for decision presented by the record.

It is clear beyond all doubt as between complainants, Taylor & Son and Taylor & Son, Maxson, and Withers, complainants are entitled to receive on this accounting all of the purchase price of their land received by their unfaithful agents, Taylor & Son. Therefore, as against these defendants, complainants are undoubtedly entitled to a decree as prayed. It is equally true that as the defendant Henry Schlichting holds the promissory note of \$2,000 made by Maxson, secured by the second mortgage on the land as security for a pre-existing debt, he is not a bona fide holder thereof, and the complainants are also entitled to a decree as prayed as against him.

As between complainants and defendant Geo. E. Babcock, I am of the opinion the same conclusion must be reached. If the conveyance made to Babcock by Maxson at the instance of Taylor & Son, the unfaithful agents of complainants, was not in accordance with their prior agreement, as claimed, by Babcock, he had his remedy to refuse the conveyance tendered and to recover back the \$2,000 cash theretofore paid by him as part purchase price

of the land, or, if so advised, and his contract for the purchase of the land was valid and enforceable, he could have refused the conveyance tendered by Taylor & Son as executed by Maxson and compelled specific performance of his contract. However, he did not elect either of these remedies, but, while attempting to repudiate the conveyance as made by Maxson, he has parted with the title to the property thereby conveyed to him in recognition of its validity as a conveyance. Having thus recognized the validity of the conveyance, his contract in writing, as expressed by the conveyance, must control.

From all the evidence in the record the master found the price to be paid by Babcock for the land was the sum of \$2,000 and the acceptance of a conveyance of the land subject to the mortgages, aggregating \$6,500, and not the sum of \$7,000, as contended by Babcock. From an examination of the record I am convinced the report of the special master in this regard is correct, and therefore the exceptions to the report must be overruled, and the same confirmed.

A decree will be entered in favor of complainants against Taylor & Son for the sum of \$500, and interest received by them as part purchase price of complainants' land.

A further decree in favor of complainants awarding to complainants the promissory note of \$2,000, and second mortgage executed by Maxson to Lewis A. Withers, received by Taylor & Son as part purchase price of complainants' lands.

A further decree will enter foreclosing this mortgage subject to the lien of the mortgage held by the Union Central Life Insurance Company.

The decree will further provide if the amount of this promissory note of \$2,000 and the costs of this litigation are not paid within 30 days from the date of the decree, a special master to be appointed by the court will, in conformity with the practice in this court, advertise and sell the real estate in satisfaction of the amount found due upon said promissory note and the costs of this litigation.

It is so ordered.

LAKE v. SHENANGO FURNACE CO.

(Circuit Court of Appeals, Eighth Circuit. March 14, 1908.)

No. 2,614.

1. MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION OF RISK—NUMBER OF SERVANTS—FACTS.

The deceased and two fellow servants had been operating a hand hoist and lowering timber with it into the shaft of a mine for about a month, when the master directed him to operate it with one co-workman, and he did so without objection. The hoist consisted of a chain attached to a rope which ran over a pulley suspended to a tripod above the shaft, and the other end of the rope was attached to a drum by which the rope was wound up by the use of adjustable cranks on the ends of the drum, and the descent of the load was controlled by a friction brake applied to the drum by a lever. After the chain was fastened around the load, it was necessary to wind the rope up until it was taut, and to apply the brake upon a signal from the chainman before the load slid or swung into the shaft, because it was so heavy that the workmen could not hold it up with the cranks. After six or seven loads had been safely lowered by the two men, the deceased, who was acting as chainman, directed his fellow workman to continue to wind up the rope so long that it slid the load into the shaft before the brake was applied. *Held*, the deceased assumed the risk of operating the machine in this way with but one assistant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 559-566.

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

2. SAME—EVIDENCE OF CHANGE AFTER ACCIDENT INADMISSIBLE.

Evidence that after an accident a master employed more men, repaired his machinery, or adopted a different method in the conduct of his business, is inadmissible to prove his negligence at the time of the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 918.]

3. EVIDENCE—OPINION EVIDENCE WHEN INADMISSIBLE.

When an issue, its subject-matter, and the facts which condition its decision are simple and open to the common understanding so that no special skill or experience is requisite to form a correct judgment upon it, the opinions of witnesses regarding it are not admissible.

4. NEGLIGENCE—TRUE TEST OF DOUBTFUL ACT CARE PERSONS OF ORDINARY PRUDENCE USE UNDER SAME CIRCUMSTANCES.

An act or omission may be in itself clearly negligent or clearly free of negligence. If its character is doubtful, the test of actionable negligence is the degree of care which persons of ordinary intelligence and prudence commonly exercise in the same circumstances. If the care exercised in such a case rises to or above that standard, there is no actionable negligence; if it falls below that standard, there is.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 1-7.]

5. SAME—EVIDENCE OF ORDINARY PRACTICE OF REASONABLE MEN IN SAME CIRCUMSTANCES GENERALLY COMPETENT.

In such a case the evidence of the ordinary practice and of the usual custom, if any, of ordinarily prudent and intelligent persons in the performance under the same or like circumstances of the same or like acts, is ordinarily competent upon the issue of negligence in the performance or omission of an act.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Minnesota.

This is an action for damages that resulted from the death of John K. Laurila, which the plaintiff below alleged was caused by the negligence of the defendant company, his master, in that it employed only two when it should have hired three servants to operate the drum used at its shaft No. 2 to lower timber into its mine. The defenses were that the defendant was not negligent, that the deceased assumed the risk of operating the drum with two men, and that he was guilty of negligence which contributed to his injury. At the close of the evidence the court instructed the jury to return a verdict for the defendant, on the grounds that the deceased assumed the risk of the work in which he was engaged, and that he was guilty of contributory negligence. This and many other rulings are specified as errors. The evidence relative to the place and circumstances of the accident was practically without contradiction, and it disclosed this condition of things:

The accident happened while Laurila and his companion, Tikka, were preparing to let a load of lagging down into the shaft during the afternoon of January 17, 1906. Laurila had been engaged in this work during the afternoons since about the middle of December, 1905, but prior to this day he had been one of three men operating the drum to lower the timber into this shaft, while on the day of the accident he was one of two. The shaft was about 6 feet by 8 feet, 137 feet deep, planked inside, and it had a crib or collar of timber which extended up above the ground a few inches. It was known as shaft No. 2. A tripod made of three posts rose over the shaft, and from it a bolt depended directly over the center of the shaft and about 19 feet above its mouth, to which a pulley was attached, over which the rope ran that was used to lower the timber. A small chain which was used to fasten the timber together and to hold it as it descended into the shaft was fastened to the end of this rope which hung from the pulley over the shaft, and the oth-

er end of the rope was secured to a drum which stood upon posts about three feet above the ground on one side of the shaft and about four feet distant from it. This drum was about 7 feet long and 16 inches in diameter where the rope wound about it. Upon one end of this drum was a friction brake operated by a lever five or six feet long, which rested upon the drum, and was made effective by pressing the outer end of it down. When the drum was used to wind up the rope, this lever was held above it by hand or by a stick placed under it, and, when a load was about to be lowered, the support was removed, the lever placed the brake upon the drum, and the descent of the load was controlled by an operator who pressed down upon the outer end of the lever. There was an adjustable iron crank about 18 inches long upon each end of the drum which was used to wind up the rope and to prepare the loads of timber for their descent, but which was removed before these loads were let down into the mine. Treating the apparatus from the station of a person standing on the side of the shaft opposite the drum and facing the latter, there was a stick of timber about six feet long and four inches thick which lay parallel to the collar on the right side of the shaft. The load to be lowered at the time of the accident was about two feet square, and it consisted then, and the loads were generally made up of posts and lagging from six to nine feet long which were laid across the collar of the shaft and the stick of timber so that they projected over the collar about a foot and rested upon the timber and upon the collar which was somewhat worn away, or upon the ice or snow which had gathered between the collar and the stick, so that the chain could be readily passed around each of the ends of the loads without raising them. It was winter, and some ice and snow had gathered about the shaft and upon the posts and lagging, and the surface where the load was placed sloped at the rate of about six inches to eight feet toward the shaft. The load which caused the accident weighed from 750 to 1,500 pounds. The loads lowered into this and other like shafts were generally so heavy that two workmen at the cranks could not hold one of them up after it swung over the shaft, and the only means of controlling its descent was the friction brake. When three men operated the drum, the first held up and upon a signal from the chainman applied the brake, the second adjusted the chain first around the end of the load in the mouth of the shaft, and next around the other end, and then held on to it with his hand until the third man, who operated one of the cranks, took the slack out of the rope and drew it taut by winding it upon the drum. When the rope was thus drawn sufficiently taut, upon a signal from the chainman, the first man pressed down upon his lever, and held the load, the third man removed his crank, the chainman let the rope go, went behind the load, and by lifting its rear end slid or pushed it into the shaft, and the first man then lowered it and controlled its descent by operating the brake. When two men used it, the brake lever was held up by a stick beneath it. One of the men adjusted the chain about the ends of the load, then held on to the rope or chain to steady it with one hand and on to one of the cranks with the other until under his direction the second man had wound the rope sufficiently taut by the use of the other crank. Then, upon a signal from the chainman, the second man removed his crank, removed the stick beneath the lever, seized the lever, and held the load with it until the chainman removed his crank, and slid or pushed the load into the shaft, when the second workman controlled and lowered it by the manipulation of the brake lever.

At the time of the accident the brake was held off the drum by a stick beneath the lever. Tikka and Laurila had lowered six or seven loads down the shaft without the aid of any third workman, with Tikka at the chain and Laurila at the crank, when Tikka took the crank and Laurila adjusted the chain and held onto it with one hand to steady it and onto the crank on his end of the drum with the other until the rope was wound up on the drum to some extent when Tikka inquired of Laurila if it was good, or in other words, if the rope was sufficiently taut, and Laurila replied: "No; wind it a little more." Tikka did so, the load slid into the shaft, the drum and the cranks escaped from the workmen as the load descended, one of the revolving cranks struck Laurila, threw him into the shaft, and killed him.

Theodore Hollister (John R. Heino, on the brief), for plaintiff in error.

H. H. Grace (George B. Hudnall, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge (after stating the facts as above). The evidence in this case conclusively proved that there was one and only one indispensable condition of safety in the doing of the specific act in the performance of which Laurila lost his life in the lowering of the loads of timber into the shaft, and that condition was that the load should not be slid, or pushed, or swung into or over the shaft until the brake was applied to the drum by means of its lever. If the load went into the shaft before the brake was applied, it would certainly descend and produce danger of injury and death when three as when two men were operating it, for the law of gravity is uniform and incessant in its work. The loads differed in size and weight, but both at this and at other shafts where similar devices were used they were generally, if not universally, so heavy that they could not be held up by the cranks upon the drums after they swung over the shafts, and this fact was well known to all the workmen about them, and was clearly proved to the jury. This was the reason why the friction brake was provided and used.

The evidence was uncontradicted that it was necessary before the load was swung over the shaft and after the chain had been thrown around its ends that the rope should be wound up so that it was taut, to the end that the timber might be drawn together in a compact body before it started to descend, so that sticks of it would not slip out of the chain and fall down the shaft. The evidence was clear and undisputed that it was the duty of the chainman to steady the chain with his hand as the rope was wound up, to determine when the tension upon it was sufficient to hold the timber together, and insufficient to slide, or tip, or swing the load into the shaft, and then to give the signal to take off the crank and put on the brake, and, after that was done, to push or slide the load into the shaft. This entire duty devolved upon the chainman whether there were two or three men at the shaft, and, in the discharge of this duty, was the one place where the exercise of judgment conditioned the safety of the operation. If the chainman failed to give the signal that the chain was sufficiently taut until the tension became so great that the load slid or swung into the shaft, immediate danger of injury was produced, and that danger was greater when but two men were operating than when there were three, because, if there was a third man at the lever, it was possible that he might catch and hold the load after it swung into the shaft, although he did not receive any signal to apply the brake.

The apparatus was simple. It was nothing but a windlass with a crank and a rope attached, the latter of which ran over a pulley above. No workman of intelligence sufficient to use the simplest tools could have assisted in operating this windlass with two la-

borers for a month and with one for an hour as Laurila did without plenary knowledge that the law of gravity would draw the load down the shaft if it was permitted to swing over it; that in such an event it could not be held up with the cranks; that the application of the brake before the load slid or swung into the shaft was indispensable to the safe operation of the machine; that he had but one assistant at the time of the accident; that, when he operated the chain, the timely application of the brake depended entirely upon his judgment and his signal; and that, if he failed to rightly exercise the former or to give the latter in time, disaster and injury were the natural and probable consequences of his dereliction. Yet, without objection or protest, he entered upon the discharge of the duty of chainman with a single assistant, and by his failure to give the signal to his companion to cease winding up the rope and to put on the brake until the latter had wound it so taut that it lifted or slid the load into the shaft he brought down upon himself the direful result.

A servant by entering or continuing in the employment of a master without complaint assumes the risks and dangers of the employment which he knows and appreciates. *St. Louis Cordage Co. v. Miller*, 61 C. C. A. 477, 490, 493, 126 Fed. 495, 508, 511, 63 L. R. A. 551, and cases there cited; *Glenmont Lumber Company v. Roy*, 61 C. C. A. 506, 510, 126 Fed. 524, 528; *Burke v. Union Coal & Coke Company* (C. C. A.) 157 Fed. 178, 180, 181. Counsel argue that the deceased did not fall under this rule because he did not know the weight of the load, because he did not know how much tension on the rope would raise the load or slide it into the shaft, and because he did not appreciate the danger from the act that he and his companion were performing that the load would slide into the shaft. They call attention to the testimony of the superintendent of the defendant that if the load lay as stated by the witnesses, and if it weighed 1,500 pounds, it could not have been sent into the mine by the use of one of the cranks by a workman because he could raise only about 300 pounds thereby, and to the testimony of the surface boss that in his opinion one man at the crank could not slide a load into the shaft if it rested on a few little projections on the top of a round surface of timber and to varying estimates made by witnesses of the weight of the load. There were, however, two men at the cranks—Tikka, who devoted all his energy to one of them, and Laurila, who used one hand upon the other. The superintendent testified that in his opinion the load weighed only 750 pounds, that a lift of 400 pounds on the rope would have sent it into the shaft, and that one man could lift 300 pounds upon the rope by the use of the crank. It follows that two men could lift 600 pounds, and, if both men exercised their powers, they could have thrown the load into the shaft. Moreover, an appreciation of the risk and danger was not conditioned by an exact knowledge of the weight of the load, or of the amount which one man could lift upon the rope by the use of one of the cranks. There was a crank upon each end of the drum and there was a man at work at

each crank. The fact that whether there was one man or there were two men at the cranks a signal was given when the rope was sufficiently taut demonstrates the knowledge and the appreciation by the workmen of the danger of permitting any man to exert all his force upon the crank without any limitation by a sign from the chainman. The only reason for the signal was to prevent the danger of sliding or swinging the load into the shaft before the brake was applied. It was the risk of this danger in the absence of the third man that confronted Laurila. He knew that the third man was not there, and that the brake could not be applied until he gave the signal to stop the winding of the rope. He knew that the load lay by the side of the shaft on an inclined plane upon the worn collar, the parallel timber, or ice and snow between them, that the load was so heavy that, if he permitted it to swing or slide into the shaft, he and his associate could not hold it with the cranks. He had assisted to operate that drum for many days. He knew that a signal had always been given to stop turning the crank before the load was pushed into the shaft, and the danger that he and his companion might slide in there by turning the cranks if the signal was not given, or, if it was given too late, was too obvious, too plainly observable for denial. A servant cannot be heard to say that he did not appreciate or realize the danger or the risk where the defect is obvious or readily observable, and the risk and danger are apparent. *St. Louis Cordage Co. v. Miller*, 61 C. C. A. 477, 493, 126 Fed. 495, 511, 63 L. R. A. 551; *Glenmont Lumber Company v. Roy*, 61 C. C. A. 506, 510, 126 Fed. 524, 528.

It is said that the risk of the master's negligence is not one of the ordinary risks of the employment, and hence that the servant does not assume it, and this is doubtless true when the master's negligence and its effect are not known or obvious to the servant and the risk and danger from them are not appreciated; but if the servant knows of the failure of his master to completely discharge his duty to exercise ordinary care to furnish sufficient servants or ordinarily safe appliances, and if he appreciates its effect, or if the failure and its effect are obvious or plainly observable and he continues in the employment without objection, he elects to assume the risk of them and he cannot recover for the damages they cause. *Texas & Pacific Railway Co. v. Archibald*, 170 U. S. 665, 672, 18 Sup. Ct. 777, 42 L. Ed. 1188; *Choctaw, Oklahoma & Gulf Railroad Co. v. McDade*, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96; *Burke v. Union Coal & Coke Company* (C. C. A.) 157 Fed. 178, 181.

Counsel argue that the deceased did not assume the risk and danger of operating this machine with but one workman because his master did not warn him of them; but no duty rests on the master to warn a servant of risks and dangers that are so apparent that a person of his ability and experience in his station may reasonably be held to have known and appreciated them. *Bohn Manufacturing Company v. Erickson*, 5 C. C. A. 341, 344, 55 Fed. 943, 946; *Glenmont Lumber Company v. Roy*, 126 Fed. 524, 528-529, 61 C. C. A. 506; *King v. Morgan*, 48 C. C. A. 507, 510, 109 Fed. 446, 449; *Railroad Company*

v. Miller, 43 C. C. A. 436, 104 Fed. 124; Mississippi River Logging Company v. Schneider, 20 C. C. A. 390, 392, 74 Fed. 195, 197.

The next objection is that assumption of the risk was not pleaded by the defendant, but it rests on the maxim, "*Volenti non fit injuria*," and inheres in the contract of hiring, and, if it were necessary to plead it, a proposition that is not conceded, the answer contains an averment that "Laurila assumed the risks of injury incident to carrying on said work," which would have been sufficient in the absence of objection in the court below. The result is that the uncontradicted evidence disclosed the fact that the defect in the company's method of operation, of which the plaintiff complains, was obvious, and the danger from it was apparent, and he continued in the service without complaint. The defense of assumption of risk is conclusively established in such a case, no question remains for the jury, and the court rightly instructed them to return a verdict for the defendant. This conclusion rests upon the mere assumption, and not upon any decision or opinion, that there was substantial evidence at the trial below of the alleged negligence of the defendant. The question whether or not there was such evidence and the question whether or not the evidence of the contributory negligence of the deceased was conclusive are no longer material, and will not be farther discussed than to say that the testimony and the considerations which have already been set forth amply sustain the decision of the court below upon the latter question. We turn to the rulings upon the admission and rejection of evidence.

Specifications 1, 2, 3, 6, and 7 are leveled at the refusal of the trial court to receive testimony of the method of operation of the drum by the defendant and of the number of men employed by it for that purpose at shaft No. 2 after the accident. But evidence that, after the accident, a master repaired his machinery, adopted a different method of operation, or employed a larger number of men in conducting his business, is incompetent because it has no legitimate tendency to prove that the number of men employed, the method pursued, or the machinery used before the accident was not reasonably safe and sufficient, and because the reception of such evidence would deter the master from improving his methods and machinery. *Railroad Company v. Hawthorne*, 144 U. S. 202, 208, 12 Sup. Ct. 591, 36 L. Ed. 405; *Motey v. Pickle Marble & Granite Company*, 20 C. C. A. 366, 371, 74 Fed. 155, 159; *Railway Company v. Parker*, 5 C. C. A. 220, 222, 55 Fed. 595, 597; *Camp Bird v. Larson*, 81 C. C. A. 412, 414, 152 Fed. 160, 162.

The trial is attacked because the court below rejected the proffered testimony of witnesses familiar with the operation of the apparatus in the use of which the accident occurred that it was in their opinion dangerous to operate it with less than three workmen. But the rule is that witnesses must state facts, and not opinions. There is an exception to it that the opinions of witnesses who possess peculiar skill or knowledge may be received when the facts are such that inexperienced persons are likely to prove incapable of forming a correct judgment from them in the matter at issue without such opinions.

But there was nothing in the facts or in the subject of the issue in this case that was not open and plain to men of common understanding. When the facts were established it was as evident to the jury, or to any one of ordinary comprehension who knew them, as to the most experienced operator of the drum, whether or not the crucial signal could be given at the proper time with safety when only two men were operating the drum, and that was the real issue which conditioned the defendant's negligence. There was no necessity for the opinions of witnesses upon this question, and, when the necessity does not exist, the exception to the rule does not operate and the rule prevails. The testimony of the experts was properly excluded. *Motey v. Pickle Marble & Granite Co.*, 20 C. C. A. 366, 370, 74 Fed. 155, 159; *W. J. Lemp Brewing Co. v. Ort*, 113 Fed. 482, 483, 51 C. C. A. 317; *Ft. Pitt Gas. Co. v. Evansville Contract Co.*, 123 Fed. 63, 64, 59 C. C. A. 281; *Mississippi River Logging Co. v. Schneider*, 20 C. C. A. 390, 396, 74 Fed. 195.

Counsel assert that, while the court rejected the opinions of witnesses offered by the plaintiff below, it received the opinion of one of the witnesses for the defendant, in that it permitted him to testify that, if there was only a normal demand for timber underground, only four men would be set at work prior to the last of January doing all the labor connected with lowering down the timber in either or both shafts No. 2 and No. 3; but this charge is not sustained by the record. When the entire testimony of this witness is read and the statement challenged is considered in connection with the questions and answers which preceded it, the fact clearly appears that the meaning which this evidence must have conveyed to the jury was not that four men ought, in the opinion of the witness, to have been employed, but that four men were actually employed at the time and under the circumstances mentioned. The testimony was rightly received.

After the defendant had proved that the general conditions relative to the tripod and the drum were the same at defendant's shaft No. 3 as at shaft No. 2, where the accident happened, and that two men had ordinarily operated the drum and lowered the timber with it at the former shaft, a witness was permitted to testify over the objection of the plaintiff that it did not appear that the place for getting the timber down into the shaft was the same at No. 3 as at No. 2, that no accident had ever occurred at shaft No. 3 while two men were operating the apparatus. But this was competent testimony, because the real issue was whether or not the signal to apply the brake and remove the crank could be safely given at the proper time when two men were operating the drum, and that issue was conditioned by the tripod, the drum, the brake, the cranks, the rope, the pulley, and the chain rather than by the particular place where the load happened to lay before it was swung into the shaft.

Finally, complaint is made that the court permitted the defendant to prove that prior to this accident machines which were in principle, in method of operation, and in construction practically identical with that used by the defendant at shaft No. 2 had been, and at that time

were, commonly used by mine owners and their workmen in the mines in the vicinity of the defendant's mine, for the purpose of lowering timber into the shafts, and that ordinarily two men operated them. It is said that this testimony was inadmissible because the defendant failed to prove that the particular places on the sides of the shafts where the respective loads lay before they were lowered into the shafts were in the same condition as was that upon which Laurila's load was placed. But this was not an insuperable objection to the evidence, for the conditions of the places where such loads are placed necessarily vary with the times, the seasons and the locations of the shafts, and these places were not determinative of the question whether or not the employment of two rather than three men to operate shaft No. 2 was a failure to discharge the defendant's duty to exercise reasonable care to employ a sufficient number of men to operate it with reasonable safety.

There are cases in which the act or omission at issue is in itself so clearly negligent that the fact that other persons in the same or like circumstances have been guilty of it is insufficient to modify its character or effect. *Dawson v. Chicago, R. I. & P. Ry. Co.*, 52 C. C. A. 286, 288, 114 Fed. 870, 872; *Gilbert v. Burlington, C. R. & N. Ry. Co.*, 63 C. C. A. 27, 32, 128 Fed. 529, 534. The defendant's act or omission was not of that character; and in such a case the true test of actionable negligence is the degree of care which persons of ordinary intelligence and prudence commonly exercise under the same circumstances. If in a given case the care exercised rises to or above that standard, there is no actionable negligence; if it falls below it there is. Hence, in an action for damages for negligence, evidence of the ordinary practice and of the uniform custom, if any, of such persons in the performance under similar circumstances of acts like those which are alleged to have been negligently done is generally competent evidence, for it presents to the jury the correct standard for their determination of the issue whether or not the defendant was guilty as charged. *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 416, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; *Union Pac. Ry. Co. v. Daniels*, 152 U. S. 684, 691, 14 Sup. Ct. 756, 38 L. Ed. 597; *Washington, etc., Ry. Co. v. McDade*, 135 U. S. 554, 569, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Texas & Pac. R. Co. v. Barrett*, 166 U. S. 617, 619, 620, 17 Sup. Ct. 707, 41 L. Ed. 1136; *Choctaw, etc., R. Co. v. McDade*, 191 U. S. 64, 67, 24 Sup. Ct. 24, 48 L. Ed. 96; *Charnock v. Texas & Pac. R. Co.*, 194 U. S. 432, 437, 24 Sup. Ct. 671, 48 L. Ed. 1057; *Chicago Great Western Ry. Co. v. Egan* (C. C. A.) 159 Fed. 40.

There was therefore no error in the admission of this evidence, and the judgment below is affirmed.

FAIRBANKS, MORSE & CO. v. WALKER.

(Circuit Court of Appeals, Eighth Circuit. March 27, 1908.)

No. 2611.

1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—INSUFFICIENT HELP.

Plaintiff and two others engaged in taking down certain machinery were ordered by their foreman to roll a five-inch rim fly wheel, weighing between 1,800 and 2,200 pounds, to a point where it could be hoisted from a basement. Plaintiff and his fellow workmen were intelligent, and made no complaint that the number of men allotted was insufficient to do the work, but proceeded to roll the wheel on the concrete floor until the wheel encountered the raised surface of a water pipe partially buried in the floor, when the lower part of the wheel slid laterally along the pipe and fell on plaintiff's leg, causing the injuries complained of. The surface of the floor was exposed when they began work, and the partially buried pipe was plainly observable until it was covered with water and grease that came from the machine they were dismantling. *Held*, that the neglect of plaintiff and his fellow servants rather than the lack of sufficient men to perform the work, was the proximate cause of his injury, and that defendant was not negligent in failing to provide a sufficient number of workmen.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 162, 257-263.]

2. SAME—DUTIES—PERFORMANCE—PRESUMPTIONS.

While employes are entitled to rely on the performance by the employer of his positive duties to them, the employer is also entitled to presume that the employes will exercise ordinary care in doing their work; neither being required to anticipate or make provision for the other's default.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 135-142.]

3. SAME—SAFE PLACE TO WORK.

Where defendant was engaged in taking down and removing machinery from premises which did not belong to it, and such work was not usually performed there, the ordinary rule as to an employer's duty to furnish a safe place to work did not apply as between defendant and its servants engaged in such work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 171-174, 193.]

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Albert Walker sued Fairbanks, Morse & Co., a corporation, for damages for personal injuries sustained in its service. The negligence charged was that defendant failed to provide a sufficient number of workmen to do the work in which plaintiff was engaged when injured. It was averred that the service reasonably required "the active work of at least four men or more." The defense was a general denial, contributory negligence, and assumption of the risk. The facts were these: The defendant sent four men, including the plaintiff and a foreman, to remove an engine from the basement of a building. The engine was dismantled, and one of the fly wheels and other parts were moved across the engine room and hoisted out by means of block and tackle. In all this work the plaintiff participated. The accident occurred while plaintiff and two of the men were engaged in rolling the second fly wheel over the basement floor to the point of hoist. The foreman having directed them to move the wheel over went to the floor above to get the block and

tackle ready. The wheel was six feet in diameter, had a five-inch rim, and weighed from 1,800 to 2,200 pounds. It stood upright when the men started to move it. The plaintiff was at one end and walked backward as the wheel rolled, another man was at the other end and walked forward, while the third walked at the side of the wheel grasping the spokes to steady it. When they were rolling it, the wheel encountered the raised surface of a water pipe partly buried in the concrete floor, the lower part slid laterally along the pipe, and plaintiff and one or both of his associates moved to the falling side and tried to support it but were unable to do so. Plaintiff was then so near another engine in motion he could not escape and the wheel fell on his leg. The pipe was concealed by water and grease which came from machinery dismantled by them, but the plaintiff had been about the basement for a day and a half prior to the accident and during part of the time the floor was not in that condition and the pipe was visible. The plaintiff was 26 years of age, and had several months' experience in repairing, taking down, and erecting engines, though none in handling a wheel as large as the one in question. He made no complaint about the number of men allotted to the task and heard none from the others. The conversations of the others on that subject are not material to the case. When the foreman before going above to fix the block and tackle directed them to move the wheel, defendant made no response, but set about the work. It was easy for the three to perform the duty assigned them, and it could have been done successfully had it not been for the exposed pipe. A motion of defendant at the close of the evidence for a directed verdict was denied. The plaintiff obtained a verdict upon which judgment was rendered.

William R. Gentry (Millard F. Watts and John E. McKeighan, on the brief), for plaintiff in error.

John M. Goodwin (Vincent McShane, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge (after stating the facts as above). The movement of the wheel in connection with which the accident occurred involved ordinary manual labor, the dangers incident to which were open and obvious. With knowledge that three men were assigned to the task the plaintiff, who was an intelligent workman, engaged in it without complaint or objection. That three men could easily roll the wheel across the floor if unobstructed was plain to a man of his experience. It was equally plain that it might escape their control if run against an obstruction, and that, if it escaped their control, it would fall. The surface of the concrete floor over which they rolled the wheel was exposed when they began work, and the partly buried pipe on which the wheel slid was plainly observable until it was covered with the water and grease that came from the machinery they themselves dismantled. This was a condition that should have been provided against by plaintiff and his associates in the exercise of ordinary care, but they seem to have paid no attention to it. The accident was the result of their neglect rather than the lack of men to perform the service. The number of men furnished being reasonably sufficient to do the work in safety if they exercised ordinary care in doing it, defendant was under no obligation to furnish more. Just as employes may rely upon the performance by the employer of his positive duties to them, so may he rely upon their exercise of ordinary care in doing their work and neither is required to anticipate and make provision for the other's default.

In respect of the controlling principles the case is quite similar to *Gust Lake, Adm'r, v. Shenango Furnace Co.* (decided at this term) 160 Fed. 887.

It may be further observed that the premises did not belong to defendant, and the work of taking down and removing machinery was not that usually performed there. The ordinary rule as to the duty of an employer in respect of the safety of the place where his work is being done does not apply. *Westinghouse, Church, Kerr & Co. v. Callaghan*, 83 C. C. A. 669, 155 Fed. 397; *American Bridge Co. v. Seeds*, 75 C. C. A. 407, 144 Fed. 605. In view of the conclusion reached, it is immaterial whether the foreman is to be regarded as a fellow servant or as a vice principal; nor is it necessary to consider the complaints as to the admission of evidence and the instructions.

The judgment is reversed, and the cause remanded for a new trial.

GRAND TRUNK WESTERN RY. CO. v. REDDICK.

(Circuit Court of Appeals, Seventh Circuit. January 14, 1908. Rehearing Denied May 6, 1908.)

No. 1,389.

1. COURTS—JURISDICTION OF CIRCUIT COURT OF APPEALS—JURISDICTIONAL QUESTIONS.

Where a judgment of a Circuit Court is taken by writ of error to the Circuit Court of Appeals for review on the merits, that court may certify the question of the jurisdiction of the Circuit Court to the Supreme Court for decision, or it may itself determine such question.

2. SAME—FAILURE TO ALLEGE JURISDICTIONAL FACTS—EFFECT OF ADMISSIONS ON TRIAL.

An admission made on the trial of an action in the Circuit Court of "the liability of defendant in this case and everything as alleged except the measure of damages" does not cure the omission of the declaration to allege facts giving the court jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 816.]

3. DEATH—ACTION—DAMAGES—EVIDENCE.

Upon the question of the damages sustained by the wife and children of a person killed by reason of his death, it was not error to permit the health, character, and earning capacity of the deceased to be shown for the period extending back from the time of his death to his young manhood; and in such connection evidence showing his earnings during the time of a partnership formed for carrying on his trade as a skilled workman 15 years before his death was admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 88.]

4. WITNESSES—CROSS-EXAMINATION—LIMITATION TO SUBJECT OF DIRECT EXAMINATION.

The sustaining of an objection to a question asked on cross-examination of a witness, relating to a matter gone into only on such cross-examination, held not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 949-954.]

5. APPEAL AND ERROR—REVERSAL—REMAND TO TRY QUESTION OF JURISDICTION.

Where a cause has been properly tried on the merits in a Circuit Court and a judgment rendered for plaintiff, on a reversal because of the fail-

ure of the declaration to allege the requisite diversity of citizenship between the parties to give the court jurisdiction, it is competent for the appellate court to remand with leave to permit an amendment, and to try the question of jurisdiction alone, if issue is taken thereon according to the practice with respect to pleas in abatement.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Leiferman was killed in an accident in Illinois on the railroad of plaintiff in error, defendant below. Suit by Reddick, as administrator, was begun in the court below and prosecuted to judgment. The only rulings of the court that are challenged in the assignments of error concern the admissibility of evidence. Reversal is also sought on the further grounds that the verdict of \$10,000 is larger than the evidence warranted, the jury in returning, and that the record fails to show that the citizenship of the parties was of the requisite diversity.

George W. Kretzinger, for plaintiff in error.

Oliver R. Barrett, for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. The declaration is wanting in proper averments respecting the citizenship of the parties, and defendant contends that the record nowhere supplies the omission. Preliminarily it is necessary to consider plaintiff's insistence that we lack the power to determine the question of the Circuit Court's jurisdiction.

The subject-matter of this suit was not governed nor affected by federal law, and so, if jurisdiction existed, it rested wholly on diversity of citizenship. In cases of this character, if the defeated defendant is content to rest his writ of error upon the question of the Circuit Court's jurisdiction, he may go directly to the Supreme Court with that question alone. But he cannot present the merits of the controversy to the Supreme Court for review, because the Courts of Appeals are given exclusive and final jurisdiction of the writ of error in that respect. Sections 5, 6, Act March 3, 1891, c. 517, 26 Stat. 827 (U. S. Comp. St. 1901, p. 549). "The general intention of the act was to distribute the appellate jurisdiction and to permit an appeal to only one court." *Huguley Co. v. Galetton Mills*, 184 U. S. 290, 295, 22 Sup. Ct. 452, 454, 46 L. Ed. 546. Conceding that the record has been properly brought here, plaintiff puts his denial of our right to decide the jurisdictional question which is presented by this record (and which inheres, whether raised or not, in every record) upon his contention that the Supreme Court has construed our power to deal with the question as being limited to certifying it to that court. The contention, which is supported by decisions of the Court of Appeals for the Second Circuit (*Sun Ptg. Ass'n v. Edwards*, 121 Fed. 826, 58 C. C. A. 162; *Boston, etc., R. Co. v. Gokey*, 149 Fed. 42, 79 C. C. A. 64), finds its ultimate base in what appears to us to be a mistaken interpretation of the following quotation from *McLish v. Roff*, 141 U. S. 661, 669, 12 Sup. Ct. 118, 120, 35 L. Ed. 893:

"When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme

Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case. If the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this court."

Clearly the contention comes to this: The power to certify excludes the power to decide. But whence comes, and what is the nature of, the power to certify? Beyond doubt this court has only the powers that are expressly conferred by the organic act and its supplements. One of the provisions of section 6 is that:

"In every subject within its appellate jurisdiction the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision."

The decision, the adjudication between the parties, must come from the Court of Appeals. The Supreme Court in such a matter limits its pronouncement to answering the certified questions, so that the Court of Appeals in the light of that instruction may properly decide what it had authority to decide without advice. This, it seems to us, is the reason of a matter that should also be taken to have been settled by authority when the Supreme Court said:

"The power to certify assumes the power to decide." *American Sugar Co. v. New Orleans*, 181 U. S. 277, 282, 21 Sup. Ct. 646, 648, 45 L. Ed. 859.

The omissions of the declaration are supplied, so plaintiff claims, by the following admission made at the trial:

"Counsel for defendant admit the liability of defendant in this case and everything as alleged, except the measure of damages."

The claim is that the defendant could not be liable "in this case" unless the Circuit Court had jurisdiction. This seems to us a mere verbal catch. For the purpose of shortening the trial, the defendant admitted the cause of action as alleged. The merits of a case is a matter quite apart from the court's jurisdiction. The fair meaning, we believe, is that the defendant admitted the truth of all the allegations of the declaration except those concerning damages.

Over defendant's objection a witness was permitted to say that 15 years ago he and the deceased were in partnership, and to state what the deceased's earnings then were. Deceased was a designer in lithography, and such was the business of the partnership. Of course, the question was: What pecuniary loss did the widow and four children suffer by the death of husband and father? The health and character and earning capacity of deceased were traced from his death at 48 years of age back to his young manhood. The partnership and deceased's earnings therein were included in the story. We think the whole of it was relevant to the question of damages, and that it was within the court's discretion to permit deceased's life history to be carried back to the extent stated.

On cross-examination of one of plaintiff's witnesses defendant brought out the fact that deceased had bought a house and two lots about 14 years before his death. "Q. Did he pay for it all at one time? A. He did not. Q. Did you say he did not pay for it at the time he bought it?" The court did not permit the defendant to

have an answer to the last question. If the ruling is to be taken for more than a disapproval of the bad habit of repeating a witness's answer in the form of a question, it was not erroneous. The subject-matter of the question was not gone into on direct examination, and we fail to perceive how any possible answer would have tended to deny or discredit the testimony in relation to damages.

Nothing in the record indicates that the jury were swayed by passion or prejudice. Deceased was 48 years old, in perfect health, a good provider, a skilled workman, with an expectancy of 19 years, turning \$30 a week over to his wife for the support of the family.

The trial was free from error throughout. But the judgment must be reversed on account of plaintiff's omission respecting citizenship. A question remains. How far ought the proceedings to be opened up? Defendant confessed the cause of action. The damages were properly proved and assessed. The justice of the matter is that plaintiff should not be required to go through another trial unless that course is unavoidable. Jurisdiction and merits are separate questions, and may properly be determined separately. Want of jurisdiction, by the very nature of the question, is merely a matter of abatement. If plaintiff had averred that he was a citizen of Illinois and defendant a corporation organized and existing under the laws of Michigan, and if defendant could honestly have challenged those allegations or either of them, the issue could have been determined in advance of a trial on the merits. We see no just reason why, after a trial on the merits, the logically separable matter of jurisdiction should not be determined. *Fitchburg R. Co. v. Nichols*, 85 Fed. 869, 29 C. C. A. 464; *Watson v. Bonfils*, 116 Fed. 157, 53 C. C. A. 535; *Everhart v. Huntsville College*, 120 U. S. 223, 7 Sup. Ct. 555, 30 L. Ed. 623; *Menard v. Goggan*, 121 U. S. 253, 7 Sup. Ct. 873, 30 L. Ed. 914. If, after plaintiff amends, the jurisdictional averments should be denied, the issue may be tried according to the practice with respect to pleas in abatement.

The judgment is reversed, with the direction to proceed in conformity with this opinion.

JOHANSON v. WHITE.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1908.)

No. 1,459.

MINES AND MINERALS—CLAIMS—PRIORITY OF RIGHTS.

If plaintiff's location of a placer mining claim on May 25th, unaccompanied by discovery at the time, gave him no right to return June 9th, after an absence to procure supplies, etc., and after defendant had made due location of the claim and taken possession for the purpose of exploration, defendant's remedy was to protect his possession against plaintiff's entry; and, plaintiff having re-entered peaceably and both being in possession by common consent after June 8th, it became a race of diligence between them to discover gold, and he who first discovered it obtained the prior right. His discovery did not relate back to the date of his location; but his location was made valid by discovery, and took effect from that date, and it gave him the full right to the claim, to the exclusion of all others.

In Error to the District Court of the United States for the Third Division of the District of Alaska.

In the court below, on the trial of an action in ejectment brought by the plaintiff in error against the defendant in error to recover the possession of a placer mining claim, evidence was introduced to show that on the morning of May 25, 1905, the plaintiff in error located and staked the claim in controversy, and thereafter departed to get supplies and necessary equipment to proceed with the development work, and on returning on June 9, 1905, found the defendant in error in possession; the latter having in the meantime located and staked the claim. It was proven that the plaintiff in error, on returning to the mining claim, entered peaceably upon the same, built a cabin thereon, and proceeded to sink a shaft. During the same time the defendant in error remained on the claim, living in a tent thereon, and was engaged likewise in sinking a shaft. The plaintiff in error, on reaching gravel, found sufficient gold therein to warrant him in the further expenditure of time and money in the development of the claim, and immediately proceeded to bring the present action. The defendant in error made a discovery of gold at a date subsequent to the discovery of the plaintiff in error. Upon this evidence the court, at the close of the testimony, instructed the jury to return a verdict for the defendant in error, "for the reason that the testimony in the case, which is admitted and which is not controverted, shows that the defendant in this action took possession of this mining property on the 8th day of June, 1905, and upon the 8th or 9th day of June, 1905, marked the boundaries of the claim by posting out corner stakes, and that he entered into the possession of the property and has remained in the actual possession of it ever since that time, and that upon the 11th or 12th day of June, when defendant was in actual possession of it, and working it for the purpose of making a discovery of gold, or to ascertain whether or not gold was in the claim, the plaintiff here, without any right, and without having any title whatever to the property, entered upon it and trespassed upon the rights of the defendant."

Bion A. Dodge and T. C. West (F. De Journal, of counsel), for plaintiff in error.

John L. McGinn and Martin L. Sullivan (J. C. Campbell, W. H. Metson, C. H. Oatman, F. C. Drew, and J. A. MacKenzie, of counsel), for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The court, in charging the jury to return a verdict for the defendant in error, evidently regarded the case as one falling within the rule, expressed in numerous decisions, that one who in good faith makes his location, remains in possession, and with due diligence proceeds to make discovery, is fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entries or intrusions upon his possession. It may be conceded that the rule would be applicable here, if the entry and possession of the plaintiff in error were of the character so described. But there is nothing in the evidence to show that the plaintiff in error entered into possession secretly, or by force or fraud, or that the defendant in error took any steps to protect his possession. It is not denied that the latter told the former that he "could go ahead and work," but it would be at his own risk. Conceding, for the purposes of this case, that the location made by the plaintiff in error on May 25, 1905, unaccompanied by discovery at the time, gave to him no right subsequently to return and take pos-

session of the claim after another had made due location thereof and taken possession for the purpose of exploration, the remedy of the latter was to protect his possession against the entry of the former. Both the locaters being in possession by common consent, as they were after June 8th, it became a race of diligence between them to discover gold, and he who first discovered it undoubtedly obtained the prior right. His discovery did not relate back to the date of his location; but his location was made valid by discovery, and took effect from that date, and it gave him the full right in the claim, to the exclusion of all others. This is well established by the authorities. *Lindley on Mines* (2d Ed.) § 216; *Horswell v. Ruiz*, 67 Cal. 111, 7 Pac. 197; *Garthe v. Hart*, 73 Cal. 541, 15 Pac. 93; *Gemmell v. Swain*, 28 Mont. 331, 72 Pac. 662, 98 Am. St. Rep. 570; *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735; *Crossman v. Pendery* (C. C.) 8 Fed. 693. In the case last cited, *Miller, Justice*, said:

"It is the opinion of the court that, inasmuch as the plaintiffs allowed the defendants to enter upon their claim and within their boundaries and there sink a shaft, in which they discovered mineral in rock in place before a discovery by plaintiffs, and make location thereof, without protest, the defendants now have the better right. But the plaintiffs might have protected their actual possession of their entire claim by proper legal proceeding prior to the discovery of mineral by the defendants, or by either party. A prospector on the public mineral domain may protect himself in the possession of his *pedis possessionis* while he is searching for mineral. His possession so held is good as a possessory title against all the world, except the government of the United States. But, if he stands by and allows others to enter upon his claim and first discover mineral in rock in place, the law gives such first discoverer a title to the mineral so first discovered, against which the mere possession of the surface cannot prevail."

In the light of these authorities it was error to instruct the jury to return a verdict for the defendant in error.

The judgment is reversed, and the cause is remanded for a new trial.

In re L. RUDNICK & CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

No. 184.

1. BANKRUPTCY—RIGHT TO PROPERTY—REPLEVIN—STAY—BANKRUPTCY JURISDICTION.

Where a sheriff took possession of certain personal property under a replevin writ, in an action pending in a state court prior to the filing of a bankruptcy petition against the defendant, plaintiff in such replevin suit claiming title on the ground that the property was purchased by means of the bankrupt's fraudulent representations, the bankruptcy court had no jurisdiction by a summary order to compel the sheriff to deliver the property to a receiver in bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 585 [U. S. Comp. St. 1901, p. 3450], invalidating levies, judgments, attachments, and liens obtained within four months against a person who is insolvent, and providing that the property so affected shall pass to the trustee, as such section only applies to property of the bankrupt.

2. REPLEVIN—REQUISITION—DISTINCTION FROM ATTACHMENT.

The distinction between a requisition in replevin and a lien created by an attachment levy is that the former deals primarily with the property of the plaintiff in replevin, and the latter with the property of the debtor.

Petition to Review Order of the District Court of the United States for the Southern District of New York, in Bankruptcy.

For opinion below, see 158 Fed. 223.

On petition to review an order directing the sheriff of New York county to deliver to the receiver in bankruptcy merchandise seized by said sheriff by virtue of a writ of replevin in an action duly commenced in the City Court of New York wherein Simon and Lewis Brinn (the petitioners for review herein) were plaintiffs and the bankrupt was defendant.

Alexander S. Marcuson and Samuel J. Rawak, for petitioners.

Stern, Singer & Barr (E. W. Tyler and Henry B. Singer, of counsel), for receiver.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. Prior to the proceedings in bankruptcy the petitioners herein commenced an action of replevin in the City Court of New York against L. Rudnick & Co., a corporation, alleging that they were the owners of property, described in a schedule annexed to the complaint, which was unlawfully taken and detained by the defendant, demand for its return having been made and refused. An undertaking in double the value of the property, approved by the sheriff, was given, the sureties agreeing to be responsible for the return of the property if the plaintiffs failed in establishing title to the same. In short, the property in question had been taken April 19, 1907, and was in the control of a court having jurisdiction prior to the filing of the petition in bankruptcy, which was on the following day, April 20, 1907.

It is undisputed that the replevin suit complied in all respects with the provisions of the New York Code and that the question of ownership of the property can be fully tried and determined in that action. On the 6th of May, 1907, upon petition of the receiver in bankruptcy and after hearing on said petition, the district court directed the sheriff of the county of New York to deliver the property taken by him to the receiver in bankruptcy. We are therefore confronted squarely with the question: Where the sheriff in an action pending in a state court holds property in replevin taken by him prior to bankruptcy proceedings under claim of ownership, has the district court jurisdiction by summary order to compel the sheriff to deliver the property to a receiver appointed by said District Court? It is contended on behalf of the receiver that the sheriff seized property not included in the requisition and in excess of the amount necessary to satisfy the plaintiff's claim; but the question thus suggested is not before us for determination. The order directs the delivery to the receiver of all the property taken, without distinction or qualification, and it is this order that is the subject of review. If the court in bankruptcy, after investigation, had directed certain designated property of the bankrupt not sold to it by the plaintiffs in replevin, or property in excess of their demand, to be delivered to the receiver, a different question might be presented.

It is also argued for the receiver that the affidavits presented by him tend to show that the property belonged to the bankrupt. The plaintiffs in replevin, on the contrary, allege that they were induced to sell

the property to the bankrupt by false and fraudulent representations and that the title never passed. These allegations of fraud are not denied by the bankrupt. It is obvious, therefore, that the question of the title to the goods is one of fact, which can be fully determined in the pending action, and if the bankrupt's successor in interest (the receiver or trustee) can prove his contention, he will be entitled to the return of the goods or their value.

The argument of convenience and expediency is not properly before us, but it cannot be denied that a question which involves the title to property can, to say the least, be determined as well in a plenary suit, where witnesses are seen, examined and cross-examined, as in a summary proceeding based solely upon affidavits. There is no form of action known to the common law in which the rights of both parties can be safeguarded so thoroughly as in an action of replevin. The jurisdiction of the District Court is purely statutory and unless the bankruptcy act permits the taking of property from a state official holding it under process duly issued, the right to do so cannot be maintained.

It is contended that section 67f of the act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]), invalidating levies, judgments, attachments and liens obtained within four months against a person who is insolvent and providing that the property so affected shall pass to the trustee as part of the estate of the bankrupt, vests the necessary power in the District Court. We cannot accede to this view. It is manifest that the section in question deals with the property of the bankrupt. Assuming that Congress might lawfully pass a law requiring the property of third parties, found in the possession of the bankrupt, to be turned over to his trustee as part of his estate; it is sufficient for the purposes of this review that Congress has not done so in the present act. If A. leaves his coat with B. to be repaired and B. refuses to return it, A. can reclaim it in an action of replevin, and the status of that suit is not affected by the fact that B. subsequently becomes a bankrupt. The mere assertion by B. of ownership in the coat does not oust the court of jurisdiction and transfer the controversy to the bankruptcy court. It presents a question of fact merely, to be tried in the court first obtaining possession of the property.

The distinction between a requisition in replevin and a lien created by levy or attachment is that the former deals primarily with the property of the plaintiff in replevin and the latter with the property of the bankrupt. It is of no moment that the title is in dispute. This is true in every contested replevin suit, and it is this question which the court must determine before judgment can be rendered. In the case of *Russell and Birkett*, 101 Fed. 248, 41 C. C. A. 323, decided April 3, 1900, this court early recognized as applicable to the bankruptcy act of 1898 the general principle that where a court of competent jurisdiction duly obtains possession of property, the title to which is in dispute, it is entitled to retain possession and no other court can lawfully interfere. The court said:

"When property is in the actual possession of a court this draws to it the right to decide upon conflicting claims to its ultimate possession and control (*Rouse v. Letcher*, 156 U. S. 47, 49, 15 Sup. Ct. 206, 207, 39 L. Ed. 341), and as between two courts exercising concurrent jurisdiction, the court which

first acquires possession will maintain its possession intact. * * * A federal court will neither interfere with property in the lawful custody of a state court, nor tolerate interference by a state court with property in its custody. *Summers v. White*, 36 U. S. App. 396, 71 Fed. 106, 17 C. C. A. 631; *Louisville Trust Co. v. City of Cincinnati*, 47 U. S. App. 36, 76 Fed. 296, 22 C. C. A. 334."

This view is sustained by the following authorities: *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; *Jaquith v. Rowley*, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620; *In re Baudouine*, 101 Fed. 574, 41 C. C. A. 318.

The order of the District Court is reversed.

THE GRACE DOLLAR.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1906.)

No. 1,461.

SEAMEN—RIGHT TO WAGES—DESERPTION—CONSTRUCTION OF SHIPPING ARTICLES.

Libelants signed shipping articles for a voyage "from the port of San Francisco, Cal., to Portland, Or., and other Columbia river ports, and return to San Francisco for final discharge, either direct, or via one or more ports on the Pacific coast, north or south of the port of discharge, as the master may direct, voyage not to exceed six calendar months." The vessel proceeded to Portland, where she took on a cargo of lumber for Los Angeles, and after its discharge proceeded north, past San Francisco, to Gray's Harbor for another cargo of lumber for San Francisco. *Held*, that she did not deviate from the stipulated voyage, and that, in leaving the vessel at Gray's Harbor against the master's protest and after having served only 26 days, libelants were deserters and forfeited their right to wages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, §§ 104, 106.]

Appeal from the District Court of the United States for the Western Division of the Western District of Washington.

For opinion below, see 149 Fed. 793.

Marquis & Shields and H. W. Hutton, for appellants.

Nathan H. Frank and Walter D. Mansfield, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The appeal in this case is from a decree of the District Court in which the libel of the appellants to recover wages as seamen was dismissed on the ground that the wages were forfeited by an abandonment of the voyage before its conclusion. On or about May 10, 1906, the appellants shipped for a voyage on the steamer *Grace Dollar*. Seven of them signed as able seamen, three as firemen, one as cook, one as waiter, and one as second mate. The shipping articles described the voyage as follows:

"From the port of San Francisco, Cal., to Portland, Or., and other Columbia river ports, and return to San Francisco for final discharge, either direct or via one or more ports on the Pacific coast, north or south of the port of discharge, as the master may direct; voyage not to exceed six calendar months."

On or about May 11, 1906, the vessel, with her master and crew, went from San Francisco to Portland, where she took on board a load of lumber. Thence she proceeded southward to Los Angeles. There the cargo was discharged. Thence she went northward, past the port of San Francisco, to Aberdeen, in Gray's Harbor, in the state of Washington, arriving there on June 5, 1906. At that port the seven sailors claimed that their contract had been completed, and they went ashore after the master had informed them that, if they did so, they would be considered deserters. Later in the same day, on the instructions of an agent of the Sailors' Union, the three firemen, the cook, and the waiter quit the vessel, and on the following day the second mate did likewise. The master refused to pay any of said crew their earned and unpaid wages, on the ground that they had deserted the ship without just or reasonable cause before their term of service had expired, or the voyage for which they had signed had been completed.

The sole question involved is whether or not there was such deviation from the voyage as to justify the libelants in abandoning the ship. The statute requires that the shipping articles set forth "the nature and so far as practicable the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate." This is one of the many provisions that have been enacted for the protection of seamen, who are regarded as the wards of the nation. Its object is to prevent the entrapping of seamen into a voyage of greater length or of more peril or labor than that which they have assented to and for which they ought to receive increased wages. Such a statute should receive a reasonable construction. Obviously, it is important that the mariner shall be informed in a general way of the general course of the voyage, but the essential requisites of the statute are that he shall know the duration of the voyage and the port of his final discharge. *The Mermaid*, 115 Fed. 13, 52 C. C. A. 607. It is not always feasible to name, at the outset of a voyage, all the ports to which the demands of trade may carry the vessel, and it is not necessary that the seamen be advised of all the operations of the voyage, and especially is this true of a coastwise voyage. To hold otherwise would be to impose burdensome and destructive restrictions on commerce without conferring any substantial benefit on seamen. British legislation on this subject has been influenced by the same protective policy as our own. The English merchant shipping act of 1854 (section 149) provided that the shipping articles should, among other things, set forth "the nature and, so far as practicable, the duration of the intended voyage or engagement." But in 1873 the section was so amended that the agreement, instead of stating the nature and duration of the intended voyage or engagement, may "state the maximum period of the voyage or engagement, and the places or ports of the world (if any) to which the voyage or engagement is not to extend." In *The Moslem*, 101 Fed. Cas. No. 9,875, it was said:

"A change of voyage which may discharge mariners from the obligation of their contract must be willfully made by the master and enforced against their consent or acquiescence."

By the shipping articles in the present case the crew consented that, after loading at Portland, the vessel might go to other ports on the Pacific Coast, either north or south of San Francisco, or both, within the prescribed six months, as the master might direct. The vessel was engaged in the lumber trade. The ports of supply were north of San Francisco, and the markets were at San Francisco, or at ports south thereof. The vessel, having loaded at Portland, sailed to Los Angeles and discharged her cargo there. It had not yet touched at a port north of San Francisco, and it proceeded north to obtain another cargo for the purpose of carrying the same to San Francisco, the port of final discharge. We think that this was within the intendment of the articles and that there was no deviation. At the time when the appellants left the vessel, they had served but 26 days of the 6 months specified in the articles. There is nothing in the record to show that on leaving Los Angeles they demanded to be taken to San Francisco, or that they made any objection or protest against going to Gray's Harbor for a cargo. Their first objection appears to have been made after the vessel had been made fast to the wharf at Aberdeen. All that then remained to be performed of the voyage was to load a cargo of lumber and take the same to San Francisco, a service that could not have occupied more than 10 days.

In *Magee et al. v. The Moss*, Gilp. 219, Fed. Cas. No. 8,944, the voyage described was from Philadelphia to South America, or any other port or ports, backwards and forwards, when and where required, and back to Philadelphia, unless sooner discharged. The ship went to Buenos Ayres, thence to Havana, thence to Marseilles, thence again to a port in South America, and returned to Philadelphia. The court, in holding that a desertion of seamen at the port of Havana was not justifiable, said:

"It will not do to tie down these contracts, made sometimes in a counting house, and sometimes in the cabin of a ship, to the strict rules of composition. We must endeavor to come at the true meaning of the parties and to give the contract a reasonable construction; to take care to put upon general words a just and reasonable limitation, but not lightly to destroy and avoid the whole contract, because the generality or breadth of the expressions may be in a degree uncertain or might be used to impose an oppressive service. * * * In the present case I can see nothing unreasonable or oppressive in the construction the captain has put upon these articles."

Of similar import is the decision of the same court in *Wood et al. v. The Nimrod*, Gilp. 83 Fed. Cas. No. 17,959, in which the voyage was described as from the port of New York to Darien, thence to St. Thomas, thence to New Orleans, or as the master may direct, and back to New York, her port of discharge. The vessel sailed from New York to Darien, thence to St. Thomas, thence to Maricaoibo, and from there sailed for Philadelphia not going at all to New Orleans. At Philadelphia the seamen deserted. It was held that thereby they forfeited their wages.

The case of *The J. M. Griffith* (D. C.) 71 Fed. 317, cited by the appellants, involved the construction of shipping articles different from those which are here presented. In that case, the voyage was to be

"from the port of San Francisco to Port Hadlock, and thence to San Francisco for final discharge, either direct or via one or more ports of the Pacific coast." There was no express provision for touching at a port south of San Francisco, and there was ground for holding that San Pedro, which lies several hundred miles south of San Francisco, was not a port which could be said to be by way of the route from Port Hadlock, Wash., to San Francisco. In *Rury v. McKay* (D. C.) 84 Fed. 360, and *The Laura Madsen* (D. C.) 84 Fed. 362, the courts, we think, went further than authority and sound reason warrant, and we are unable to agree with the conclusions which they reached.

The decree is affirmed.

READER v. HAGGIN.

(Circuit Court of Appeals, Second Circuit. March 10, 1908.)

No. 176.

1. EXCEPTIONS, BILL OF—SETTLEMENT—TIME.

After the expiration of the term at which the cause was tried, the court cannot allow a bill of exceptions *nunc pro tunc* unless control over the case has been reserved by rule or order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, §§ 72½, 73.]

2. APPEAL AND ERROR—REVIEW—OBJECTIONS NOT MADE AT TRIAL.

An objection that plaintiff did not have his day in court in that the case should have been submitted to the jury, and even if a verdict were directed, it should not have been on the merits, was not available on a writ of error, where not made in the trial court.

3. SAME—SCOPE OF REVIEW.

The inquiry of the Circuit Court of Appeals on writ of error must be confined to the pleadings and proof as embodied in a bill of exceptions, and, where the record so made up is free from error, the judgment must be affirmed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2887.]

4. SAME—MOTION FOR NEW TRIAL.

The denial of a motion for a new trial presents no question which can be considered by the Circuit Court of Appeals.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3860–3865.]

5. SAME—BILL OF EXCEPTIONS—INSERTION OF EXCEPTION.

A motion that an exception be inserted in a bill of exceptions, where no exception was in fact taken, is addressed to the discretion of the trial judge, and his denial of the motion cannot be reviewed on a writ of error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3891.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Dittenhoefer, Gerber & James (A. J. Dittenhoefer and Dudley F. Phelps, Jr., of counsel), for plaintiff in error.

Alexander and Green (Francis L. Wellman and Sumner B. Stiles, of counsel), for defendant in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The action was brought to recover \$250,000 as commissions, under an alleged oral agreement by which the defendant promised to pay the plaintiff 10 per cent. on the price of certain mines in Peru which were purchased by the defendant through the plaintiff as defendant's broker.

The bill of exceptions shows that plaintiff was the only witness. Upon his cross-examination numerous letters, cablegrams, and other documents signed by the plaintiff were produced by the defendant, and the plaintiff was interrogated regarding them. It is unnecessary to characterize these papers further than to say that many of them are quite inconsistent with the theory upon which the action was prosecuted. When the court adjourned on Wednesday, December 19, 1906, the plaintiff was still on the stand with his cross-examination unconcluded. On the assembling of the court on Thursday morning the following proceedings took place.

"The Court: I think we are ready to take up Reader against Haggin. Mr. Stanchfield: In Reader against Haggin the plaintiff rests his case. Mr. Wellman: The defendant rests if your honor please. The defendant now moves for the direction of a verdict on the merits in favor of the defendant. The Court: I think you are entitled to it. Take the verdict Mr. Clerk. By direction of the court the jury returned a verdict for the defendant."

The plaintiff did not ask to submit any question to the jury. This, then, is all that took place on the trial, the plaintiff was examined and partly cross-examined. He then rested his case. The defendant also rested and asked for the direction of a verdict, which was granted. To this action of the court no exception was asked for and none appears in the record. Exceptions were noted to rulings of the court admitting several of the letters heretofore referred to, but they are so manifestly untenable that it is unnecessary to discuss them in detail. The cause was tried at the October term, and no bill of exceptions was signed, filed, or served during that term. The time in which to file a bill of exceptions was not extended by order or otherwise, and the bill was not presented for signature until August 28, 1907, five months after the expiration of the October term, when it was signed nunc pro tunc as of March 30, 1907. This court has repeatedly held that after the expiration of the term at which the cause was tried, unless the court reserves control over the case by rule or order, it is too late to allow a bill of exceptions. If, however, we assume the bill of exceptions to be properly before us, it does not aid the plaintiff for the reason that it is absolutely barren of any exception which would justify a reversal of the judgment. The grievance of which the plaintiff particularly complains is that he did not have his day in court, that the question in dispute should have been submitted to the jury, and, even if a verdict were directed, it should not have been upon the merits. The short and conclusive answer is that the plaintiff made no such contention in the trial court. On the contrary he permitted the verdict to be directed without objection or exception. Our inquiry upon writ of error must be confined to the pleadings and the proof, as embodied in a bill of exceptions, and where the record, so made up, is absolutely free from error the judgment must be affirmed. A reversal in such circumstances would be a gross abuse

of power. Although we might end the discussion at this point with propriety, the unusual circumstances attending the direction of the verdict lead us to examine briefly the other contentions advanced by the plaintiff.

No motion for a new trial was made at the trial, but in January thereafter the plaintiff made such a motion, and at the same time moved that an exception might be entered to the direction of the verdict. This motion was denied, and the plaintiff appealed to this court. No rule of practice has been adhered to with greater uniformity than the rule that the denial of a motion for a new trial, even if made at the trial, presents no question which this court can consider. Our latest decision reaffirming this rule was made January 7, 1908. *Denison v. Shawmut Mining Co.*, 159 Fed. 102. A motion that an exception be inserted in a bill of exceptions is clearly addressed to the discretion of the trial judge, and his denial of the motion presents no question which can be reviewed by this court, and especially so when it is conceded that no exception was in fact taken.

A large part of the record is taken up with the affidavits read on the motion for a new trial, the plaintiff contending that the action of his counsel in submitting to the direction of a verdict for the defendant was without his consent; the defendant contending that the plaintiff not only consented to, but actually directed, the course followed by his counsel. As before stated, these affidavits are wholly irrelevant to any question legitimately before us, and should not have been included in the record. We have, however, examined them, thinking that they might reveal some aspect of the controversy which would enable us to give the plaintiff relief. The affidavits disclose a clear contradiction between the plaintiff and his wife on the one side and two counselors of the circuit court on the other, but present no facts which are of the least avail on this review. It is proper to say that counsel who appear for the plaintiff in error in this court did not appear for him in the court below.

After careful consideration of all the questions presented, we find ourselves powerless to grant a new trial unless we are prepared wholly to disregard the practice which has been uniformly followed since this court was established.

The judgment is affirmed with costs.

THE STANLEY DOLLAR.*

(Circuit Court of Appeals, Ninth Circuit. February 3, 1908.)

No. 1,287.

1. ADMIRALTY—JURISDICTION—MARITIME CONTRACTS—PASSENGER CONTRACTS BINDING VESSEL.

A corporation of Washington contracted with a dock company to bring 600 Japanese laborers from Honolulu to Seattle on respondent steamship, owned by a steamship company, for which the corporation was to pay a stated sum per head for carriage. A Japanese agent of the dock company in Honolulu advertised for laborers and contracted with libelants and

*Rehearing denied June 10, 1908.

others to transport them to Seattle, collecting from them a part of the passage money agreed upon, and taking their notes for the balance. A representative of the steamship company went to Honolulu and there received from the agent a portion of the passage money, and issued tickets for carriage to Victoria, B. C., the vessel being of Canadian register and not entitled to carry passengers from there to any United States port. Libelants being unable to read the tickets, which were in English, did not know that they were not to be taken to Seattle until after they had gone on board, but on learning such fact left the vessel, and libeled her for breach of the contracts. *Held*, on evidence showing that the arrangement between the dock company and the steamship company was not a charter but a joint enterprise in the profits of which each was to share, and that the Japanese agent who made the contracts also represented the owner of the vessel, that the contracts were maritime and gave a right of action in admiralty against the ship.

[Ed. Note.—Admiralty jurisdiction as to matters of contract, see notes to *The Richard Winslow*, 18 C. C. A. 347; *Board of Com'rs v. Howard*, 27 C. C. A. 530.]

2. CARRIERS—DAMAGES—BREACH OF CONTRACT OF CARRIAGE—SUIT BY PASSENGER.

Libelants were not entitled to recover damages for loss of time after breach of the contracts and while waiting for the trial of the case.

3. ADMIRALTY—COSTS—DOCKET FEE IN CONSOLIDATED CASES.

Where libels against a vessel are similar in character and are consolidated for trial, but one docket fee is taxable for the libelants.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 1, Admiralty, §§ 851, 853.]

Appeal from the District Court of the United States for the Territory of Hawaii.

E. C. Peters, John W. Cathcart, Nathan H. Frank, and Walter D. Mansfield, for appellants.

Charles Page, Edward J. McCutchen, Samuel Knight, and J. J. Dunne, for appellees.

Before GILBERT and ROSS, Circuit Judges.

ROSS, Circuit Judge. The case shows that a Japanese named Kikutake, in the early part of June, 1905, caused to be inserted in certain Japanese newspapers published at Honolulu and circulated in the Islands, an advertisement for laborers to go to Seattle and Tacoma, state of Washington, by a certain steamship called the "Stanley Dollar," to sail June 19th of that year direct to Seattle, stating the wages such laborers would receive, and the fare each was to pay, and further stating that if any such laborer should not be able to pay the full fare, he (Kikutake) would lend him \$20 of the amount. In response to that advertisement, each of the 36 appellees, among a large number of other Japanese, contracted with Kikutake for transportation on board the Stanley Dollar from Honolulu to Seattle, at the time paying to Kikutake \$20 in money on account of his passage, and executing to Kikutake his promissory note for the balance of the passage money, and receiving from Kikutake a receipt therefor. At this time the ship mentioned was in the waters of the Orient. Prior to her arrival at Honolulu, Mr. Robert Dollar arrived at that place as the representative of the steamship company owning the vessel, and for the purpose, in part, of issuing tickets to the laborers secured by Kikutake by means and

in pursuance of the advertisements. After his arrival in Honolulu Dollar and Kikutake had several conferences upon the subject, resulting in the issuance by Dollar to each of the libelants of a ticket printed entirely in English, entitling him to transportation from Honolulu to Victoria, B. C.—Dollar thereupon collecting from Kikutake \$14 for each of such tickets. The steamship in question did not reach Honolulu from Yokohama until June 27, 1905, and then it was discovered that she was without a license or certificate to carry passengers. Moreover, she was of Canadian register, and was consequently not entitled to carry passengers from Honolulu to Seattle or any other American port. A survey was made at the instance of the collector of customs at Honolulu, resulting in the making of certain repairs and additions to the equipment of the ship, deemed essential to the granting of a license to her to carry passengers. The day before she was finally ready to sail, which was about midnight of July 15, 1905, the libelants went on board with their baggage, and then for the first time discovered that they were not to be taken by the ship to Seattle, in accordance with their agreement with Kikutake, but to Victoria, in accordance with the tickets which had been issued to them, which tickets they could not read, not understanding any English, and which had not been theretofore explained to them. The appellees thereupon left the ship and filed the libels which were in the court below consolidated, and which formed the basis of the appellees' recovery there.

From the record it seems that a corporation called the "Construction & Maintenance Company" had entered into an agreement with another corporation called the "Commercial Dock Company," doing business at Tacoma, for the transportation by the latter of 600 Japanese in the steerage of the steamship Stanley Dollar, from Honolulu to Victoria, for \$26.50 each (\$28 to Seattle), to leave Honolulu on or about June 15, 1905, and to arrive at Victoria on or about June 30th, and that Mr. Dollar, before going to Honolulu, had been directed by the Stanley Dollar Steamship Company, and authorized by the Commercial Dock Company, to collect from Kikutake, who seems to have been originally acting for the dock company, one-half of the total amount which the dock company was to receive from the Construction & Maintenance Company per passenger, to be applied on account of the money due to the steamship company under its agreement with it. The balance of the money due to the steamship company from the Commercial Dock Company, and which was to be determined by the number of passengers carried by the ship, was payable before or at the time the vessel should sail from Honolulu. It is not pretended that the Japanese laborers in question had any notice of the agreement between these corporations, and even if they had, we think it very clear from the record that their agreement was a common venture, each to share in the profits to be derived therefrom, and that in no true sense was it a charter party. It was, in effect, a common venture for the transportation of the laborers from Honolulu, to which the owner of the steamship was a party along with the other corporations mentioned; and we think from the evidence in the case that the court below was quite right in holding that Kikutake, in his dealings with the

appellees, was all the time representing the owner of the ship, as well as the other parties interested in the enterprise. *United States v. Shea*, 152 U. S. 178, 186, 14 Sup. Ct. 519, 38 L. Ed. 403.

It is equally clear, we think, that the temporary acceptance of the tickets by the appellees, not at the time understood by or explained to them, and which were repudiated and transportation thereunder declined as soon as their contents were discovered, did not create a new contract between the appellees and the ship, or annul or in any way change that made by them with Kikutake, which was the contract sued on, strictly maritime in character, and therefore clearly within the jurisdiction of the court below, and which contract was violated by the delivery, under the circumstances stated, by Dollar to the appellees of the tickets providing only for their transportation to Victoria, and by the inability of the vessel to transport them to Seattle.

We are of the opinion, however, that the court below erred in allowing the appellees damages for loss of time after the breach of the contract and while awaiting the trial of the case, and also in allowing a docket fee in each of the libels. Where the libels are consolidated, as in the present instance, but one docket fee can be allowed. *The Mount Eden* (D. C.) 87 Fed. 483.

The cause is remanded to the court below with directions to modify the decree as above indicated, and, as so modified, it will stand affirmed.

LEARY et al. v. TALBOT et al.

(Circuit Court of Appeals, Second Circuit. April 14, 1908.)

No. 191.

SHIPPING—DEMURRAGE—LIABILITY OF CHARTERER FOR DELAY IN DISCHARGING.

The owners of a schooner *held* entitled to recover demurrage from a charterer for delay in discharging a cargo of lumber in New York under a charter providing for customary dispatch where the vessel was required by the charterer to discharge portions of the cargo at different docks, and the delay resulted from her detention at the first for a longer time than was anticipated through no fault of the vessel, which threw her behind in reaching the others, and in consequence the berths reserved for her there were occupied and she was obliged to wait, the charterer being bound by the custom of the port to furnish her berths when ready.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 576.

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 151 Fed. 355.

Hagen, Goodrich & Coughlan and H. W. Goodrich, for appellants.
Armstrong, Brown & Boland and P. M. Brown, for appellees.

Before Judges LACOMBE, WARD, and NOYES.

WARD, Circuit Judge. This libel is filed by the owners of the schooner *Persis A. Colwell* to recover 21 days' demurrage at the port

of discharge. The charter party provided as to lay days and demurrage:

"Customary dispatch at port of discharge where vessel can safely get and discharge. And that for each and every day's detention by default of said party of the second part (the charterers) or agent (\$44.00) forty-four dollars per day, shall be paid by said party of the second part, or agent, to the said party of the first part, or agent. The cargo or cargoes to be received, and delivered alongside, within reach of the vessel's tackles."

Though the vessel does the loading and discharging, this provision for lay days is an engagement of the charterers that they will take the cargo within that time, and the provision for demurrage is an engagement that thereafter they will pay at the rate of \$44 per day for every day of detention due to them. The purpose of lay days is to fix the period during which the charterer may detain the vessel in discharging for the agreed freight and beyond which he must pay her an extended freight in the form of demurrage, or of damages in the nature of demurrage. Carver, at section 608 of his work on Carriage of Goods by Sea, states the law thus:

"The work of putting the goods into the ship and of taking them out again, whether under a charter party, or in a general ship, is in nearly all cases done by the servants of the shipowner. But the duty of bringing the goods to be shipped, and of receiving them at the port of discharge, lies upon the freighter. And in these matters defaults are apt to occur which lead to detention of the ship, and consequent loss to the shipowner. It is, therefore, usual in charter parties, and sometimes in bills of lading, to fix times within which the ship is to be loaded and discharged; and, where that is done, the provision is understood as an undertaking by the freighter that the ship shall be loaded or discharged within the time so fixed. The shipowner must not be in default; he must by his servants do his part of the work of receiving and stowing, or unloading, with diligence and with the proper number of men; but the undertaking as to the time which the loading or discharge shall occupy is given by the freighter, not by the shipowner. This is commonly marked in the charter party by saying that so many days 'are to be allowed the said merchant for loading, etc.' But the effect is the same whether the clause is in that form, or states, generally, that the cargo 'shall be loaded' in so many days. The promise is made by the freighter, for the benefit of the shipowner. Exceptional cases, however, occur. A charter party provided that the cargo should be 'received from alongside ship at port of discharge as customary as fast as steamer can deliver in ordinary working hours. * * * Not less than 100 standards a day loading or discharging, and ten days on demurrage over and above the said laying days at £70 per day.' The Court of Appeals, affirming Wills, J., held that the stipulation as to 100 standards a day was for the protection of the charterers; and did not amount to an undertaking by them that the ship should be discharged at that rate."

It is stipulated in this case that the vessel carried 411,040 feet of lumber, and that the customary discharge at the port of New York for such a vessel is 25,000 feet per day, making 16½ lay days. After these lay days had expired the charterers were bound to pay demurrage for every day of detention in discharging the cargo which was in any way due to them.

The charterers having sold the cargo to four different persons had, in accordance with a rule of the Maritime Exchange of this port which was received in evidence, one full calendar day after the vessel had reported in which to furnish her a berth, and were bound to furnish her a berth where she could discharge each subsequent consignment

after receiving 24 hours' notice from the master that he would be ready to discharge it at the expiration of that time. The vessel reported on October 17th at 11 a. m., and, under the rule, the charterers were entitled to one full calendar day in which to furnish a berth, which would have given them until the morning of October 19th, a calendar day extending from midnight to midnight. Chapter 677, Laws of New York, § 27. In point of fact the discharge began on the morning of October 18th, so that lay days should be calculated from that time, and omitting Sundays, because the lay days contemplated are evidently working days, the $16\frac{1}{2}$ days expired November 7th at noon. Thereafter the discharge continued at two subsequent berths designated by the charterers until November 25th at 5:30 p. m., during which time every working day seems to have been used except 7, on which the designated berth was occupied by other vessels.

Respondents claim that this detention resulted from delay of half a day in discharging the vessel at the first berth, on account of rain, which disarranged the schedule they had provided for the subsequent berths, so that other vessels got into them. We do not think the schooner had anything to do with this schedule. The charterers were bound to furnish berths, and were responsible for any delay caused by their not doing so. If the vessel was at fault for any delay during the lay days the legal consequence would be simply to extend the lay days pro tanto, and not to make her liable for the disarrangement of the charterers' schedule, but the delay in question was due to the refusal of the custom house inspector to work in the rain and not to the fault of the vessel at all, so that the half day must be included in the lay days.

All the subsequent detention except Sundays was due to the charterers, so that as demurrage began to run on the afternoon of November 6th, and parts of demurrage days are treated as whole days, the libelants were entitled to recover for 18 days, but, as they have not appealed, the decree of the District Court giving them $15\frac{1}{2}$ days is affirmed, with interest and costs.

IN re STROBEL.

(Circuit Court of Appeals, Second Circuit. February 28, 1908. On Rehearing, March 9, 1908.)

Nos. 170, 171.

1. BANKRUPTCY—RECEIVERS—ATTORNEY.

Where a debtor is declared a bankrupt at the instance of a creditor, and a receiver is appointed, the attorney for such petitioning creditor should not be employed as attorney for the receiver.

2. SAME—ORDERS—MODE OF REVIEW.

A receiver in bankruptcy having turned over to the petitioning creditor certain of the bankrupt's property on the creditor's claim that the bankrupt was a bailee thereof only, a special commissioner recommended that the receiver's action be not approved, which recommendation was affirmed by an order of the district court. Another order was thereafter made.

referring to the same commissioner the duty to ascertain the value of the property, and the sum the creditor should pay to the bankrupt's trustee, and, on the commissioner's finding being filed, an order was entered confirming his report and directing payment to the trustee or clerk of the court. *Held*, that none of such orders were appealable or reviewable otherwise than by a petition for review, as authorized by Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432).

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 O. C. A. 9.]

3. SAME—TIME.

A petition to review such orders could not be sustained, unless taken within 10 days after the entry of the order, under Circuit Court of Appeals rule 38, providing that a petition for review shall be filed within 10 days after the entry of the order, unless by an order filed within such 10 days the District Court enlarges the time.

4. SAME—OBJECTIONS—WAIVER.

A stipulation that two petitions to review orders in bankruptcy, with certified copies transmitted by the clerk of the District Court should be printed in one appeal book, was not sufficient to constitute a waiver of any legal objection to the petitions.

Petitions for Revision of Proceedings of the District Court of the United States for the Eastern District of New York, in Bankruptcy. See 155 Fed. 692.

This cause comes here upon petitions to review two orders of the bankruptcy court. The facts are sufficiently set forth in the opinion.

Frank Trenholm (Garrard Glenn, of counsel), for petitioner.

B. F. Edsall, for respondents.

A. C. Aubrey, for bankrupt.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. On July 17, 1905, the present petitioner for review, Bachrach, filed a petition praying that Strobel, whose business was the making of gold watch cases, be adjudged a bankrupt. He claimed to be a creditor for goods, wares, and merchandise sold between August 26, 1904, and August 15, 1905. In due course Strobel was adjudged a bankrupt and trustee was appointed; Bachrach on the trial testifying that Strobel was indebted to him for gold sold and delivered. After petition was filed a receiver was appointed, who took possession of the bankrupt's property. Said receiver appointed as his attorneys the firm of lawyers who had represented Bachrach as petitioning creditor. The latter is represented on the hearing in this court by a lawyer in no way connected with that firm. It would have been well had Congress, in the bankrupt act expressly prohibited receivers from selecting as attorneys or counsel lawyers who had appeared for either the bankrupt or the petitioning creditor. Such selection affords a ready opportunity for chicanery, fraud, and perjury; and it would seem desirable for bankruptcy courts generally to adopt the wholesome rule in force in the Southern district of New York forbidding such selection, and to enforce such rule rigidly.

Having secured the appointment of his own lawyer as the legal adviser of the receiver, Bachrach changed his position, claiming that Strobel was a bailee of the gold, which he had let him have solely to be made into watch cases and returned to himself (Bachrach). Thereupon the receiver under the advice of the lawyer who represented both sides—receiver and petitioning creditor—allowed the latter to take into his possession all the watch cases, some completed, some in course of manufacture, all material for the making of such cases, all sweepings and cleanings, gold nuggets, gold from water tanks, and even the tar paper floor covering, in which was gold filings; in fact everything but the machinery, tools and safe. After appointment of the trustee the receiver filed his account, and objections were made to his delivery of the property to Bachrach, whereupon, on the latter's petition, it was referred to a special commissioner to examine and report thereon. He recommended that the action of the receiver in that respect be not approved, and his report was confirmed by an order of the District Court August 2, 1906. On November 19, 1906, an order was made referring it to the same special commissioner to ascertain the value of said property and what sum Bachrach should be required to pay to the trustee. The special commissioner found the value of said property to be \$3,015.76, and on August 12, 1907, the District Court confirmed his report and entered an order directing Bachrach to pay said sum, with interest and costs, to the trustee or to the clerk of the court.

None of these three orders was appealable, or could be reviewed otherwise than by petition to review, under Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432). The bankrupt act does not limit the time within which such petition to review shall be filed and served; but this court by rule 38 has, in analogy to the provisions of the act touching appeal, fixed such time as "within 10 days after the entry of the order sought to be reviewed," with the proviso that by order filed within such 10 days the District Court may enlarge the time for filing petition for review. In the case of these three orders, entered, respectively, August 2, 1906, November 19, 1906, and August 12, 1907, we find in the record no such order enlarging time; and, since the petition to review these three orders was not filed until September 28, 1907, more than 10 days after the entry of the last of them, they cannot now be reviewed. On May 27, 1907, Bachrach applied to the District Court, on petition, for an order vacating the several reports of the special commissioner and also the orders of August 2, 1906, and November 19, 1906. That application was denied by an order entered August 12, 1907, and a petition to review this last-mentioned order was filed and is now presented. But such petition was not filed till September 28, 1907, and no order enlarging time to file is found in the record.

Petitioner contends that his adversary cannot take advantage of these technical defects, because of some stipulation entered into in this court. But upon examination it appears that the stipulation is only that the two petitions to review, with the certified copies transmitted by the clerk of the District Court, "be printed in one appeal book." That is

not sufficient to constitute a waiver of any legal objection to such petitions, and they are therefore dismissed.

On Rehearing.

Attention has been called to the stipulation extending time to file petition for review. A reargument, however, should not be ordered, since, upon the merits, we were satisfied that the order of the District Court should be affirmed.

BORDEN'S CONDENSED MILK CO. v. LOUISIANA PURCHASE EXPOSITION CO.

(Circuit Court of Appeals, Eighth Circuit. March 27, 1908.)

No. 2,445.

EQUITY—JURISDICTION—REVIEW OF ACTION OF SPECIAL TRIBUNAL—AWARD BY EXPOSITION JURY.

Under the rules and regulations adopted and promulgated by the Louisiana Purchase Exposition Company for the government of exhibitors and the making of awards, which created a superior jury, with power to finally pass upon the recommendations of department and group juries and to make awards after notice to exhibitors affected and an opportunity to be heard, an award so made after a full hearing is conclusive, and cannot be reviewed by the courts, unless some ground of equitable jurisdiction, such as fraud, accident, or mistake, is shown; nor can the company be compelled to change its records or enjoined from publishing the true purport of its proceedings at suit of an exhibitor.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Frederick N. Judson, for appellant.

Franklin Ferriss (Nathaniel S. Brown, on the brief), for appellee.

Before HOOK, Circuit Judge; and PHILIPS, District Judge.

HOOK, Circuit Judge. This is an appeal from a decree dismissing the bill of complaint of the Borden's Condensed Milk Company against the Louisiana Purchase Exposition Company to establish an award for a collective exhibit of its products and to annul and enjoin the publication of a separate award for a member of the collection.

The Exposition Company, in connection with a commission organized under an act of Congress, conducted the Exposition at St. Louis, Mo., in 1904, held in commemoration of the purchase of the Louisiana Territory. Rules and regulations for the conduct of the exposition, the government of exhibitors, and the making of awards were promulgated by the Exposition Company and approved by the commission. A system of classification into departments and subordinate groups and classes was adopted for the exhibits. One of the great departments was that of Agriculture, and among the groups composing it were No. 85, relating to animal food products, and No. 87, relating to farinaceous products and their derivatives. Each group was in turn subdivided into minor classes. There were also provisions for the examination of the exhibits by juries and a system of

awards of merit indicated by diplomas of four classes: Grand prizes, gold medals, silver medals, and bronze medals. A decimal scale was used in judging the exhibits, in which 100 points indicated perfection, and the points were apportioned among various matters, some of which had no relation to the intrinsic excellence or worth of the articles exhibited. A scale of markings determined the standard attained, thus, for example, a marking of from 75 to 84 points, inclusive, entitled an exhibit to a bronze medal, the lowest award. There were group juries, department juries, and one superior jury. It was the duty of a group jury to examine the competing exhibits in the group to which it was assigned, and, having determined their rank or class in order of merit, to recommend awards accordingly. The recommendations were then reported to the department jury of the department in which the group belonged, whose duty it was to review the reports, to harmonize differences between the recommendations of the several group juries, and to make them conform to the rules and regulations of the exposition. After being approved or changed by the department jury, the recommendations for award were certified to the superior jury, which was given power to "determine finally and fully the awards to be made." Provision was made for notice to exhibitors of their awards, for their protests in writing setting forth their grounds of dissatisfaction, and for decision thereof by the superior jury. What a group jury and a department jury did was merely advisory. It was the superior jury that made awards and determined controversies about them.

Borden's Company, the complainant, entered in group 85 exhibits of its condensed milk, evaporated cream, and malted milk as animal food products. It may be assumed that it duly asked an award for the exhibit as a collective one. It is certain that it applied for a separate award for each kind of product. Horlick's Food Company entered its malted milk in group 87 as a farinaceous product. Both brands of malted milk, Borden's and Horlick's, might properly have been entered in either group. They were similar in composition and commercially competitive. The superior jury made the Borden's Company the following awards: On condensed milk a grand prize, on evaporated cream a gold medal, and on malted milk a silver medal—all in group 85. It awarded the Horlick's Company a gold medal on malted milk in group 87. The complaint of the Borden's Company is twofold: It says it either had or is entitled to a grand prize on its exhibit considered as a collective one, and it asks that one be established by decree of court. It also says that the plan of the exposition contemplated competition between exhibitors, the determination by juries of the comparative excellence of competing articles, and the making of awards accordingly; also that its malted milk in group 85 and Horlick's malted milk in group 87 were examined by different group juries, thereby ignoring the basic rule of competition, and that a higher award to Horlick's Company indicates to the world a greater merit, and is therefore unjust and injuriously affects the value of its product. In this connection the Borden's Company seeks a decree annulling its own award on malted milk and enjoining the publication thereof.

The claim for an award of a grand prize for a collective exhibit cannot be sustained. Though the group jury recommended one, it conclusively appears that the superior jury never made such an award. Whether this was due to the fact that the recommendation was never before the superior jury, or to the position of that jury that the rules and regulations of the exposition prohibited such an award, is immaterial. There was no award by the specially constituted board which alone had authority, and a court cannot, in a case like this, assume its functions and decree one. Nor can the Exposition Company be compelled to change its records relating to the awards for exhibits of malted milk, or be enjoined from publishing the true purport of its proceedings. It is true the malted milk of Borden's Company and that of Horlick's Company were examined by different group juries; but that fact, indicating the absence of individual competition in the examination, must have been known to the department jury when it acted on the recommendations, and also to the superior jury when it made the awards. Moreover, Borden's Company made specific complaint in writing of this very matter to the superior jury, as it was authorized to do by the rules and regulations of the exposition; but, notwithstanding the complaint, the original awards were adhered to. When we refer to the superior jury, we include the committee upon which the powers of that jury devolved after its dissolution. In the scheme of the exposition, to which the Borden's Company consented when it entered its exhibits, the superior jury was the tribunal of last resort, in the absence of recognized grounds for interference by a court of equity. Power to determine awards finally and fully was given it. There were provisions for notice to the exhibitors and for a hearing of complaints. Notice was given, complaint made, and hearing had, and the decision was adverse to complainant. Courts of equity will grant relief in cases of fraud, accident, or mistake from the awards, reports, and acts of special tribunals, whether created by law or by the convention of the parties; but we can discover no such grounds here. The final decision of the superior jury proceeded upon a full knowledge and consideration of the essential facts. It was not the result of misapprehension of conditions. In their brief counsel charge fraud on the part of certain exposition officials. The bill contains no averments of fraud sufficiently direct and particular to invite an issue; but it is proper to say that we think the evidence discloses no ground whatever for the imputation. The matters to which attention is directed are consistent with the utmost honesty and good faith, and that they occurred is not surprising, considering the complicated details of procedure and the immense amount of labor connected with an exposition of that magnitude.

It may be said, in conclusion, that the view prevailed with the superior jury that the competition contemplated in the plan of the exposition was primarily with fixed standards, and not a competition of each exhibit with its commercial competitor, though it does not clearly appear that this was the moving reason for the final result.

The decree is affirmed.

HOLMES v. BAKER & HAMILTON et al.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1908.)

No. 1,513.

1. PARTNERSHIP—DISSOLUTION—CONTINUANCE FOR PAYMENT OF DEBTS.

Where assets or debts of a partnership remain after dissolution, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 624-644.]

2. BANKRUPTCY—PARTNERSHIP—ACT OF BANKRUPTCY—DUTY OF RETIRING PARTNER.

Bankr. Act July 1, 1898, c. 541, § 5a, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3424], declares that a partnership during the continuance of the firm business or after its dissolution and before final settlement may be adjudged a bankrupt, and section 5c provides that the bankruptcy court which has jurisdiction of one of the partners may have jurisdiction of all of the partners and of the administration of the partnership and individual property. *Held* that, where a partnership was insolvent at the date of its dissolution, and thereafter an execution was levied on the firm's property for a partnership debt, the duty devolved on the retiring partner to discharge such levy, as well as on any other members of the firm, and a failure so to do constituted an act of bankruptcy, justifying an adjudication against the firm, and also against its members, including such retiring partner.

Appeal from the District Court of the United States for the Eastern Division of the Eastern District of Washington.

In a petition of the creditors of the firm of C. H. Holmes & Co., filed on August 18, 1906, praying that the firm and each member thereof be adjudged bankrupt, it was alleged that the said partnership and each of its members are and have been insolvent since May 1, 1906, that the said firm committed an act of bankruptcy in permitting one of its creditors to obtain a preference through legal proceedings against the firm, resulting, on July 12, 1906, in a judgment upon which execution was issued and levy made on the stock of goods of the said firm, which goods were advertised to be sold by the sheriff on August 21, 1906, and that neither the firm nor any of its members have done aught to vacate or discharge said preference. The appellant, C. H. Holmes, who was one of the members of said partnership, answered the petition, alleging that on March 27, 1906, for a good and valuable consideration he had sold and transferred to his copartner Park all his interest in the firm and severed his connection with the same and its business. On these pleadings and the stipulation that at the time of its dissolution on March 27, 1906, the partnership was insolvent, the said partnership and each member thereof was adjudged bankrupt.

O. C. Moore, D. W. Henley, and A. G. Kellam, for appellant.
W. H. Winfree and B. C. Mosby, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). It is assigned as error that the District Court adjudged the appellant a bankrupt. It is contended that the failure of the appellant to release and discharge the preference of the execution creditor was not an act of bankruptcy on his part, the debt not being his debt, nor the merchandise levied on his property, but that of a firm with which he had severed his connection months prior thereto, and it is argued that at

the time of the alleged act of bankruptcy the firm had long ceased to exist, and that no act can be committed by a nonexisting entity. The vice of this argument is that it assumes that an insolvent partnership at the time of its dissolution ceases to be an entity. The rule is well settled that, where assets or debts of a partnership remain after dissolution, the partnership is considered as subsisting as to its creditors until its property is subjected to the satisfaction of their claims. In *re* Crockett et al., 2 Ben. 514, Fed. Cas. No. 3,402; In *re* Foster, 3 Ben. 386, Fed. Cas. No. 4,962; In *re* Noonan, 3 Biss. 491, Fed. Cas. No. 10,292; In *re* Stowers et al., 1 Lowell, 528, Fed. Cas. No. 13,516; In *re* Hirsch et al. (D. C.) 97 Fed. 571. The bankruptcy act of July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], in recognition of this rule, provides in section 5a that a partnership during the continuance of the partnership business or after its dissolution, and before the final settlement thereof, may be adjudged a bankrupt, and section 5c provides that the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property. See In *re* L. Stein & Co., 127 Fed. 547, 62 C. C. A. 272.

It is true that an individual member of a firm cannot be adjudged a bankrupt for an act of bankruptcy not committed by him or in which he did not participate (In *re* Meyer, 98 Fed. 976, 39 C. C. A. 368); but that is not the case here presented. The act of bankruptcy in this case was committed by all the members of the firm. It was an act of omission, the failure to discharge the levy of the execution, a duty which rested as much upon the appellant as upon any member of the firm. Notwithstanding the dissolution of the copartnership, it remained, as it was before, the appellant's duty to see that the property of the copartnership was devoted to the payment of the partnership debts, as to which he had not been released.

The adjudication is affirmed.

NEW LIVERPOOL SALT CO. v. WELLBORN, District Judge.

(Circuit Court of Appeals, Ninth Circuit. March 7, 1908.)

No. 1,568.

APPEAL AND ERROR—EFFECT OF APPEAL—CORRECTION OF JUDGMENT—CLERICAL ERRORS.

Where, a decree, enjoining defendant therein from diverting water from a river so that it should flow on complainant's land, by clerical error failed to describe the land, the court, after the term and after an appeal had been taken, had power to correct the mistake, and, having done so pursuant to a stipulation of the parties, had no power thereafter to vacate the corrected order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2201.]

Petition for Writ of Mandate.

Page, McCutchen & Knight, for petitioner.

John S. Chapman, for respondent.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

PER CURIAM. The petitioner herein having filed its petition for a writ of mandamus to the above-named respondent, directing him to entertain an application made in said Circuit Court in a cause wherein the petitioner herein is complainant and the California Development Company is the defendant, for an order upon said defendant, its officers and agents, to show cause why they should not be dealt with as for contempt of said court in disobeying its decree of injunction in said cause; and an order having been made by the court in response to said petition that the respondent show cause why said petition should not be granted, and the respondent having answered said petition and appeared herein by his counsel John S. Chapman, the petitioner appearing by E. J. McCutchen, and it appearing from the said petition and answer that on January 10, 1908, a decree was entered in the said Circuit Court of the United States for the Southern District of California in the case of New Liverpool Salt Company, Complainant, v. California Development Company, Defendant, enjoining the defendant therein from diverting water from the Colorado river in any way so that the same should flow upon the lands of the complainant described in the bill of complaint, and that by clerical mistake in the entry of the decree so made the lands of the complainant were incorrectly described; that on February 8, 1908, said mistake was discovered by complainant's counsel, whereupon a stipulation was made and signed by counsel for the respective parties that a manifest clerical error had been made in such description of said lands in said decree, and that an order be made by said Circuit Court directing the clerk thereof to correct the said description by inserting and changing the necessary words to render the same correct and in accordance with the judgment of the court; that on February 10, 1908, an order was accordingly made by the court directing said clerk to correct the original decree and the record thereof in accordance with the stipulation, and said clerk did then and there make said correction by interlineation in the text of the said decree and the record thereof; that on said February 10, 1908, the said complainant filed in said court and cause a petition for a judgment for a contempt, setting forth that said injunction embodied and contained in said decree had been violated and disobeyed by the defendant and others, officers and agents of the defendant, and on said day an order was made by the court directing said defendant and its said agents and officers to appear before the said Circuit Court at a time therein named to show cause, if any they had, why they should not be punished for contempt for disobeying said injunction; that on February 19, 1908, while a motion made by the defendant for the interpretation of said final decree was pending and on hearing before said court, the judge thereof stated to counsel representing the respective parties that he entertained grave doubt as to the validity of the order made on February 10, 1908, for the correction of error in said final decree, for the reason that said order was made after the expiration of the term at which the decree was signed and after an appeal had been perfected by the defendant from said decree to this court; that thereafter the said court made an order reciting that it appeared to its satisfaction that its previous order for the correction of said de-

cree was void, and that the decree in so far as it related to injunctive relief was inoperative, because of the failure therein to describe the complainant's land, whereupon it was ordered that the amendment so previously made and ordered be vacated and set aside, and the amendment stricken from the decree, but the clerk was directed by the court not to physically strike out the amendments so interlined by the order of February 10, 1908; and it now appearing to this court that the error in the description of the lands so contained in the original decree was a manifest clerical error such as the said Circuit Court had the power and jurisdiction to correct, notwithstanding the expiration of the term and the perfection of the appeal to this court, and that it was properly corrected on stipulation of the parties by the interlineations made therein under the order of February 10, 1908, and that said court had not the power subsequently to set aside or vacate its order making said corrections in accordance with the stipulation of the parties, it is therefore ordered that a writ of mandate issue from this court directing said Circuit Court to entertain said application so made for an order to show cause why the defendant and its officers and agents should not be dealt with for contempt of said court in disobeying the injunction of said decree in said court, and to proceed and hear the same.

LEON RHEIMS CO. V. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 11, 1908.)

No. 129 (4,393).

CUSTOMS DUTIES—CLASSIFICATION—TRIMMED HATS—"WEARING APPAREL IN CHIEF VALUE OF SILK."

In applying the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 432, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1675), for "hats * * * trimmed, * * * composed wholly or in chief value of fur," the composition of the hats should be determined by reference to the whole hat, including the trimming; so that where hats, the bodies of which are fur, are so trimmed that the silk trimming is the component of chief value in the hats, they are dutiable under Schedule L, par. 390, 30 Stat. 187 (U. S. Comp. St. 1901, p. 1670), as "wearing apparel in chief value of silk."

Appeal from the Circuit Court of the United States for the Southern District of New York.

Appeal from a decision of the Circuit Court, affirming a decision of the Board of General Appraisers, G. A. 6,411 (T. D. 27,541), which sustained the action of the collector.

For decision below, see 154 Fed. 969.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The merchandise consists of trimmed hats. The bodies are made of fur and the trimmings of silk. Silk

is the component material of chief value in the completed hat; fur, in the body considered by itself.

The hats were assessed for duty as "wearing apparel of which silk is the component material of chief value," under paragraph 390 of the tariff act (Act July 24, 1897, c. 11, § 1, Schedule L, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]). The importer claims that the hats should have been assessed under paragraph 432 of the act:

"Hats * * * trimmed or untrimmed * * * composed wholly or in chief value of fur of the rabbit, beaver, or other animals. * * *"

The importer contends that only the body should be considered in determining that which is the most valuable material in the hat. But as the statute speaks specifically of trimmed hats—a completed article—it is impossible to perceive any ground for the contention. The articles in question are trimmed hats not composed in chief value of fur, and are manifestly outside of paragraph 432.

The claim of the importer that the Board of Appraisers in considering other paragraphs of the act have not always ruled consistently with their decision in the present case is not a matter in which we can be expected to express interest. It certainly has no bearing upon our decision here.

The decision of the Circuit Court is affirmed.

WOOD v. GENERAL ACCIDENT INS. CO. OF PHILADELPHIA.

(Circuit Court of Appeals, Third Circuit. May 1, 1908.)

No. 43.

INSURANCE—ACCIDENT POLICY—CONSTRUCTION—"RIDING AS PASSENGER IN REGULAR PASSENGER CONVEYANCE."

Where a beneficiary in an accident policy was a United States railway mail clerk, and was killed while riding in a mail car in the performance of his duties, he was not "actually riding as a passenger in or on any regular passenger conveyance provided by a common carrier," within an accident policy insuring the person named as beneficiary under certain circumstances against loss by accident while actually riding as a passenger in or on any regular passenger conveyance.

[Ed. Note.—Accident insurance—risks and causes of loss, see note to National Acc. Soc. of City of New York v. Dolph, 38 C. C. A. 3.]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion of lower court, see 156 Fed. 982.

Edmond Englert, for plaintiff in error.

Before MOODY, Circuit Justice, and DALLAS and GRAY, Circuit Judges.

DALLAS, Circuit Judge. In the court below the plaintiff in error brought an action against the defendant in error on a policy of accident insurance, which contained a clause as follows:

"In case a beneficiary other than the insured or his legal representatives is specifically named in the schedule of warranties indorsed on this policy,

then and not otherwise this policy shall also, in consideration of the premium, insure the person named as beneficiary in the said schedule as follows: Against any one of the following losses, resulting within ninety days from date of accident and caused solely and exclusively by injuries covered by this policy and sustained by said beneficiary while actually riding as a passenger in or on any regular passenger conveyance provided by a common carrier, or (2) while riding in a regular passenger elevator, or (3) in consequence of the burning of a building in which said beneficiary shall be at the commencement of the fire, in the following sums: Payment for loss of life, \$5,000."

Ira H. Wood, "the person named as beneficiary," was a United States railway mail clerk. In pursuance of this employment he was in the mail car of a moving train, when an accident by derailment caused his death, and the sole point now made is as to whether, upon these facts, and with reference to the provision above quoted, the Circuit Court erred in holding that he was not "actually riding as a passenger in or on any regular passenger conveyance provided by a common carrier." As these words are ordinary words, the meaning of which is plain, they should, of course, be understood and applied accordingly; and that a mail clerk at work in a mail car is not, in common apprehension, "actually riding as a passenger in or on any regular passenger conveyance," cannot, we think, be reasonably questioned. This being so, neither the argument of counsel with relation to the locus contractus, nor their discussion of cases against carriers for personal injuries, need be considered.

We are clearly of opinion that the court below put the proper construction (if construction it may be termed) upon the policy sued on, and therefore its judgment is affirmed.

BALLANTINE et al. v. BALLANTINE et al.

(Circuit Court of Appeals, Third Circuit. February 18, 1908. On Rehearing, March 26, 1908.)

No. 52.

TRUSTS—LEGAL ESTATES—VESTING IN BENEFICIARY.

A bequest to executors, in trust to pay the income to a son until such time as they think proper to pay him the principal, is valid, and the son is not entitled to demand the principal immediately, or on reaching his majority.

Appeal from the Circuit Court of the United States for the District of New Jersey.

Reynolds D. Brown and John G. Johnson, for appellants.

John O. H. Pitney and R. V. Lindabury, for appellees.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

PER CURIAM. This case has been thoroughly presented by counsel and has received our careful consideration. But nothing could profitably be added to the opinion of the learned judge below. We concur in his conclusion, and think he adequately sustained it. Ballantine v. Ballantine (C. C.) 152 Fed. 775. The contention that a bequest to executors, in trust to pay the income to a son until such time as

they think proper to pay him the principal, entitles the son to demand the principal immediately, or on reaching his majority, has been strongly urged, and is not wholly unsupported by judicial decision; but there are decisions likewise to the contrary, and we are of opinion that, in the absence of binding authority, the position taken by the Circuit Court should be upheld.

The decree is affirmed.

On Rehearing.

This cause came on to be further heard on the suggestion and agreement of counsel hereto annexed. On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court in this cause be and the same is hereby modified, so that the first paragraph thereof shall read as follows:

"That the bill be and the same is hereby dismissed, without prejudice to complainants' rights to hereafter claim that the trust as to the last one-fifth of George A. Ballantine's share will cease upon the death of testator's widow."

And it is further ordered that the decree of the said Circuit Court for the District of New Jersey, as thus modified, be and the same is hereby affirmed. And it is further ordered that the appellants pay the costs in this court.

DELAWARE SEAMLESS TUBE CO. et al. v. SHELBY STEEL TUBE CO.

(Circuit Court of Appeals, Third Circuit. April 23, 1908.)

No. 5

1. PATENTS—ASSIGNMENT—SUFFICIENCY.

A conveyance by a corporation of all of its property, including its "good will, patents, trade-marks," etc., is effective as an assignment of a patent then owned by it, although not described therein, and it is immaterial as against an alleged infringer that it was not eligible for record under Rev. St. § 4898 (U. S. Comp. St. 1901, p. 3387).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 276.]

2. SAME—INFRINGEMENT—CHANGES IN FORM.

Mere formal changes, where there is substantial identity, are unavailing to escape infringement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 371.]

3. SAME—MACHINE FOR MAKING TUBING.

The Stiefel patent, No. 531,340, for mechanism for making tubes from metallic ingots, was not anticipated and discloses invention, nor is it strictly limited to the precise construction shown and described; also *held* infringed.

Appeal from Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 151 Fed. 64.

Charles K. Offield, for appellants.

Thomas W. Bakewell, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. The specification of error based upon the proposition that the complainant did not exhibit a sufficient title

to the patent sued on has not been maintained. The suggestion that "the test" of whether title passed by the assignment in question is "whether such paper could be recorded" under section 4898 of the Revised Statutes (U. S. Comp. St. 1901, p. 3387) has been attentively considered, but cannot be accepted. That section provides that "every patent * * * shall be assignable in law by an instrument in writing," and it makes an assignment void for omission to record only "as against any subsequent purchaser or mortgagee," etc. In this instance we have a writing which, as was said by the learned judge below, is an assignment, in terms, "of all the property of the company executing it, * * * specifically including also 'the good will, patents, trade-marks,'" etc. Of course, the word "patents" included every patent which was assignable by the assignor (*Herring-Hall-Marvin Safe Co. v. Hall's Safe Co.*, 28 Sup. Ct. 351, 52 L. Ed. —); and, with respect to the parties to this cause, it is immaterial whether the instrument was or was not eligible for record.

The patent involved is No. 551,340, dated December 10, 1895, issued to Ralph Charles Stiefel, for "mechanism for making tubes from metallic ingots." Of its validity independent examination of the record and careful consideration of the arguments of counsel leave us in no doubt. We have arrived at the same conclusion as was reached by the Circuit Court, and deem it unnecessary to add anything to the reasoning of the learned judge in its support. *Shelby Steel Tube Co. v. Delaware Seamless Tube Co.* (C. C.) 161 Fed. 64.

Upon the question of infringement, too, but little, if anything, remains to be said. The departure of the defendant's machine from the prior art, even as advanced by Mannesmann, is palpable, and there is convincing evidence that it was contrived with especial reference to Stiefel's invention, and with intent to elude, if possible, the terms of his patent. The two organisms are similar in structure and appearance, but they are not precisely identical, and the sufficiency of their variance to preclude conflict depends upon the scope of the claims in suit, which are as follows:

"(1) The combination of two parallel disks revolving in the same direction and overlapping each other, one of said disks being beveled at its outer edge which beveled surface is opposed to a portion of the plane surface of the other disk; the outer diameter of this plane surface and the inner diameter of the beveled surface opposed to it being substantially the same and the edges formed by both diameters intersecting the same transverse plane through the pass between the disks; the angles of the opposing surfaces converging to this plane which is at the narrowest part of the pass, with a conical mandrel lying in the axis of the pass at its exit side, substantially as set forth.

"(2) The combination of two parallel disks revolving in the same direction, beveled at the edges of their adjacent faces and overlapping each other so that the beveled portion of one disk lies opposite a flat portion of the other disk, the edges formed by the smaller diameters of the beveled portion of the disks intersecting the same transverse plane through the pass between the disks whereby the sides of the pass first converge to this plane and then diverge beyond it, with a piercing mandrel located between the diverging sides of the pass and exactly in axial line of the pass, substantially as hereinbefore set forth."

It is true that the appellant "avoided a mere servile copy of the form" described in these claims. But, though he abstained from op-

posing the beveled portion of one disk to the flat surface of the other, yet the practical success which he accomplished was due to the embodiment in his slightly altered arrangement of the very essence of the meritorious invention which Stiefel had disclosed, and this court has repeatedly held that mere formal changes where there is substantial identity are unavailing to escape infringement. *Mitchell v. Ewart*, 81 Fed. 390, 26 C. C. A. 443; *Thompson v. Second Avenue Traction Co.*, 93 Fed. 824, 35 C. C. A. 620; *Smeeth v. Perkins & Co.*, 125 Fed. 285, 60 C. C. A. 199. See, also, *Ives v. Hamilton*, 92 U. S. 431, 23 L. Ed. 494; *Elizabeth v. Pavement Co.*, 97 U. S. 137, 24 L. Ed. 1000; *Hoyt v. Horne*, 145 U. S. 302, 12 Sup. Ct. 922, 36 L. Ed. 713.

The contention that the file wrapper and contents in the matter of a certain abandoned application of Stiefel require that the patent in suit should be confined "to exact and specific mechanical construction and details" does not call for extended discussion. The application referred to presented claims both for an apparatus and for a process. The latter only were disallowed. The others were withdrawn, and are substantially contained in the patent now before the court.

As the first and second specifications do not "set out separately and particularly each error asserted and intended to be urged," they need not be regarded. Rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii). The remaining specifications are overruled for the reasons we have briefly indicated, and which are more fully set forth in the opinion of the court below.

The decree is affirmed.

PIEPER et al. v. ELECTRO DENTAL MFG. CO.

(Circuit Court of Appeals, Second Circuit. April 14, 1908.)

No. 198.

PATENTS—INVENTION—REGULATOR FOR ELECTRIC MOTORS.

The Pieper patents, No. 704,099, for electric motor regulation, and No. 721,229, for a motor, are void for lack of invention; the only novel feature in the combinations shown being the application to the small alternating current fan motors of the existing art of the regulating shunt with varying resistance already in use in direct current dental motors, which did not involve invention.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree dismissing the bill in an equity suit brought for infringement of two patents. One patent is No. 704,099, issued July 8, 1902 (application filed March 24, 1899) to complainants for "electric motor regulation." The other is 721,229, issued February 24, 1903 (application filed September 20, 1901), to complainants for a "motor." The opinion of the Circuit Court will be found in 156 Fed. 672.

Charles Brown and F. F. Church (Church & Rich, of counsel), for appellants.

Howson & Howson (Charles Howson, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The specifications of the earlier patent state that the invention—

“relates to electric motors adapted for alternating currents and to certain improvements relating to and means for and method of controlling them, whereby they may be started with the necessary torque, and when the armature is under full speed it can be instantly stopped, and, if desired, its direction of movement reversed, without the use of clutches, brakes, or other mechanical holding devices. The invention, which is designed more particularly for small motors intended for operating dental engines or machines, where accurate speed regulation is the leading requisite, relates to alternating current motors of the direct-current type having usual laminated field magnets and the windings designed for a relatively high electro-motive force or relatively high self-induction, armature-coils designed for a relatively low electro-motive force or having a relatively low self-induction, commutator and commutator-brushes arranged at the neutral point, said field and armature windings being connected in series; and the novel features of the invention relate to the control of such motors at any speed and with or without a load by a permanent shunt around the armature, and the accurate regulation of the motor is accomplished by the manipulation of a variable resistance interposed in said shunt. * * * The function of the resistance in shunt with the armature of a series-wound motor of the direct-current type, which is wound as stated for alternating currents, is not only to maintain the voltage at the armature-terminals constant, but permits an armature winding of relatively low self-induction or few turns, which is necessary in an alternating-current motor of this type to prevent excessive sparking.”

Eight claims are relied upon. It will be sufficient to quote two of them.

“1. The combination, in a motor for alternating currents, of field-windings, armature coils, commutator, and commutator-brushes arranged at the neutral point, all connected in series, as customary in constant-current motors, and a regulating device for controlling the speed of the motor consisting of a variable resistance permanently in shunt across the armature.

“2. The combination in a motor for alternating currents, of field-windings with relatively high self-induction and armature coils with relatively low self-induction, commutator and commutator-brushes arranged on the neutral point, all connected in series, as customary in continuous-current motors and a variable resistance in shunt with the armature.”

The judge who heard the cause at circuit held this patent void for lack of patentable novelty. We are led to the same conclusion, not by any transactions in the Patent Office, nor by construing the language of the specification so as to find in it some “concession,” which the patentee did not intend to make, but because of the disclosures of the prior art. The patent shows an alternating-current motor of the direct-current type, with field and armature wound so as to secure the differences in electro-motive force above indicated, with means for regulating speed, not mechanically, but by cutting in and out a series of resistances arranged in shunt with the armature. This precise combination in its entirety was novel; but mere novelty is not invention, when the teachings of the art would naturally lead one skilled therein to produce such a combination whenever an improvement of that sort was required.

We have from the complainants no history of the development of their improvement, and the date assigned to it is that of the application—March, 1899. At that time there were in existence electric motors for dental purposes in all respects, save as to details of winding, the same as the one in suit, operating by direct currents. There were also similar motors operated by alternating currents, and reg-

ulated as to speed by frictional attachments. There were also small motors for alternating currents, in which there was no regulation of speed, and which had the precise construction of laminated field and differing windings of field and armature that the patentees describe. These were used as fan motors. Quite possibly the patentees had never heard of them. It would seem from his *prima facie* testimony that complainant's expert did not know of them till the trial of this suit; but they are none the less a part of the prior art, to be referred to in testing the validity of the patent.

The direct current dental motors gave entire satisfaction and were capable of accurate and complete control in the manner indicated. It was not until the alternating current came into extensive use that there was demand for any other motor. When that time came it was necessary only to apply to the small fan motors the regulating shunt with varying resistances which was already in successful use in direct-current dental motors, without changing or modifying either element of the combination. Did this constitute invention? Would the means employed for regulating the alternating motors, so that their speed would be controlled when operating with or without load be obvious to one skilled in the art? That is a question which can be answered more satisfactorily by those so skilled than by one who is not. When we turn to the record, however, we find a difference of opinion. Defendant's expert insists that it was obvious. Complainant's expert that it was not. Both of them are gentlemen of eminence in their profession. Manifestly one of them only correctly answers the question, and the only thing possible for a court, itself without special technical knowledge of the subject, is to make a careful study of the testimony of both, and accept as controlling that which commends itself as the more persuasive. Upon such study of the testimony of both witnesses, we are of the opinion that the defendant's expert gives the correct answer. It is unnecessary to review in detail such testimony, which is extremely voluminous; but we may indicate a few circumstances which lead us to this conclusion.

Complainant's expert has much to say of the wide differences between direct and alternating currents; the management of the first being a relatively simple matter, while the actions which take place in motors of this type operated by alternating currents are exceedingly complex, so that one cannot say in advance just what will happen when using alternating currents, and certain results, which inevitably follow when using direct currents, do not follow when using alternating currents. It would seem, however, that this very uncertainty as to what would happen would be more likely to induce a skilled person, who had before him the problem of regulating one of these small fan motors so as to make it available for dental purposes, to try the resistance shunt, which already worked well with direct current dental motors. If there is so much uncertainty as to what will happen when alternating currents are applied to direct-current devices, the less chance there is that the "teachings of the art" would turn the skilled person away from what to an unskilled person would seem to be an obvious experiment.

It is argued that there was a long-existing prior demand for alternating-current dental motors, speed-controlled as the Pieper mo-

tors are. Satisfactory evidence of this would go far towards indicating patentable invention; but the evidence produced is not satisfactory. Several circulars and advertisements of dental supply houses were put in evidence. They contained statements to the effect that such a motor could not be produced, though efforts were being made to devise one. But the documents are competent only to show that such statements were made, not that the statements were true. For aught that appears they may have been made by dealers who had other types of dental motors which they wished to sell. There is no proof as to what efforts were being made by skilled electricians to solve the problem. The time was so short after the introduction of the direct current dental motor that it would seem the alternating-current motor of the patent was produced as a development due to the gradual extension of the use of commercial alternating currents. The record does not make out a case "where the need has been long apparent and various persons had vainly sought to accomplish the desired result." *Electric Railway Co. v. Jamaica Co.* (C. C.) 61 Fed. 655.

The later Pieper patent, 721,229, differs from the earlier one only in the substitution of an inductive resistance for an ohmic resistance. The evidence shows that these two varieties of resistance were old and well-known equivalents of each other. The change from one to the other did not involve invention.

The decree of the Circuit Court is affirmed, with costs.

O'ROURKE ENGINEERING CONST. CO. V. McMULLEN et al.

(Circuit Court of Appeals, Second Circuit. January 22, 1908. On Rehearing, April 14, 1908.)

No. 97.

1. PATENTS—INVENTION—EVIDENCE OF INVENTION.

When the court has to deal with a device which has achieved an undisputed success, and accomplishes a result never attained before, which is new, useful and in large demand, it is generally safe to conclude that the man who made it is an inventor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 39.]

2. SAME—INFRINGEMENT—AIR LOCK FOR CAISSONS.

The Moran patent, No. 500,149, for an air lock for caissons in which work is carried on under an air pressure greater than that of the atmosphere, by means of which a bucket can be lowered into and hoisted from the working chamber by a continuous movement, whereas previously two hoists and two sets of tackle had been necessary, discloses invention, and covers a device of great merit and utility. Claim 2, in specifying a valve "closing against" the fall rope, does not include by implication as a necessary part a stuffing box or packing on the valve or a stuffing box on the rope. As so construed, claim 2 *held* infringed. Claim 3 *held* void for lack of invention, and, if conceded, validity not infringed.

3. SAME—SUIT FOR INFRINGEMENT—PLEADING.

That a bill for infringement of a patent alleged infringement in a certain district only, omitting the usual words "and elsewhere," will not prevent the consideration of evidence of infringement outside of such district, where the answer denied infringement in such district or elsewhere, and the pleadings were treated as presenting such issue.

4. SAME—INVENTION—AIR LOCKS FOR CAISSONS.

The Barr patent, No. 514,843, for an air lock for caissons, *held* void for lack of invention as to claims 1, 3, 4, 6, and 8.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 150 Fed. 338.

W. D. Edmonds, for appellant.

Gifford & Bull (I. Edgar Bull, of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This action is brought for infringement of letters patent, No. 500,149, to D. E. Moran, and No. 514,843 to William C. Barr, duly assigned to complainant.

The subject of the controversy is an air lock in combination with a caisson used in construction work at levels beneath the water line, such combination having been long in use. The caisson sinks as excavation continues, the water being kept out by compressed air constantly pumped into the caisson. If the empty bucket were carried directly into the caisson or the full bucket out of it, the compressed air would rapidly escape, and for this reason an intermediate lock or chamber between the caisson and the open air has always been used. Devices whereby pressure in the working chamber could be cut off from the lock, such as a door between the two were familiar. If the bucket were coming from the outer air the door between the lock and the working chamber was closed, the air in the lock was equalized with the atmosphere, the bucket was then introduced in the lock, the air in the lock equalized with that in the caisson, the door between them opened, and the bucket lowered into the working chamber and vice versa when the loaded bucket was coming out. This always involved two separate hoists, one from the caisson into the lock and another from the lock into the open air and vice versa. Moran's was the first lock which permitted the continuous and uninterrupted hoist from the caisson into the upper air and descent from the upper air into the caisson. He accomplished it by passing the hoisting fall through a hole in the center of a two-part gate or valve separating the air lock from the outer air with a device to prevent the undue escape of the compressed air. It was an undoubted improvement, and as such has been generally adopted.

The two claims relied upon are:

"2. The combination in an air lock of a two-part valve with a rope opening at the center with a seat on the inner side of the air lock and a rope at the center against which the valve closes substantially as specified.

"3. The combination in an air lock of a two-part valve opening in the air lock closing against a seat in the inner side of the air lock and a central opening in the valve and stuffing boxes to close the same, substantially as specified."

These claims are not very clear, but we read them thus: 2. (a) Two-part valve; (b) Opening for rope at center of valve; (c) valve seat on inner side of air lock; (d) rope against which valve closes either by means of a stuffing box or packing on the valve or by means of a stuffing box on the rope. 3. (a) Two-part valve; (b) opening for rope at center of valve; (c) valve seat on inner side of air lock; (d) stuffing box on rope. In other words claim 2 is larger and covers all the means

mentioned in the specifications of making the central opening air-tight, whereas claim 3 covers only the stuffing box, T, which is carried on the rope.

Claims 1, 3, 4, 6, and 8 of the Barr patent are sued upon. They cover the mechanism that moves the two-part valve doors horizontally, and the first claim may be quoted as illustrative of the mechanism:

"1. An air lock for caissons comprising upper and lower gates, pistons connected to said gates and operating in cylinders and connections between said cylinders and the air-confining cylinder of the caisson whereby said pistons and gates are operated by the air pressure in the caisson, substantially as set forth."

The defendants Richard Deeves & Son had the contract to build an extension to the Manhattan Life Building on Broadway in the city of New York, and they employed the defendant McMullen to do the foundation work. McMullen used two caissons with air locks carrying stuffing boxes on the hoisting fall which concededly infringed the patent sued upon, if valid, but the judge of the Circuit Court found that those two locks were licensed under both patents, and had not been reconstructed as distinguished from being repaired (*Shickle v. St. Louis Car Company*, 77 Fed. 739, 23 C. C. A. 433; *Goodyear Company v. Jackson*, 112 Fed. 146, 50 C. C. A. 159, 55 L. R. A. 692) in which conclusions we agree with him, so that they are out of the case. McMullen used two other unlicensed locks, described as the 1901 locks, which were like those in the patents sued upon, except that no stuffing box was carried on the hoisting rope, and no flexible packing was used, metallic bushing in the center opening of the two-part valve being substituted for it. The defendant claims that these locks having never been used in New York City were not covered by the bill, which alleged infringement in New York City only, but, without passing on this question at all, we proceed to inquire whether the claims of the patent sued upon are valid.

Although we have read the claims 2 and 3 of the Moran patent somewhat differently from the judge of the Circuit Court, we have arrived at the same conclusions. If the combination of the rope and a stuffing box carried on the rope with the two-part valves which we think covered by claim 3 is patentable, the answer to the complainant's claim is that the defendants did not use this combination on these 1901 air locks.

Taking up claim 2 we agree with the judge of the Circuit Court that the combination with the two-part valve of flexible packing or of a stuffing box fixed to the two-part valve at the central opening involved no invention. Every element was old. Two-part valves or gates opening upward or downward or horizontally were old; the running of hoisting falls through the center of such gates or valves was old; the location of such gates or valves under pressure against the inside so that the pressure would tend to make them tight was old; packing or stuffing boxes to prevent the escape of steam or heated gases was old. So in the case of the Barr patent, the horizontal gates of the lock were moved by compressed air moving pistons connected with the gates in one direction or the other according as the air was admitted into one end or the other of the cylinders in the usual familiar way.

The specifications show that Moran contemplated some sort of packing to make a close joint. McMullen apparently was the first person to discover that the necessary air-tightness could be accomplished by using merely metallic bushing. However, we do not think that the use of either a stuffing box or of flexible packing or of metallic bushing in combination with and fixed in a two-part valve to make the central opening air-tight involved invention. Although Moran and Barr accomplished novel and excellent results, they did so by the application of old means to analogous uses. The decree is affirmed, with costs.

On Rehearing.

On January 22, 1908, we filed a decision affirming the decree of the Circuit Court for the Southern District of New York dismissing the bill founded upon letters patent No. 500,149 to Daniel E. Moran and letters patent No. 514,843 to William C. Barr. On February 3, 1908, the complainant—appellant—filed a petition for a reargument upon two points, viz.:

"(1) That claim 2 of Moran's patent is entitled to cover closure of a naked valve against the naked rope without the intervening 'stuffing box or packing on the valve' or 'stuffing box on the rope' which this court has read into it (see court's analysis of claim 2).

"(2) That said naked closure involves invention."

On February 11th we granted the petition for a rehearing confining it strictly to the two propositions as stated, *supra*. In our former decision we said:

"The subject of the controversy is an air lock in combination with a caisson used in construction work at levels beneath the water line, such combination having been long in use. The caisson sinks as excavation continues, the water being kept out by compressed air constantly pumped into the caisson. If the empty bucket were carried directly into the caisson or the full bucket out of it, the compressed air would rapidly escape and for this reason an intermediate lock or chamber between the caisson and the open air has always been used. Devices whereby pressure in the working chamber could be cut off from the lock, such as a door between the two were familiar. If the bucket were coming from the outer air the door between the lock and the working chamber was closed, the air in the lock was equalized with the atmosphere, the bucket was then introduced in the lock, the air in the lock equalized with that in the caisson, the door between them opened and the bucket lowered into the working chamber and vice versa when the loaded bucket was coming out. This always involved two separate hoists, one from the caisson into the lock and another from the lock into the open air and vice versa. Moran's was the first lock which permitted the continuous and uninterrupted hoist from the caisson into the upper air and descent from the upper air into the caisson. He accomplished it by passing the hoisting fall through a hole in the center of a two-part gate or valve separating the air lock from the outer air with a device to prevent the undue escape of the compressed air. It was an undoubted improvement and as such has been generally adopted."

Claim 2 is as follows:

"The combination in an air lock of a two-part valve with a rope opening at the center with a seat on the inner side of the air lock and the rope at the center against which the valve closes substantially as specified."

We construed the claim as containing the following elements: (a) Two-part valve; (b) opening for rope or center of valve; (c) valve seat on inner side of air lock; (d) rope against which valve closed ei-

ther by means of a stuffing box or packing on the valve or by means of a stuffing box on the rope. It will be observed that the words "either by means of a stuffing box or packing on the valve or by means of a stuffing box on the rope" are not in the claim.

COXE, Circuit Judge. The patent to Moran is for an improvement in air locks for use in work carried on under air pressure greater than that of the atmosphere, known as the pneumatic method. The invention "consists in the combination in an air lock of a valve adapted to close around and open from a rope at or near the center of the valve while the rope is bearing a load." The specification states that prior to the invention it was customary in the construction of underground or underwater works to connect the working chamber with the outer air by a tube or shaft through which access is had to and from the working chamber. For this purpose the air lock was provided with pipes and valves to equalize the pressure in the air chamber with that in the working chamber or with the outer air. In passing material from the working chamber to the outer air it was necessary, when using the old devices, to close the outer door, open the inner door, move the material into the lock and rest it there. The inner door was then closed, the pressure equalized with the outer air and the material hoisted out of the way. This method, when tackle was used, required one tackle to bring the material into the air lock and another to move it from there to the outer air. The purpose of the invention is to do all this in one continuous journey without special appliances, change of tackle or intermediate handling.

No one can read this patent without being impressed with the fact that the inventor is an accomplished engineer thoroughly conversant with the art and impressed with the importance of the difficulties which confronted him. It was no ordinary problem which he undertook to solve. He had to deal with the tremendous force of compressed air in its relation to a continuous passage of the bucket through the lock. The old air locks, hoisting falls and single gates were useless here. Nothing which had been produced before could be utilized to subdue and hold in check the persistent pressure of the air while the journey through the lock was taking place. The lock of the patent in its most minute details was constructed to meet and overcome this difficulty and to treat the problem as one of ordinary mechanics does injustice to the inventor.

Previous to Moran's invention no one had ever taken material through the lock by a continuous hoist. The defendants' expert says:

"No instance has come to my knowledge where material was hoisted straight through prior to the date of the Moran patent."

The idea of doing this was a bold and brilliant one and was at first deemed chimerical and impossible by hydraulic engineering. When, however, it became an accomplished fact, it made a decided sensation among contractors, engineers and builders, and was hailed as "a flash of genius." The Moran locks were at once adopted and are now in general use.

To assert that Moran's invention is anticipated by freight elevators which passed through several stories of a building, the openings on

each floor being closed by two-part doors, is tantamount to asserting that he who solves the problem of aerial navigation will be entitled to no credit because similar vehicles with the same motive power have traveled successfully over the land and through the water.

The Kennedy and Scott patent for a blast furnace top seems principally to be relied on, but we are of the opinion that it belongs to a different art, and we fail to see how it imparted any useful information which was not known to all familiar with the old air locks.

Bearing in mind that Moran's invention relates solely to an air lock so constructed that material can be hoisted "straight through" it, and confining it to this feature alone, it may be said truly that there was no prior art. No one had ever done this before, although the necessity for such action was generally recognized. Moran's idea was new and brilliant, and he carried it out by constructing a new air lock bringing together elements, several of which were old, but which were never combined before. In other words, the combination was new and produced a new and highly useful result. To do this, we think, involved invention.

The principal question in such cases is: Has the patentee added anything of value to the sum of human knowledge, has he made the world's work easier, cheaper and safer, would the return to the prior art be a retrogression? When the court has answered this question, or these questions, in the affirmative, the effort should be to give the inventor the just reward of the contribution he has made. The effort should increase in proportion as the contribution is valuable. Where the court has to deal with a device which has achieved undisputed success and accomplishes a result never attained before, which is new, useful and in large demand, it is generally safe to conclude that the man who made it is an inventor. The court may resort to strict and, it may even be, to harsh construction when the patentee has done nothing more than make a trivial improvement upon a well known structure which produces no new result; but it should be correspondingly liberal when convinced that the patentee's improvement is so radical as to put the old methods out of action. The courts have frequently held that one who takes an old machine and by a few, even inconsequential, changes compels it to perform a new function and do important work which no one before ever dreamed it capable of performing, is entitled to rank as an inventor.

In *Hobbs v. Beach*, 180 U. S. 383, 392, 21 Sup. Ct. 409, 413, 45 L. Ed. 586, the court says:

"It appears from the testimony that several of these addressing machines, of which that of Dennis and York is a type, and which are now claimed to have inspired the Beach patent, had been upon the market for many years and yet it never seemed to have occurred to any one engaged in the manufacture of paper boxes that they could be made available for the purpose of attaching strips to the corners of such boxes. This very fact is evidence that the man who discovered the possibility of their adaption to this new use was gifted with the prescience of an inventor. While none of the elements of the Beach patent—taken separately or perhaps even in a somewhat similar combination—was new, their adaption to this new use and the minor changes required for that purpose resulted in the establishment of practically a new industry, and was a decided step in advance of any that had theretofore been made."

This language is descriptive of the old hoists, elevators and hatchways prior to Moran and may be applied to his achievement with even greater emphasis because Beach had no such force as compressed air with which to contend.

In *Magowan v. N. Y. Belting Company*, 141 U. S. 332, 12 Sup. Ct. 71, 35 L. Ed. 781, invention was found in placing a rubber back upon the packing for stuffing boxes.

In the *Barbed Wire Case*, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154, the court decided that the substitution of a wire barb for one cut from an iron plate involved invention.

In *Potts & Co. v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275, the court held that one who improves an old device so that it is adapted to a different industry, "may draw to himself the quality of an inventor."

In *Loom Co. v. Higgins*, 105 U. S. 580, 591, 26 L. Ed. 1177, the court says:

"It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention. It certainly was a new and useful result to make a loom produce 50 yards a day when it never before had produced more than 40."

The keynote of all the decisions is the extent of the benefit conferred upon mankind. Where the court has determined that this benefit is valuable and extensive it will, we think, be difficult to find a well considered case where the patent has been overthrown on the ground of nonpatentability. The so-called 1901 locks, which are alone in controversy, did not have packing or a stuffing box on the rope. Arthur McMullen, one of the defendants, testified that "instead of a stuffing box there had been a bushing put in for the rope to go through. It was an ordinary bushing, it may have been brass and it may have been steel. Its function was to keep the rope from wearing into the doors. Practically the same purpose was subserved by the bushing as by the stuffing box."

Upon reflection we are convinced that we improperly limited the second claim by reading into it the words "either by means of a stuffing box or packing on the valve or by means of a stuffing box on the rope." The claim itself is entirely free from such limitation. In fact, its language negatives such a construction for it describes the rope in the opening at the center of the two-part valve against which rope the valve closes. The argument of the defendants seems to be that the claim, although no language therein supports such a contention, must be limited to some kind of packing. The reasoning is as follows—the claim says that the valve closes against the rope; it cannot close without packing; therefore the presence of packing must be inferred. To the mind of the writer it seems that the direct converse of this proposition is true, i. e., that the valve cannot close against the rope if packing intervenes. Significance must be given to the fact that "a stuffing box to close the central opening" is an element of the third claim, and if we read "a stuffing box" into the second claim the two claims are substantially alike. Such a construction should be avoided unless imperatively necessary. *Bresnahan v. Tripp Giant-Co.*, 102 Fed. 899, 43

C. C. A. 48; Thomson-Houston Co. v. Nassau Electric Co. (C. C.) 110 Fed. 647.

It is conclusively demonstrated that when the valve is made to close tightly against the rope no packing is necessary. Why should the inventor, who has unquestionably covered such a construction in the second claim, be deprived of the fruits of his invention when practiced in its simplest and most convenient manner? That the inventor contemplated the use of the unpacked opening is deducible from the language of the claim, if it does not cover such a combination it is a meaningless excrescence. There is nothing in the description or drawings to indicate that the inventor did not intend to claim such a combination, indeed, the contrary is true.

There can be no dispute that figure 2 of the drawings shows the rope bearing directly on the metal sides of the valve hole without stuffing box or packing of any kind. Apparently figures 9 and 10 show the same thing and figures 11 and 12 show a hole through the valve without packing of any kind. Figure 12 shows a single piece upper valve with a slot cut from the periphery to the hole in the center to permit the introduction of the rope into the hole which, as stated, has no packing around it. We are unable to see how this valve could be operated in connection with a stuffing box on the rope. Any doubt as to this drawing showing a naked rope passing through a naked hole is solved by the language of the specification which says:

"The slot is provided with a slide to close the slot, so as to leave passage only for the rope or cable."

Again the patentee, speaking of the two-part valve, says:

"The opening N is made to conform to the rope or cable which is to pass through it. About the hole N I may arrange a stuffing box," etc.

In describing the operation of the lock he says:

"The bucket is lowered into the air lock and the upper valve, K, K', closed, so as to encircle the rope or cable and make a close joint at the meeting edges."

Without quoting further from the specification we think it may fairly be construed to mean that the inventor contemplated a closing of the valve against the rope, this was his preferred construction and he hoped that it would at all times prove sufficient. But it might not; wear and tear, or other causes, might prevent the valve from closing on the rope with sufficient tightness, and so he provided a remedy which the operator may use, viz., the stuffing box and packing. "May" does not mean "must."

The defendants' expert, Mr. Waterman, is apparently in accord with this construction, for he says, after describing the Moran patent:

"The specification also says that lips or flanges are made on the edges to give a more perfect joint as regards holding the air pressure, and also that a stuffing box in two halves may be employed, or flexible packing arranged in some other way, so as to make a close joint with the cable, such construction, however, not being described as compulsory (specification, page 2, lines 112 et seq.)."

Counsel for the defendant say:

"There is not a word in the specifications indicating that packing is absent in the locks of Fig. 2, or Fig. 9, or Fig. 10, or Fig. 11, or Fig. 12."

We think, as we have just seen, that there is very much to indicate the absence of packing. But, assuming the statement to be correct, the contrary is also true, there is not a word indicating that packing is present. We have, then, a universally recognized improvement in a different and dangerous art, we have a claim which concededly makes no reference to packing of any kind and we have a description and drawings which, let us assume, leave the presence or absence of packing in doubt. Why should the doubt be resolved against the inventor, why should the court be astute to destroy the claim by construction when it can be sustained by giving to its words their plain and logical meaning?

Counsel contends further that the joint at the rope opening of the second claim must be air-tight, not relatively or sufficiently air-tight, but absolutely air-tight. This contention is based upon the language of the claim—"the rope at the center against which the valve closes." It is said if the valve closes against the rope an air-tight joint must result and such a joint can only be produced by packing. This, we think, is a nonsequitur, neither justified by the language used nor supported by the description. To one unskilled in the technicalities of the art it seems manifest that a stuffing box or packing could not be used where the valve closes against the rope. In describing the lower valve Moran says:

"On the upper surface of the valve, W, between it and the seat, V, I may arrange a gasket of rubber or other material."

This language clearly indicates that this valve may close against its iron seat or may have rubber interposed to make it more air-tight. No packing is suggested for the upper valve, and, indeed, it could not be used in the construction shown in figure 9, for the sliding doors would rub it off. "The upper valve fits against a continuous circular valve-seat, B." If, then, naked iron contacting with naked iron around the entire inner surface of the lock can make a sufficiently air-tight joint, why should it have been thought incredible that steel and iron contacting in the comparatively negligible rope opening should make an operative joint? The construction contended for, if consistently carried out, would require us to read packing into the claim on every part against which the valve closes. This, as we have seen, is, as to the upper seat at least, impossible.

Moran must have known that absolute air-tightness was not attainable in such a large and rough structure as his air lock and that a small escape of air did not destroy its efficiency. He knew or, at least, he may have known, that the slight leakage between the wall of the center opening and a tightly fitting steel cable would be negligible. He arranged his lock, even to the most minute details, with all this in mind. He evidently intended to provide for all contingencies, including a rope opening initially too large and also one made too large by the wear on the rope and valve. He therefore provided a stuffing box and packing for use whenever excessive leakage made their use necessary.

As the counsel for the defendants says in his original brief:

"Any intelligent mechanic would know enough to use packing to make an air-tight joint between two metal surfaces, if the joint were not tight enough

without it. * * * It does not appear that any one who ever built an air lock was so deficient in common sense as to * * * omit packing where packing was desirable."

And he might have added, with equal truth, "or to put packing in where it was undesirable." Because Moran endeavored to provide against emergencies he should not be deprived of the fruits of his invention when practiced in its most simple and obvious form. The novel feature is not the rope, or the rope opening, or the two-part valve, or the valve seat; but it is the combination of all of these elements which produced a new air lock doing what no other air lock ever accomplished before.

That the 1901 locks infringe the second claim if unrestricted by the limitations placed upon it in our former decision, is too obvious to require discussion.

The contention that these locks cannot be considered because infringement as to them is not pleaded is properly disposed of by the judge of the Circuit Court, and we agree with him in what he says regarding it. The argument rests upon the omission to aver in the bill that infringement occurred "at New York City in the Southern district of New York and elsewhere"—the words "and elsewhere" being omitted. But the defendants denied that they had infringed "at New York City or elsewhere," and the case was tried in all respects as if the question were properly presented by the pleadings. It would be a hardship to all concerned to subject them to the expense and annoyance of a new action when the addition of the two words "and elsewhere," will make the bill criticism proof.

We do not understand that the defendants Deeves are in any way connected with the 1901 locks.

The decree is reversed without costs in this court to the complainant but with costs in this court to the defendants Deeves on both patents and with costs to the defendant McMullen on the Barr patent alone. The cause is remanded to the Circuit Court with instructions to enter the usual decree, based upon the second claim of the Moran patent, against the defendant McMullen without costs and to dismiss the bill, with costs as to all the other defendants.

UNITED STATES FASTENER CO. v. CÆSAR et al.
(Circuit Court of Appeals, Second Circuit. March 13, 1908.)

No. 174.

PATENTS—INFRINGEMENT—SEPARABLE BUTTON.

The Pringle patent, No. 720,616, for the stud member of a separable button or fastener, construed, and *held* not infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 154 Fed. 671.

Appeal from a decree of the Circuit Court in favor of the complainant in a suit charging the infringement of a patent.

Stephen J. Cox (William R. Baird, of counsel), for appellants.

John P. Bartlett and Thomas W. Bakewell, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The patent in suit, for an improvement in studs, is No. 720,616, and was granted February 17, 1903, to the complainant as assignee of Eugene Pringle.

The patentee thus states the nature and object of his invention:

"My invention relates to studs for separable buttons or fasteners—such, for instance, as are employed on gloves and other articles of apparel; and it consists of structural improvements in the stud member of such fasteners.

"The object of my invention is to provide means whereby a stud member of a stud-and-socket fastener adapted to engagement with a complementary socket may be secured in place upon the fabric, leather, or what not by means of an eyelet, of which the barrel passes through the fabric, enters the stud, and is upset or clinched within the stud itself to form a fastening-flange on the barrel by means of a turning-piece or deflector contained within the body of the stud, which deflector by contact with the eyelet-barrel determines the direction and degree of its deflection as the eyelet and stud on opposite sides of the fabric are forced together by means of a suitable tool or press."

The claims of the patent—all of which it is contended that the defendants infringe—follow:

"1. In a member of a stud-and-socket fastener, a stud, comprising a head, an engaging groove below the head, and a flange below the groove, an eyelet-turning piece within the stud, and an eyelet to attach the stud to material, having its tubular portion passed through the material and upset against the eyelet-turning piece.

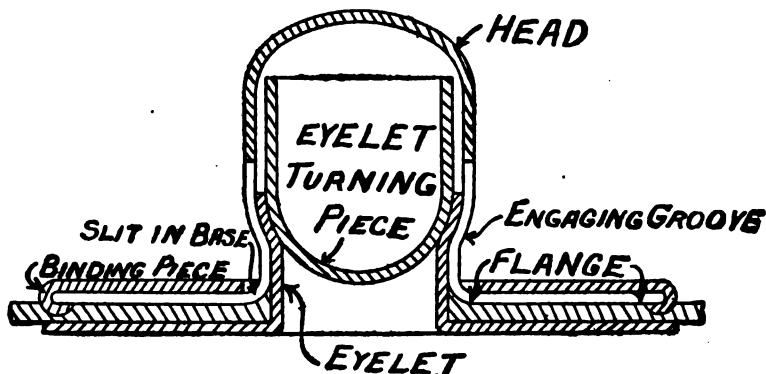
"2. In a member of a stud-and-socket fastener, the combination of a hollow grooved stud seated on one side of material, a fastening-eyelet therefor, seated on the opposite side of the material and having its stem projected through the material into the stud, and a binding piece, secured to the stud and having a central tubular portion entering the stud and surrounding the stem of the eyelet.

"3. In a member of a stud-and-socket fastener, the combination of a hollow stud, having a head, a base, a groove between the head and base, the stud and base slitted radially, an eyelet-turning piece within the stud, a binding-piece confining the slitted base, and an eyelet, inserted in the stud from below, and upset against the eyelet-turning piece."

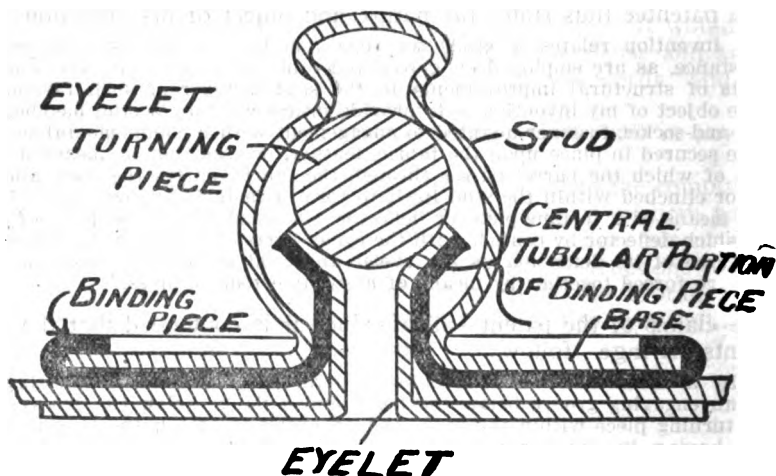
The following cuts taken from the defendants' brief and enlarged from drawings in the patent make the nature of the invention clear

and are so marked as to be self-explanatory; the first illustration showing the structure covered by claims 1 and 3, and the second that specified in claim 2:

CLAIMS 1 AND 3.



CLAIM 2.



The Circuit Court held the patent valid and infringed in all its claims. Upon this appeal we shall consider the questions in their inverse order. If no infringement be found, consideration of the other questions will be unnecessary.

In examining a question of infringement, the primary inquiry is whether every element of a claim is found in the device complained of. If any element, or an equivalent therefor be lacking, there is no infringement. Taking up claims 1 and 3, we find that a material element of each is the "eyelet-turning piece within the stud." The device as

shown in the above illustrations, as well as in all the drawings of the patent, is separate and distinct from the head of the stud in which it is located; in some illustrations being in the form of a conical bullet and in others in that of a ball. Moreover, complainant's counsel urge that it is so separate from the stud, saying:

"We hardly need point out that the claims when read in the light of the drawings could only have this meaning."

In fact—as they also show—a sharp distinction was drawn in the proceedings in the Patent Office between an eyelet-turning piece and an eyelet-turning surface, thus indicating, using their language, "that an eyelet-turning piece separate and distinct from the stud itself was of importance." And it certainly is very clear that what the patentee desired to embrace within his patent was a separate and distinct turning piece; e. g., a bullet or ball shaped piece, and not a turning surface in the post or head into which the eyelet was introduced. Whether the patentee desired this on account of supposed mechanical advantages or to avoid earlier patents—e. g., the Platt patent of 1876 which covered a stud with an eyelet-turning surface—does not appear. The suggestion of the complainant, however, that this requirement of a separate turning piece had its basis in a desire to provide for a resilient stud finds little support in the patent. In all the 10 illustrations of the patent the stud shown is rigid, and adapted to be used with spring sockets only. It is true that the inventor, having stated that the base of the stud might be slitted in order to facilitate the insertion of the eyelet-turning piece, also says:

"The slits continued into the bulb shaped head of the stud, A, will lend it that resiliency which is common to several forms of studs used prior to this invention."

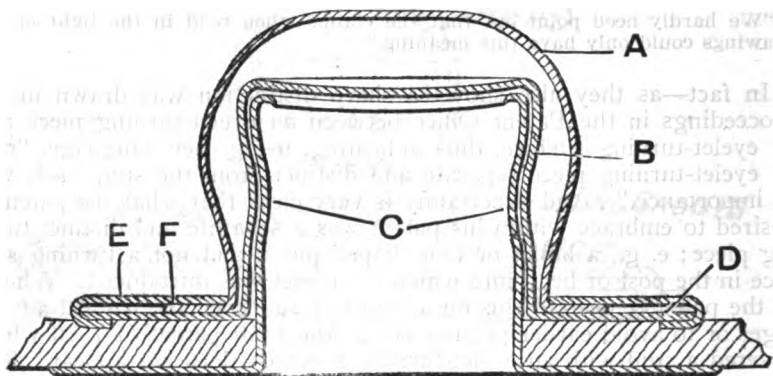
But this is stated rather as a possible incidental use of slits primarily designed for another purpose than as a material factor in the invention. In fact, the method of fastening the stud to the fabric was what the inventor was concerned with. He illustrated his invention with rigid, and apparently gave little consideration to spring, studs. We see nothing to indicate that the adoption of the separate turning piece had any connection with the use of a resilient stud.

We may say, moreover, in this connection that the proof is not satisfactory that continuing the slits further up into the stud—as suggested in the patent—would produce a workable spring stud. The stud of the patent must necessarily be rigid to an extent. It must tightly hold the turned eyelet. It is also made somewhat rigid by the pressure of the eyelet-turning piece. Flexibility seems inconsistent with its functions. Undoubtedly some spring could be obtained from slits, but nothing like that of the "bird cage" structure—which we will consider later—would be possible. In fact, what spring could be obtained is wholly a matter of surmise, for, no one, so far as appears, ever attempted to carry out the inventor's suggestion.

We come now to the inquiry whether the element of claims 1 and 3—the separate eyelet-turning piece—is found in the defendants' struc-

ture. The following cut taken from the defendants' brief (that in complainant's brief being similar in its essentials) illustrates the construction of the defendants' device, the lettering being ours:

DEFENDANTS.



A represents the external spring which engages with the socket, and is called in the testimony a "bird cage." B is the hollow post which directly engages with the eyelet barrel, C. D is the base of the post. E is a binding piece for attaching the "bird cage," A. F represents the feet of the "bird cage." When the eyelet barrel, C, is forced into the hollow post, B, it is turned and clinched by the interior surface of the post, and the stud is thereby secured to the fabric. The complainant urges that the external spring of the defendants' device is the stud proper of the claims of the patent, and that the post, B, being within it and separate from it and having a convex head to turn the eyelet, is "the eyelet-turning piece within the stud." On the other hand, the defendants contend that the post, B, is the stud proper, that the external spring is merely an appendage to the stud, and, consequently, that there is no separate and distinct turning piece within it. How the word "stud" shall be used in comparing the structures is therefore important. But two structures cannot be compared unless the same word is used to designate the same thing in each. And, if the same term is applied to the same thing in each structure, it is of little importance whether its use is technically correct. The question is one of things rather than of words—whether the device of the patent is found in the alleged infringing structure. Broadly speaking, the whole structure of the patent is the stud—"the stud member of a stud-and-socket fastener." But, when the inventor speaks of the stud in the claims in connection with the eyelet-turning piece, he has reference to that portion of the stud member which receives the eyelet. He very properly designates this hollow post as a stud. It is the only thing shown in the patent which could be so designated. But, in case the inventor had provided in some of his drawings for an external spring or cage, there would have been no reason for a change in terms. The rigid stud would still have been the stud proper. Therefore, in determining whether the defendants' structure possesses a separate and distinct

"eyelet-turning piece within the stud," we should properly apply the word "stud" to the same thing the patent applies it to—the post which receives the eyelet barrel.

Stated in a different way: Any fair comparison of stud members should involve the comparison between two rigid studs or two resilient studs. There should be a common form. The complainant's expert testifies that the defendants' structure without the "bird cage" would be a practical rigid stud. Compared in this form it is evident that the post, B, is the stud proper corresponding to the stud proper of the patent. On the other hand, it is undoubtedly practicable to attach an external spring to the structure of the patent. Compared in this form, the post of the patent would correspond to the post of the defendants' structure, and both would properly be designated the stud proper. All the force of the complainant's argument lies in the application of the same term to different things. The defendants' structure having an external spring or cage, it is possible to designate that as the stud, and thereby call that which corresponds to the stud of the patent, and which has an interior turning surface, "an eyelet-turning piece within the stud."

But: (1) The defendants' structure minus the outside cage does not infringe. This is obvious and is admitted by the complainant's expert. (2) The external spring or cage does not infringe. The patent shows nothing like it. Therefore we cannot here find infringement produced by uniting that which does not infringe to that which not only does not infringe, but is wholly outside, the patent. The charge of infringement with respect to claims 1 and 3 is not sustained.

The remaining inquiry is whether claim 2 is infringed. A material element of this claim, according to both sides, is a "binding piece secured to the stud and having a central tubular portion entering the stud and surrounding the stem of the eyelet." Consequently claim 2 is not infringed unless this element is found in the defendants' device. The second cut taken from the patent and shown above illustrates the structure of this claim. In this structure—unlike that shown in the first cut—the eyelet barrel is turned and clinched at a point considerably above the base of the stud. This is accomplished by the central tubular portion of the binding piece. The eyelet barrel, instead of engaging directly with the stud when clinched, is engaged by this structure, which by surrounding it and affording a long support takes upon itself much of the strain. But, however meritorious this device may be, there is nothing corresponding to it in the defendants' structure. The complainant's contention that the post of the defendants' device, in connection with the separate binding piece securing the external spring, is equivalent to a binding piece having a central tubular portion entering the stud, is practically disposed of by the conclusions already reached. The post of the defendants' structure is the stud itself. It is not a tubular portion of the binding piece entering the stud. And, even if it were not properly designated as the stud, it could not be considered a part of the binding piece, which is separate and distinct from it. Claim 2 is not infringed.

The decree of the Circuit Court is reversed, with costs, and the cause remanded, with instructions to dismiss the bill, with costs.

McSHERRY MFG. CO. et al. v. DOWAGIAO MFG. CO.*

(Circuit Court of Appeals, Sixth Circuit. February 20, 1908.)

Nos. 1,667, 1,751.

1. PATENTS—SUIT FOR INFRINGEMENT—PROFITS RECOVERABLE.

If a patent covers only a particular feature of an article sold by an infringer, the burden rests on him to show that the profits realized by him from the sale were not solely attributable to such feature; and a finding of a special master that they were so attributable, approved by the trial court, will not be disturbed on appeal unless there is clear evidence of mistake or error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 545.]

2. SAME—DAMAGES—SUFFICIENCY OF PROOF.

To entitle the owner of a patent to recover from an infringer as damages the profit he would have made on the same number of machines or articles, he must prove that he could have supplied such machines and that but for the infringer he would have made the sales that were made by the latter. Upon the latter proposition the proof necessarily cannot reach certainty, but there must be evidence tending to establish it and sufficient to furnish data from which the number of his sales may be calculated with reasonable certainty.

3. SAME.

Complainant was the owner of, and sole manufacturer under, a patent for a grain drill which defendant was adjudged to have infringed. On an accounting under the decree it was shown that defendant sold a certain number of infringing drills, some outside of the territory where complainant's drill was on sale, and a certain number within such territory. Within such territory a large number of other drills were on sale and many of them, as well as defendant's, were sold at a lower price than complainant's. *Held* that, as to the territory where complainant's drills were not on sale, it could not be inferred that the purchasers of defendant's drill had any knowledge of complainant's or would have bought it if they had not bought defendant's, nor could the inference be drawn from the fact alone of defendant's sales within complainant's territory that the purchasers, or any certain number of them, would have bought complainant's drill if they had not bought defendant's; that such evidence, even when reinforced by the testimony of complainant's sales manager and certain of its general agents to the effect that its sales decreased in places where defendant's drill was sold in competition, and in consequence of such competition, did not afford data from which the amount of complainant's damages could be computed so as to entitle it to recover more than nominal damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 579.]

4. SAME—TREBLE DAMAGES—CONSTRUCTION OF STATUTE.

The provision of Rev. St. § 4921 [U. S. Comp. St. 1901, p. 3395], authorizing a court of equity to increase the damages found in favor of complainant in a suit for infringement of a patent, has no application to profits recoverable in such suit.

5. SAME—SUIT AGAINST CORPORATION—LIABILITY OF OFFICERS.

Where officers of a corporation are joined with it as defendants in a suit for infringement of a patent, the complainant is not entitled to a decree against such officers for profits realized by the corporation alone from the infringement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 459.]

6. JUDGMENT—EQUITABLE RELIEF—PENDENCY OF APPEAL.

On a bill by a defendant to enjoin the enforcement of a decree against him on the ground of fraud, filed pending an appeal from such decree, the court is without jurisdiction to set aside such decree for error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 771.]

Richards, Circuit Judge, dissenting.

*For opinion on rehearing, see 103 Fed. 34.

Appeal and Cross-Appeal from the Circuit Court of the United States for the Southern District of Ohio.

E. E. Wood and Joseph Wilby, for appellant McSherry Mfg. Co.

B. F. Harwitz, for appellant C. B. Oglesby.

F. L. Chappell, for appellee.

Before LURTON and RICHARDS, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. This case is here for the second time. The opinion delivered on the former occasion is reported in 101 Fed. 716, 41 C. C. A. 627. We then held, partly in affirmance, and partly in reversal of the action of the lower court, that the appellant company had infringed the first five claims of patent No. 446,230 for an improvement in shoe grain drills issued February 10, 1891, to W. F. Hoyt, and by him assigned to the appellee, and that appellee was entitled to an injunction and an accounting. Questions relating to this patent have also been passed on by this court in the case of Dowagiac Manufacturing Company v. Brennan & Co., 127 Fed. 143, 62 C. C. A. 257, and by the Circuit Court of Appeals for the Eighth Circuit in the cases of Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 118 Fed. 136, 55 C. C. A. 86, and Dowagiac Mfg. Co. v. Fowler et al., 121 Fed. 988, 58 C. C. A. 643. On the return hereof to the lower court a decree was entered pursuant to the mandate, and a reference had to a special master to take and state the account. The suit was brought in March, 1897, and the infringement complained of extended from 1893 to June, 1900, the time of the entry of said decree. The special master found that the appellant company had made and sold during said infringing period 3,496 shoe grain drills of the kind held to infringe the patent, and that it was accountable therefor to appellee in the sum of \$76,082.07. He found in its favor both for profits received by the appellant company and damages sustained by appellee on account of the sale of said drills. The amount of profits which he found said company had so received was \$1,729.69. The damages which he found appellee had sustained he divided into two items. One item amounted to \$46,122.26, and was for the profits which appellee would have made had it made and sold that number of its shoe grain drills, assuming that the making and sale thereof would have involved a proportionate increase in its expenses of administration, operation, and selling. The other amounted to \$28,232.62, and was for additional profits appellee would have in fact made because such assumption would not be correct, inasmuch as the making and selling thereof would not have involved such proportionate or even a material increase therein. The lower court on the hearing of exceptions to the special master's report approved his finding as to profits received by the appellant company, and as to the first item of damages sustained by appellee, but disapproved his finding as to the second item of such damages. A decree was entered accordingly in favor of appellee for the sum of \$47,851.95. It is from this decree that this appeal is taken. A cross-appeal has been taken by the appellee because of the rejection of said

second item of damages and of the refusal of the court to treble the amount of damages allowed.

First, as to the appeal. The position of the appellant company as to the finding of the special master that it had received said amount of profits from the sale of said drills and should be charged therewith is that in fact it received no profits whatever from the sale thereof, and that, if it did, it should be charged only with so much of the profits received as was attributable to the patented feature of the drills, the burden of showing which was on the appellee, and that it has not shown how much thereof was attributable thereto. As to this last branch of said appellant's position, appellee contends that the patent covered not some part of the drill, but the entire machine; that it was not for an improvement on a shoe grain drill as it is characterized in the patent, but in reality was for an improved shoe grain drill; and that, therefore, all the profits received were for the patented article, and it is entitled to the whole thereof, or that if, in fact, the patent was only for a particular feature of the drill, to wit, the spring pressure device, that the profits received from the whole drill were attributable solely to that device, and on this ground, therefore, it is entitled to the whole thereof. The special master, and the lower court in approving his action in this particular, based the allowance of the whole profits received on this latter ground. In the case of *Canda Bros. v. Michigan Malleable Iron Co.*, 152 Fed. 178, 81 C. C. A. 420, we held that, if a patent covers only a particular feature of an article sold by an infringer, the burden is on him in a suit against him to recover the profits received from such sale to show that they were not attributable solely to the patented feature thereof, and that it is only in case the infringer sustains this first burden that the second burden rests on the patentee to apportion said profits between such feature and the rest of the article.

There was evidence tending to show both that the appellant company received said amount of profits from the sale of said drills, and that the profits arising therefrom were attributable solely to said spring pressure device, which it contends was all that was covered by the patent. The findings of the special master that such was the case, approved by the lower court, must, therefore, be presumed to be correct, and, in the absence of clear evidence of mistake or error, should not be set aside or modified. To say the least, we find no such clear evidence in the record, and for this reason we feel bound to affirm the action of the lower court in this particular.

Then as to the first item of damages allowed by the special master, which the lower court approved. It is a portion of the profits which he found the appellee would have made had it sold to the persons to whom the appellant company sold said 3,496 drills of its make in addition to those which it did sell. Said company questions whether appellee would have made profits to the amount of this item had it so done, and raises the same question as to the apportionment of such profits as it would have so made that it raised in relation to the profits which it made by the sale of said 3,496 drills. And back of these two questions it is contended that there is no sufficient legal evidence tending to show that appellee would have sold that or any other certain

number of its drills to said persons had not appellant company sold them its drills. Of course, if this contention is correct, then appellee is not entitled to any allowance on account of the profits that it would have so made. Walker on Patents (1st Ed.) § 563, states, as one of the two methods of assessing damages for infringement of patents, available where the patentee keeps his patent within a close monopoly by not granting licenses, the ascertainment of "what the plaintiff would have derived from his monopoly if the defendant had not interfered, but which he failed to realize because of that interference with his rights." It is this method that is involved here. Further, "in order," as he states, "to show that a patentee would in fact have made a particular profit if an infringer had not forestalled his sales," he says that "it is necessary to show that he would, but for that infringer, have made those sales; and to that end it is necessary to show that he could have supplied the articles wanted, and that the persons wanting those articles would have bought them had no infringer interfered." In order, then, to uphold the action of the lower court in the particular under consideration, there must be evidence tending to establish two things. One is that appellee could have supplied 3,496 drills of its make in addition to those it did supply; the other, that the persons who bought from the appellant company that number of drills of its make would have bought from appellee a like number of drills of its make had not they so bought from appellant company. It is not sufficient that there is evidence to establish either—there must be evidence tending to establish both.

As to the first proposition, it may be said that there is evidence tending to establish to a certain extent, at least, that appellee could have supplied that additional number of drills of its make. Appellee's sales manager testified that it had a plant capable of producing 24,000 drills per year, and the greatest number of drills it produced in any year during the infringing period did not exceed 7,000. Such fact, however, is hardly sufficient of itself to make out that appellee could have supplied that additional number of drills of its make. It should also have had sufficient capital to enlarge its business to this extent, or been able to obtain it. Concerning this, the record is by no means satisfactory. Nor was any attempt made at demonstrating that appellee's plant had such productive capacity. We have nothing more than the bald statement that it did. But perhaps it should be accepted that any successful business concern, as appellee was, can readily obtain under ordinary conditions sufficient capital to enlarge its business to the extent that the production of this additional number of drills would have involved on appellee's part, and, in the absence of anything to the contrary to said statement, that the plant did have such productive capacity. At any rate, it would seem that it cannot be said that there is any clear evidence that the master's report, in so far as it involved a finding that appellee could have so done, was so plain an error as to justify the court in ignoring the finding.

How is it, then, as to the second proposition? Is there any evidence tending to establish that the persons who bought from the appellant company the 3,496 drills of its make would have bought from appellee a like number of drills of its make had they not so bought from the

appellant company? Ordinarily the problem as to a matter of fact in a lawsuit is as to whether a certain thing in dispute has happened. Here the problem is as to whether a certain thing would have happened had not a certain other thing not have happened. In the one instance the problem is as to what is the fact; in the other, as to what in a certain assumed past contingency would have been the fact. In the nature of things it seems hardly possible for one to attain to as certain a degree of persuasion in the latter instance as in the former. What has happened may have been witnessed, and is likely to have left traces behind it. No such sources of factors of reasoning exist as to what has not happened. Yet, it is possible to reach a certain degree of persuasion as to whether a certain thing would have happened had a certain other thing not have happened. And the proper administration of justice sometimes requires that where a certain degree of persuasion is attained as to such a thing in question in a lawsuit that it be acted on. This happens particularly where the question relates to the matter of damages. But here, as where the problem is as to what has happened, there must be factors of reasoning, something from which an inference can be drawn, something that has "rational potency" or "probative strength," something that tends to establish that the thing in question would have happened had the other thing not have happened. We are not concerned here with the degree of persuasion that must be attained to in order to justify action thereon, only with emphasizing that there must be something tending to some degree at least to persuade. A mere guess or conjecture as to what would have happened will not do. All speculation in regard to the matter must be excluded. The word which expresses what is needed in such cases according to the Supreme Court is "data." In speaking of the question of damages in a suit for an infringement of a patent, in the case of *Seymour v. McCormick*, 16 How. 480, 14 L. Ed. 1024, Mr. Justice Grier said:

"Actual damages must be actually proved, and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact. What a patentee would have made if the infringer had not interfered with his rights is a question of fact, and not a judgment of law. The question is not what speculatively he may have lost, but what actually he did lose."

In the case of *Mayor, etc., of New York v. Ransom*, 23 How. 487, 16 L. Ed. 515, the same learned judge said:

"Where a plaintiff is allowed to recover only 'actual damages,' he is bound to furnish evidence by which the jury may assess them. If he rest his case after merely proving an infringement of his patent he may be entitled to nominal damages but no more. He cannot call on a jury to guess out his case without evidence. Actual damages must be calculated, not imagined, and an arithmetical calculation cannot be made without certain data on which to make it."

And in the case of *Philp v. Nock*, 17 Wall. 460, 21 L. Ed. 679, Mr. Justice Swayne said:

"The plaintiff must show his damages by evidence. They must not be left to conjecture by the jury. They must be proved, and not guessed at."

The same rule has been announced and followed by the Supreme Court in cases where lost profits were sought to be recovered for breach

of contract. In such cases the question is what would have happened, i. e., what profits the obligee would have made, had not something else have happened, to wit, the obligor breached his contract. See the cases of *Howard v. Stillwell & Bierce Mfg. Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; *Cin. Gas Co. v. Western Siemens Co.*, 152 U. S. 205, 14 Sup. Ct. 523, 38 L. Ed. 411; *Anvil Min. Co. v. Humble*, 153 U. S. 549, 14 Sup. Ct. 876, 38 L. Ed. 814. This is familiar law. But in dealing with a question involving its application it will aid one, in applying it, to feel it—to get, as it were, in its grip. This its statement and repetition in the language of the Supreme Court will enable one to do.

What evidence, then, is there in this case tending to establish that the persons who bought from the appellant company the 3,496 drills of its make would have bought from appellee a like number of drills of its make had they not so bought from the appellant company? The question should not be limited to the exact number of drills sold by the appellant company, to wit, 3,496. It should take in any number less than that. For, if there is evidence tending to show that any less number of said purchasers would have bought appellee's drills had they not bought the appellant company's, though the former would not be entitled to the full amount allowed, yet it might be entitled to a less amount. But in order to do this it must tend to establish that some certain number, or some certain number at least, of said purchasers would have so bought. If it does not, there can be no allowance to any extent, even though it be sufficient to satisfy one that an uncertain number thereof would have bought appellee's drills. Judge Clark in his opinion in the lower court truly said:

"Damages cannot be allowed when the amount or the extent of the damage is matter of speculation, or of guess, any more than in the first case above supposed, where the evidence is uncertain as to the existence of damages at all, or not."

There is certain evidence herein which it may be thought not only tends to, but does, establish that at least some of those persons would have bought appellee's drill had they not bought that of appellant company. It consists of certain portions of the testimony of appellee's sales manager and three of its general agents. We will not, however, at this point, attempt to state this evidence and determine its effect. It will be well, before doing so, to treat the case as if such evidence were not in it, and determine whether the circumstance that those persons did buy that number of appellant company's drills, itself or in connection with such other considerations as the case, so limited, presents, tends to establish that had they not done so they would have bought a like or any certain number at least of appellee's drill.

That circumstance indicates that those persons were subject to being induced to buy appellant company's drill from its agent. Possibly it indicates that they might have been induced to buy appellee's drill if offered on terms satisfactory and by an agent understanding the "talking points" of that drill. But that such was their psychological condition is not evidential of the fact that they would have bought appellee's drill on any terms had they not bought that of appellant company. For it to have any tendency in that direction it must have

been that said persons when they bought were aware of the existence of appellee's drill. Notwithstanding such may have been their frame of mind if they were not so aware, there is no possible room for any such conclusion.

Outside of the testimony hereinbefore referred to and yet to be considered, there is nothing indicating such awareness on the part of any of those persons except the fact of location within the same territory in which appellee was offering its drill for sale, and it, so far as it indicates awareness at all, indicates it only on the part of such of those persons as were located within that territory. It does not indicate it on the part of such of them as were not so located. It is important, therefore, to understand the extent of the territory in which appellee had offered its drill for sale up to the close of the infringing period, and how were appellant company's customers located as to this territory. Appellee's plant is at Dowagiac, Mich. It was organized in 1881, succeeding at that place others who began making shoe grain drills as far back as 1868. From that time until 1889 appellee operated mainly in Michigan and northern Indiana. Possibly as early as 1885 or 1886 it entered to a small extent the states of Wisconsin, Minnesota, North Dakota, and South Dakota, where spring wheat is grown, or some of them, and in 1890 its efforts therein were greatly increased. Its original territory it termed its "Home Territory." The subsequently added territory it divided into three separate departments, which it termed its "Madison Territory," "Minneapolis Territory," and "Fargo Territory," and the whole was known as the "Northwest." Each of these territories was in charge of a general agent, those in charge of the three departments of the Northwest being stationed at Madison, Wis., Minneapolis, Minn., and Fargo, N. D., respectively. Towards the end of the infringing period appellee seems to have entered Kansas, Indian Territory, and Oklahoma, and to have made sales at San Francisco, Cal., and Dallas, Tex., and during that time it sold scatteringly in other wheat-growing states. The bulk, however, of its business was done in the Northwest. It paid no special attention to and did not try to develop trade outside of the territory covered by its general agents as aforesaid. Its sales manager testified that its business policy was to seek no trade. Possibly he meant outside of the territory covered by its general agents, but he did not so limit his testimony. It sold only to local dealers, except so far as the sales at San Francisco and Dallas were concerned, which were to jobbers. It advertised its drills solely by catalogues and circulars—not by insertions in local newspapers. In 1889 it had two or three general agents; in 1890, seven. Besides these agents it employed what were known as "ninety-day men," to aid the local dealers, each year during the 90 days preceding seeding time, which began about April 1st. In 1893 it employed 4 such men, in 1890, 36; there being a gradual increase in the number of men so employed each year between. In 1891 its sales amounted to 2,000 or 3,000 drills; in 1899, to 7,000.

Until 1888 its shoe was the same as in the Hoyt patent, save that it was shorter; and until 1890, when its efforts in the Northwest were greatly increased, weight alone, supplied by either a heavy iron hopper

attached to the shoe, or by a chunk of iron attached to the hopper, was used for forcing the shoe into hard ground. At that time a change was made from weight to spring pressure. This was done to meet conditions existing in the Northwest. A greater range of pressure is demanded there because of the nature of the soil and obstructions in it. The soil at seeding time is sometimes dry and sometimes wet, and in some sections it is light and loamy, and in others heavy and compact. The obstructions in it consist of trash, such as stubble and corn stalks, which on account of the dryness of the atmosphere will not rot, and in the operation of the drill loads up in front and clogs it so that it has to be passed over or cut through in order to make progress. Such obstructions exist especially in northwestern Minnesota and North Dakota. The spring pressure adopted enables the drill to pass over the obstructions and sow the grain successfully. In 1890 the spring used was a flat bar attached to a rock shaft near the front of the frame of the drill and extended thence rearwardly to the shoe. In 1891 this device was superseded by the device described in the Hoyt patent. That device, however, was used only during that year. In the summer thereof a change was made by which the clamping plates were dispensed with and the pressure rods connected direct with the draft rods, and this method of construction was used ever thereafter. In the Northwest appellee sold mainly wide drills, i. e., drills having 17 or more, or on an average 20, shoes, and drawn by four horses.

How, then, were appellant company's customers located as to the territory covered by appellee? Its plant is at Middletown, Ohio. The sales of the first three years of the infringing period were, with a very few exceptions, to persons located in Missouri, Illinois, Kentucky, and Tennessee. It seems to have entered the Northwest for the first time in 1896. This it did by selling its drills outright to the Minnesota Moline Plow Company, jobbers at Minneapolis, the defendant in the case reported in 118 Fed. and 55 C. C. A., supra, who in turn sold to local dealers in the Northwest, who in turn sold to the farmers thereof. It continued to do this thereafter during the entire infringing period. In 1899, after this suit was brought, it seems to have made a raid into appellee's home territory, Michigan and northern Indiana, and in that year and in 1900 it raided Wisconsin also. Out of the 3,496 drills in all sold by it, at least 850 of them were to persons located outside of the territory covered by appellee's general agents. They were mainly located in Missouri, Nebraska, Illinois, Kentucky, Oregon, Georgia, and Tennessee, and some of them in New York, Iowa, Kansas, Ohio, and Pennsylvania. The remainder thereof were sold to persons located within the field of appellee's operation. As to the purchasers of said 850 drills, there is not the slightest ground for inferring that at the time they bought they were aware of the existence of appellee's drill. They were located in territory not covered by appellee's general agents, and where at least it was the business policy of appellee not to seek or develop trade. The mere fact that, where they were located, appellee may have sold its drill scatteringly, is not sufficient to justify an inference of such awareness on their part.

Is, then, the fact of location within the territory covered by appellee's general agents, which may be characterized as the field of appellee's operation, sufficient to justify an inference that the purchasers of the remainder, or of a certain number at least, of said 3,496 drills of appellant company's make were aware, at the time they bought, of the existence of appellee's drill? It is quite likely that some, if not many of them, were so aware. Possibly it is more likely that such of them as were located within appellee's home territory where its operations had been long continued were so aware than such of them as were not. As to the Northwest, it did not make any considerable effort therein until three years before the beginning of the infringing period. That is quite a large territory, containing slightly less than 300,000 square miles, and there were in it a great number of wheat growers. As more fully shown hereafter, broadcast seeders, hoe drills, and many makes of shoe grain drills were in use therein for sowing wheat. The evidence establishes that a drill embodying appellee's patent was and is the best machine for sowing grain in that territory, because of its spring pressure device, which enables it readily to overcome the obstructions heretofore referred to. But notwithstanding this, it does not appear that appellee made an attempt to cover the entire territory at once. Its efforts seem to have widened with the years as they went by. One of appellee's witnesses, Mr. Gregg, a Minnesota farmer since 1870, operating a 500-acre farm on improved lines, and for 15 years superintendent of the Minnesota Farmers' Institute, who has been over that state many times and had visited the two Dakotas to a limited extent, seems to have known but little of any other shoe grain drills in those states than the Havana press drill, one of which he purchased in 1885, and appellee's drill, one of which he purchased in the early 90's, when during that time there were many other shoe grain drills in use therein besides these two. That some of appellant company's customers in that locality were more ignorant of appellee's drill than he seems to have been of such other drills is not at all unlikely. In view of these considerations we find it quite difficult, in the absence of anything else, to say that the purchasers of all, or any certain number at least of said 3,496 drills located within appellee's field of operation, being the purchasers of all except 850, were at the time they bought aware of appellee's drill.

If this cannot be said, then, nothing else appearing, there is no possible basis for holding that the purchasers of all, or any certain number at least, of said 3,496 drills of appellant company's make, would have bought appellee's drill on any terms had they not bought the drill of appellant company. It cannot be so held as to those purchasers who were located outside of appellee's field of operation and who represent 850 of said drills, because there is nothing tending to show that any of them were aware at the time they bought of appellee's drill. Nor can it be so held as to those purchasers who were located within appellee's field of operation, and who represent the remainder of said 3,496 drills, because it cannot be said that all of them, or those representing a certain number thereof at least, were aware at the time they bought of appellee's drill. But even if it can be so said, and not only this but that appellee's drill was actually offered to them,

it cannot, because of two other factors, be held that they would have bought appellee's drill had they not bought that of appellant company. One was that many kinds and makes of machines for sowing wheat other than the shoe drills of appellee and appellant company were in use and offered by the trade during the infringing period in the field of appellee's operation. They were broadcast seeders, hoe drills, other kinds, and many other makes of shoe drills and disc drills. The original machine was the broadcast seeder. After it came the hoe drill, then the shoe drill, and finally the disc drill. Though the shoe drill, particularly one embodying appellee's patent, was much better adapted to sowing wheat successfully than either the broadcast seeder or hoe drill, neither had been completely eliminated at the close of the infringing period.

Appellee's sales manager testified that one of the circumstances which it took into consideration in estimating annually the number of shoe drills to be made by it was the rapidity of the change by farmers from broadcast seeders to shoe drills, and that at the time he testified, which was after the end of the infringing period, the shoe drill had then almost entirely supplanted the broadcast seeder in Minnesota and the two Dakotas. He further testified, however, that appellee began in 1895 for the first time to make broadcast seeders and hoe drills; that in 1896 it sold less than 100 of each; that in 1897, 1898, and 1899 it sold more of each kind, 200 or 300 of each, besides 300 or 400 cheap hoe drills. As to hoe drills it is testified that in southeastern Minnesota more hoe drills have always been used than shoe drills.

The shoe drills were of three kinds. One kind was where there were no carrying wheels, and the weight of the machine was divided between the shoes and the following press wheels. Of this kind there were two makes, the Havana Press Drill, made by Stoddard & Co., of Dayton, one of which Mr. Gregg purchased in 1885, as heretofore stated, and the Ashurst. Mr. Gregg testified that at that time he had and was still using his Havana press drill under certain conditions where it did better than appellee's drill, which he owned also, and that in certain portions of North Dakota and Minnesota, where the soil is very loose and a press wheel is desired, such drills and drills of that character and style were then largely used. The Ashurst went into the Dakotas in 1889. In 1899 its sales were greatly decreased, and it was practically out of the market. Another kind of shoe drill in use and offered by the trade in appellee's territory during the infringing period was one where the spring pressure device was a coil spring instead of a rod spring, as in appellee's patent. Of these there were a great number of makes. Amongst them were the Van Brunt drill, of Van Brunt & Wilkins, of Horicon, Wis.; the Superior drill of the Superior Drill Company, of Springfield, Ohio; the Tiger drill, of Rowell Company of Beaver Dam, Wis.; and the Hoosier drill, of the Hoosier Drill Company, of Richmond, Ind.—which were the chief makes of that kind of shoe drill. There were probably others. The shoe drill, with such a spring pressure device, preceded that with the rod spring. But it was not

as successful a machine as the latter, particularly in localities where it came in contact with obstructions of the character hereinbefore referred to, and it has been gradually supplanted by the latter, except as to one make. That make is the Van Brunt. In 1892 it appeared with a device for raising and lowering the toe of the shoe, and in dealing with such obstructions it is fairly successful, sufficiently so to be able to maintain itself in competition with the shoe drill having a rod spring as its spring pressure device. The other kind of shoe drills was the one where the rod spring was the spring pressure device. Hoyt, appellee's assignor, was the inventor thereof. But appellant company was not the only other maker of such drills besides appellee. There were a number of other infringers of appellee's patent. Besides appellant company's drill there was the Kentucky drill, of Brennan & Co., of Louisville, Ky., held to infringe in the case of 127 Fed. and 62 C. C. A., supra; a drill made by the Cassopolis Manufacturing Company, of Cassopolis, Mich., held to infringe in the case in 121 Fed. and 58 C. C. A., supra; the Peoria drill, of Selby, Starr & Co., of Peoria, Ill.; the Richmond Champion drill, of the Wayne Works of Richmond, Ind.; and, possibly, also, drills made by the National Drill Company, of Dublin or Liberty, Ind., and by the Monitor Manufacturing Company, of Minneapolis, Minn.—all or most of which drills have also been held to infringe appellee's patent. The sales of the Kentucky drill during the infringing period, and mainly in the field of appellee's operation, were greatly more than appellant company's drill, possibly as many as 10,000, and the sales of the other infringing drills amounted possibly to as much as 5,000 or 6,000. Then as to the disc drill. It was introduced about 1898. This drill requires no previous plowing for preparing the soil for seeding, but cultivates the ground at the same time that it sows the grain. Of course, such a drill is adapted to dealing with obstructions of the character stated, inasmuch as it will cut through them. But inasmuch as the ground is generally plowed prior to seeding in the Northwest, it does not seem to have been generally introduced in that portion of appellee's field of operation. Upon its introduction, however, it made rapid progress, and appellee with many other manufacturers engaged in pushing it. In offering these different kinds and makes of seeding machinery to the wheat growers of appellee's field of operation, there were possibly as many as 15 different concerns engaged. Each was in active competition with the other, and each had its numerous agents extolling the virtues of its particular kind or make of machine and offering it for sale on such terms as it saw fit.

The other factor referred to above is that the price at which appellant company sold its drills was much less than the price at which appellee offered its drill and was willing to sell. In view of these two additional factors, it would seem to be impossible for one to say that all of the purchasers of appellant company's drill located within appellee's field of operation, or so many of them as represented a certain number at least of the drills which it sold therein, would have bought appellee's drill had they not bought that of appellant com-

pany's, even though at the time they bought they may have been aware of appellee's drill and it was actually put at them to buy. At that time those persons either already had seeding machinery or they did not have it. If they then had such machinery, it is quite likely that it was machinery inferior in merit to a drill embodying appellee's patent like that of appellant company and appellee's drills, such, for instance, as a broadcast seeder, or a hoe drill, or a shoe drill of the Havana type, or with a coil spring other than the Van Brunt. If it was of equal merit, it is not likely that they would have made any further purchase. In such case it is possible that at the same time there were offered to them, besides the drills of appellant company and appellee's other drills of equal merit with them, or substantially so, such as the Van Brunt, or the drills of appellee's other infringers, or possibly, if it was in 1898 and after, a disc drill. It is just as likely that the Van Brunt and the drills of appellee's other infringers were then offered them as that appellee's drill was. If they did not then have seeding machinery and were buying for the first time, it is possible that said inferior machinery, as well as that of equal merit, came in competition with appellant company and appellee's drills. This is just as likely as that appellee's drill was then offered them.

That appellant company in the first alternative succeeded in displacing the inferior machinery, or in the second won out as against it, is not evidential that appellee would have done likewise had appellant company not been there, for it may have been that it was appellant company's price that enabled it to do so, and that, therefore, appellee's price would have been against its being able to do likewise. But even if it was not appellant company's price that enabled it to do so, but the merit of its drill, its price simply enabling it to win out as against appellee, it does not follow that appellee would have sold had not appellant company been there, for the Van Brunt and the drills of appellee's other infringers, and possibly the disc drills, drills of equal or substantially equal merit with appellee's drill, were there and offered, at least so far as the Van Brunt and drills of said other infringers were concerned, at a lower price than appellee's. Indeed, if appellant company had not been there, it would seem to be more likely that the sale would have gone to some one of appellee's other infringers than to appellee, and just as likely that it would have gone to some one of them as to appellee had their prices been the same as appellee's. The existence of this inferior machinery alone in connection with the fact that appellant company's price was much lower than appellee's is sufficient to interfere with one's concluding that all or so many of said purchasers would have bought appellee's drill had not appellant company offered its drill, even though they may have been aware of the existence of appellee's drill and it had been put at them to buy. The existence of the Van Brunt drill alone, without reference to such fact, is sufficient to interfere with one's so concluding. Possibly the existence of the disc drill is also alone sufficient to that end. The existence of the drills of appellee's other infringers, even though they had been offered at appellee's price,

is alone sufficient to interfere with one's so concluding. But certainly, in view of the existence of all this seeding machinery and the fierce competition between the sellers thereof that covered the entire field of appellee's operation during the whole infringing period, it is the purest speculation, at least in the absence of the evidence which we have laid aside for the time being, for one to say what all or so many of said purchasers would have done had they not bought appellant company's drill, much more so, if that were possible, that they would have bought appellee's drill had they not done so.

What, then, is that evidence, and what is its effect? As stated, it is a portion of the testimony of appellee's sales manager and three of its general agents. Its sales manager testified that in the immediate vicinity of Dowagiac, where its plant was located, it sold to the farmers on an average 20 to 30 drills per year; that in 1898 (probably meaning 1899) one of its former general agents, who had left appellee and engaged with appellant company, placed an agent at Dowagiac and immediately began selling its drill at about \$20 per drill lower; that during that year appellant company secured the most of said trade and appellee's sales were very few, but in 1900 and 1901 it reduced its prices and kept a canvasser out with a team several months in each year, and it succeeded in getting nearly all of the trade. He further testified generally that the sale of appellant company's drill had quite materially affected the sales of appellee's drills, because of them being built so nearly on the same lines and being sold at lower prices; that just to what extent it affected them was problematic, but that it materially curtailed them and to some extent affected its prices. Appellee's general agent stationed at Madison, Wis., during the years 1899 and 1900, the years when, as before stated, appellant company made a raid into that state, testified that in those years appellant company offered its drill in Wisconsin at a much less price than appellee's price for its drill; that it sold its drill to eight named dealers, who, prior to that time, handled appellee's drill and had not handled appellant company's; that this competition reduced the number of sales of appellee's drills, and that in his opinion if appellant company had not been in the market a like number of appellee's drills would have been sold, instead of appellant company's. Appellee's general agent, stationed at Minneapolis, Minn., since 1898, testified that in the fall of 1898 he came in contact with dealers who told him that appellant company's drill had been offered to them at a great reduction from appellee's price; that in 1899 some of them reduced their order of appellee's drill, and at the time of settlement told him that they had sold appellant company's drill. He further testified that since that time the latter drill had been in strong competition with appellee's, and was offered at such low prices that he could not compete and consequently lost agencies, and his orders were in many instances cut in on. He gave two instances: One, where appellee lost a sale to six farmers at Bellevue, Minn., and the other at Hoffman, Minn., where appellee only sold seven or eight drills, when it had usually sold a full car load each year. Both these instances, however, happened in 1901, after the close of the in-

fringing period involved herein. Appellee's general agent at Fargo since 1897 or 1898 testified that he had met with strong competition from appellant at Graceville and Hallock, Minn., and Larimore, Church's Ferry, Leeds, and Langdon, N. D.; that in 1899 appellant company sold to appellee's local dealers at Hallock, Minn., who had been such for five or six years previous, and appellee was unable to sell to them at all on account of price; and that in the same year appellant company also secured appellee's local dealer at Langdon, and it was compelled to put a salaried man there and sell its drill to farmers at nearly wholesale prices, in order to sell any at all. He testified generally that, in his opinion, he could have sold at least 75 per cent. of the drills appellant company had sold in addition to his regular trade, and that the offer of appellant company's drill at cut prices caused appellee to lose a great many sales.

This is all the evidence of this character which the record contains. Several things in regard to it are to be noted. In the first place, one is impressed with the paucity of instances which appellee has presented of appellee coming into direct competition with it during the eight years covered by the infringing period. The only cases given are that at Dowagiac, in appellee's home territory; that at eight different places in its Madison territory; that at two different places in its Minneapolis territory, after the close of the infringing period; and that at six different places in its Fargo territory. Again, assuming that it is enough to engender the opinion that appellee did lose some sales by reason of the competition of the defendant, it does not present any data by which the master or this court could say that so many sales made by defendant were sales which would have been made by complainant but for its interference. If it does not do this, there is no ground for more than nominal damages. Further, this evidence suggests that possibly it was within appellee's power to have made out that it lost a certain number at least of the sales made by appellant company, and this by proving at least the number of drills the appellant company sold to the eight dealers in appellee's Madison territory and to the six dealers in the Fargo territory referred to above, who were old customers of appellee. It might be reasonable to conclude that if appellee's old customers had not bought appellant company's drills they would have bought a like number of appellee's.

In the case of *Zane v. Peck* (C. C.) 13 Fed. 475, Judge Shipman said:

"I think that the master was justified by the testimony in finding that but for the infringement the plaintiffs would have made the sales of their faucets to their old customers, which were made to them of the infringing faucets by the defendants."

Still, further, the opinions of said witnesses that appellee lost sales by reason of appellant company's sales or as to the extent of its losses does not help matters. As said by Judge Sanborn, in the case of *Central Coal & Coke Company v. Hartman*, 111 Fed. 96, 49 C. C. A. 244:

"The speculations and conjectures of witnesses who know no facts from which a reasonably accurate estimate can be made form no better basis for a judgment than the conjectures of the jury without facts."

And, finally, we have appellee's sales manager's word for it that the extent to which appellant company's sales affected the sales of appellee is "problematic." If the evidence in the record gets us no further than this, as to that extent no allowance can be made appellee for sales lost.

Such, then, is substantially all that the record presents us that can be claimed to have a tendency to make out that appellee would have made the sales which appellant company made had it not made them. There is nothing in it tending to establish that appellee lost all, or any certain number at least, of said sales. There are other slight considerations presented in the evidence which tend to render the matter more uncertain, but it is not necessary to make any detailed reference to them.

We have treated the question presented for determination here as being whether appellee would have made said sales had not appellant company made them, and not as whether appellee or some other infringer of its patent would have made them had not appellant company made them. It cannot be maintained that, if the evidence established that appellee or some other such infringer would have made said sales, or some certain number of them at least, had not appellant company made them, the appellee would be entitled to recover from appellant company as damages the profits which it would have made had it made said sales or such certain number thereof. There was no concert of action between appellant company and said other infringers. Each one was acting on its own account, and neither was responsible for the action of the other. But the evidence did not tend to establish this. In the state of the evidence it is not possible to say that many of the purchasers of said drills would not have retained or purchased inferior machinery, or the Van Brunt drill, possibly of somewhat less and yet substantial merit, or the disc drill, had they not bought the drill of appellant company, and, if so, how many of them would have so done.

It is not enough to show that it is probable complainant has lost some sales and therefore sustained some damages. Damages cannot be given upon such a conjectural basis. *Seymour v. McCormick*, Mayor v. Ransom, and *Philp v. Nock*, cited heretofore. To say that every farmer who bought an improved spring shoe drill would have bought the Dowagiac drill when the field was full of competition selling the drill of other infringers with whom the McSherry Company was not in accord, or a drill of some other make, is the wildest speculation, and ignores the well-known effect of the methods employed for exploiting such mechanism. In *Reed v. Lawrence* (C. C.) 29 Fed. 920, Judge Severens, referring to such a contention, said:

"To say that every purchaser would have bought a spring-toothed harrow having the peculiarity of the Garver patent, and would have bought no other spring harrow, is impossible, without ignoring what is constantly happening throughout the country."

In *Tatum v. Gregory* (C. C.) 51 Fed. 446, the petition claimed the profits he would have made upon sales made of an infringing device; Judge McKenna, now Mr. Justice McKenna, denied the sufficiency of the evidence upon which the master had allowed such dam-

ages. The very learned judge in respect of the evidence to make out such damages, after referring to the inadequacy of some evidence claimed as direct evidence that particular sales had been lost through the presence of the infringer in the market, said :

"And no presumption can be safely indulged in against the fact that there were other competitors of complainants besides respondents, other edgers, and other infringers. If the other edgers are conceded to be inferior, they were cheaper, and the testimony shows were salable; and there are suits pending against other infringers. In this condition of things and the evidence, it would be incurring too much risk of doing injustice to decide that plaintiffs would have made the sales which respondents made. In other words, that the purchasers from respondents would not have bought them or another, some other edger, or bought the same edger from another infringer, but would have bought of plaintiffs at a higher price; that they would not have done what the witness said they did do. I do not think, therefore, that the evidence sustains the finding of the master that the plaintiffs incurred \$1,742.62 damages by respondents' sales."

No case cited by appellee shows an allowance of damages for sales lost upon any such line of evidence as that upon which the decree of the court below was based. The case of Manufacturing Company v. Cowing, 105 U. S. 253, 26 L. Ed. 987, which has been much relied upon, was a totally different case upon its facts. That was a case in which the question was whether the entire gain of the defendant in making and selling an infringing device was a loss sustained by the patentee. The device of the patent was an improved pump, which had superseded all other pumps in use for pumping gas. There was no market for this pump except in the oil-producing region of Pennsylvania and Canada, and less than a thousand supplied the demand. It was also found that the infringer could not enter the field unless he took the improvement of the patentee and added to his old-style pump, and the court found without the improvement no sales would have been effected. Upon this state of facts the court said :

"This is an exceptional case. A limited locality required a particular kind of pump, to be used only in that locality for a special purpose. The market was not only limited to a particular locality, but it was unusually limited in demand. A single manufacturer possessing the facilities the appellant had could easily, and with reasonable promptness, fill every order that was made. There was no other pump that could successfully compete with that controlled by the patent. Under these circumstances it is easy to see that what has been the appellees' gain in this business must necessarily have been the appellant's loss, and consequently the appellant's damages are to be measured by the appellees' profits derived from their business in that special and limited market. This, as it seems to us, is the logical result of the rule which has been stated. By infringing on the appellant's rights, the appellees obtained the advantage of the increased marketability of their pumps. The action of the court below, therefore, limiting the field of inquiry as to damages, cannot be sustained."

Appellee's counsel does not contend that there are any data in the record from which it can be argued that appellee would have made all or any certain number at least of those sales had not appellant company made them. His position is that, by certain action on its part, appellant company prevented appellee from showing that such was the case, and that therefore it should be treated as if it had shown it. In the course of the preparation of this case in the lower court, appellee placed the manager of the Minnesota Moline Plow Company, the jobber to whom

a large number of said 3,496 drills were sold by appellant company between 1898 and 1900, against whom appellee then had a suit pending in the Circuit Court for the District of Minnesota, which resulted in the decision reported in 118 Fed. and 55 C. C. A., referred to above, on the witness stand within said District of Minnesota, and asked him to give the prices at which said plow company resold the drills so purchased by it to dealers, and to produce its book of account with its customers showing the number of drills which it had so resold. On advice of appellant company's counsel, the witness declined to answer the question and to produce said books. Thereupon appellee applied to Judge Lochren, sitting as Circuit Judge of said court, to make an order requiring the witness to answer and to produce, and the said plow company made an application to him to make an order in said suit against it preventing appellee from making an inquiry of its officers or employes as to the contents of said books or as to the persons to whom or the prices at which the drills purchased from appellant company were resold by it. Said judge denied the former motion and granted the latter. This is the action on the part of appellant company which is relied on as relieving appellee of the burden of making out its case in the particular now in question. It is claimed that if it had not thus been balked it would have shown who the exact customers of the plow company were, and with this information could have shown further why they purchased appellant company's drill and that they would have purchased appellee's drill had they not done so.

It is not entirely clear, to say the least, that appellee in this matter had any such ultimate purpose in view. We are somewhat impressed with the notion that the object of this inquiry was solely for the purpose of showing the prices at which said plow company resold said drills, upon the idea either that it could recover of appellant company the profits which said plow company made upon such resale, or that it would show that said prices were considerably less than appellee's, and thereby tend to make out that it lost the sales which were so made. But it is not important that we state the grounds of this impression. Appellee in the instance heretofore referred to did prove who certain of the exact customers to whom said plow company sold appellant company's drill were, and that they were its old customers, and it could have shown through them exactly how many drills they bought from the plow company, but it did not do so. Appellant company had the right in good faith to take the position that appellee was not entitled to this evidence, and there is nothing impugning its good faith in the matter.

Judge Lochren held that it was right. Appellee could have questioned his action in the appellate court and had him set right if in error, but this it did not do. This it did as to similar action had in the Brennan Case pending in the Circuit Court for the Western District of Kentucky, and it was held that appellee was entitled to the evidence it sought, even though it may have been irrelevant. *Dowagiac Mfg. Co. v. Lochren*, 143 Fed. 211, 74 C. C. A. 341. We fail to see anything in appellant company's preventing in this way the introduction of this evidence to relieve appellee of the burden of mak-

ing out its case. No presumption exists that if appellee had been allowed to have its way it would have made it out.

When we come to consider the report of the special master and the opinion of the lower court, all that we find relied on as upholding the allowance of these damages is the fact that appellee could have supplied 3,496 drills in addition to what it did supply, and the further fact that appellant company was a wanton and malicious pirate. But the fact that appellee could have supplied this additional number of drills is not sufficient in and of itself to entitle appellee to the damages allowed. It must appear that it would have sold them had not appellant company made the sales it did. The burden was on appellee to introduce evidence of data from which this could be inferred. It was not relieved of this burden by the fact that appellant company was a wanton and malicious pirate. It is questionable whether it was such, and whether more can be said of it than that it was a stubborn defender of what it believed were its rights, though the way in which, after it was sued, it raided appellee's home and Madison territories with appellee's former general agent at Madison in charge of its forces may be thought to indicate a degree of viciousness. But, however this may be, the quality of the act of infringement complained of had no relevancy on the question as to whether the sales which appellant company made, or a certain number of them at least, were sales lost by appellee, which was essential in order for appellee to be entitled to the damages allowed. Any consideration thereof when that problem is up for solution is calculated to interfere with the free play of one's mind thereon.

Our conclusion, therefore, is that the appellee was not entitled to be allowed damages for profits that it would have made had it sold any of the drills which appellant company sold. There is some evidence that it was compelled to reduce its prices slightly and to incur additional expense in employing more men to push its drills by reason of the competition to which it was subject. But no allowance was made or is claimed on that account. It is not clearly made out just what its loss in this particular was, and the evidence comes short of showing that this loss was due to appellant company's particular competition, just as much so as it comes short of showing that appellee would have made the sales which appellant company made had not it not made them.

The decree awarding more than nominal damage to appellee is reversed as to the appellant company.

This decree is also appealed from by the individual appellants, C. B. Oglesby and T. O. Eichelberger. It was claimed at the time the suit was brought that they were respectively the president and the secretary and treasurer of the appellant company. It is made a question whether they are sued, and the decree is against them in their official or in their individual capacity. It is also questioned whether, even though appellee may have been entitled to all the relief granted as against the appellant company, it was entitled to any relief whatever against them in either capacity. We do not find it necessary to dispose of either question. As appellee was not entitled to a decree against appellant company for any damages, it was not entitled thereto against

the other appellants. So far as the profits are concerned, though entitled to the decree therefor as against the appellant company, it is not entitled thereto as against the other appellants. The appellant company alone received those profits. It is not claimed that the other appellants received any portion thereof.

The decree is therefore reversed in toto as to the individual appellants.

Then as to the cross-appeal. As appellee was not entitled to the first item of damages, it follows that it was not entitled to the second. And, as it was entitled to no damages at all, there was no room for application of the trebling statute. That statute has no relation to profits. It concerns damages alone.

As to the costs, it is equitable to divide them equally between the appellant company and the appellee in both the lower court and this court, and we so direct.

The cause is remanded to the lower court for further proceedings consistent herewith.

Simultaneously with said cause, there was heard and submitted an appeal by said Dowagiac Manufacturing Company from a decree of the lower court in favor of said C. B. Oglesby upon his so-called cross-bill treated in the lower court as an original bill, the relief which it sought and the ground thereof being set forth in the case of Dowagiac Mfg. Co. v. McSherry Mfg. Co. (C. C. A.) 155 Fed. 524, granting him the relief sought thereby. The ground upon which that relief was granted was that in the record in the foregoing cause said company was not entitled to a decree against said Oglesby. This was error. That relief was not sought on that ground. It was sought on the ground of fraud in the procurement of the decree whose enforcement was sought to be enjoined. The lower court had lost all control over its enforcement on any other ground. But inasmuch as we have reversed said decree for error, it is not necessary that we pass on the question of fraud. The decree in favor of Oglesby is therefore reversed, with direction to divide the costs as aforesaid, and this opinion will be filed in both cases.

RICHARDS, Circuit Judge, dissents.

PHILLIPS v. FABER SULKY CO.

(Circuit Court, W. D. New York. April 14, 1908.)

No. 206.

PATENTS—INFRINGEMENT—SPEED WAGON.

The Phillips patent, No. 611,438, for a speed wagon, was not anticipated and discloses invention; also *held* infringed.

In Equity. On final hearing.

Roberts, Becker, Messer & Groat (Tracy C. Becker and Alfred L. Becker, of counsel), for complainant.

George B. Selden (Ernest Wilkinson and Samuel T. Fisher, of counsel), for defendant.

HAZEL, District Judge. The bill charges infringement of patent No. 611,438, issued to complainant on September 27, 1898, for improvements in speed wagons—light four-wheeled vehicles with narrow bodies, used chiefly on circular racing tracks with fast running horses. The body of the speed wagon is supported on a running gear of peculiar style or construction, consisting of front and rear portions, each carrying on spindles the front and rear wheels. These two portions of the running gear are not directly connected with each other, but are separately attached to the vehicle body, and, except for the fifth wheel and the thill couplings carried by the front portion, they are substantially similar in construction. The novel features of the frame of the wagon are claimed to exist in the employment of a so-called double truss, which carries the fifth wheel at its front portion; its lower ends extending downwardly to the inner ends of the wheel spindles. The arched and rearwardly inclined brace engages at its extremities the extremities of the spindles. By this arrangement the arched brace connects with the spindles on the outside of the wheels, the spindles become a part of the wagon frame, and rigidity of the spindles is secured.

The patent has 11 claims, all of which are in issue except the fifth, sixth, and ninth. The first claim, which contains the important elements, may be fully set forth, and an epitome of the others will suffice to enable an understanding of the controversy. Claim 1 reads as follows:

"1. A speed wagon consisting of front and rear truss-frames carrying the wheel spindles, each frame extending upward perpendicularly from the spindles, an arched brace for each frame and its set of spindles arranged at an angle of substantially forty-five degrees to the said frame, and a wagon body connecting said frames and having said arched braces bearing against the bottom of the same, said braces having substantially straight portions at their bearing against the body, substantially as described."

The essential elements of this claim are (1) front and rear truss-frames carrying the wheel spindles perpendicularly from the spindles; (2) an arched brace for each frame and its set of spindles, arranged at an angle of substantially forty-five degrees to said frame; (3) a wagon body, connecting said frame and having the arched braces bearing against the bottom of the same. Claim 2 is similar to the first, and includes "the inwardly and upwardly inclined arched brace"; claim 3 is broader, and embraces the feature of separate frames for the front and rear; claim 4 is for the running gear, including a thill connection directly above the spindles; claim 7 is for an arched supporting frame, the spindles and inclined brace, and the fifth wheel; claim 8 is substantially the same as the preceding claim, except that it mentions "lateral arched braces"; claim 10 specifically relates to the combination, including a king-bolt support; and the eleventh claim is for a front arched frame and brace in combination with the fifth wheel. In his specification the patentee says:

"My invention has reference to speed wagons; and the object of the invention is to overcome and remedy certain material defects in speed wagons as they are now constructed, all substantially shown and described and particularly pointed out in the claims."

According to the evidence the defects in the speed wagon consisted of objectionable strains, vibrations, and swaying on the fifth wheel, due to the high speed which race horses attain in running with vehicles of this class. Emphasis is laid upon the feature of the patent by which the truss frames are arranged perpendicularly to the wagon body and the brace frames extend approximately at an angle of 45 degrees to the body. The problem presented to the inventor, and which he designed to solve, was to remove the strain caused by the weight of the pull of the driver from the running gear and the king-bolt to the arched brace. Speaking on this point the patentee says:

"So perfectly does this construction and arrangement of parts operate that I can use a materially lighter running gear than before, with greatly improved effects in rigidity of frame and action on the road."

The defendant contends that the claims in controversy lack patentable invention, and, even should the court sustain them as covering a combination of elements, that it does not infringe, because the details of construction, together with the arrangement of the brace and truss frames at an angle of substantially 45 degrees, is wholly absent in its construction. The complainant, however, rejoins that as far as the particular construction is concerned he was a pioneer, and therefore a broad construction must be given to the claims. He also insists that, even if the claims are limited to the details of construction, the preponderance of the evidence shows that the defendant's structure embodies the subject-matter, and by the employment of substantially the same elemental features the identical functional result is attained.

The first proposition for discussion is whether the first and second claims disclose invention. None of the prior patents for sulkies or speed wagons contain the element of an "inclined arched brace for each frame and its spindles arranged substantially at forty-five degrees to said frame." I do not doubt the analogy between the sulkies and speed wagons; but nevertheless it is not clear to me that the patents cited by defendant relating to sulkies anticipate the patent in suit. The arrangement of complainant's arched brace connected to the spindles is not found in the prior art; nor does the brace found in sulkies or other vehicles suggest its application by the skilled in the art to the Phillips structure. It is true that in the patent to Windle, No. 587,828, the wagon body may be supported on the front and rear axles without using a pole or reach; yet such structure has not the arched brace connected to the spindles which is the essential element of the claims under discussion. The braces, *j*, in the Windle wagon are differently arranged than those of the Phillips structure, they being used to impart rigidity to the reach when fixed to the trusses; and, moreover, the truss frames are vertically arranged in connection with the spindles. But as they are without the inclined arched brace I do not think they can possibly attain the particular object of the patent in suit. The prior patent to Wells, No. 577,339, is for improvement in sulky to prevent the rocking motion. Braces are shown running from the spindles to the forward thills; but such structure does not anticipate the patent in suit, for it has not the truss

frame built from the wheels and the inclined brace of the claims in suit. The Perren speed wagon is also without the inclined brace, nor has it the arrangement for bracing the outer ends of the spindles; hence the spindles, being unsupported at their ends, lack the rigidity produced in complainant's arrangement of spindles. Nor does the Clark patent, No. 522,150, disclose the elements of claim 2. In the Phillips patent, as already observed, the arched brace inclines upwardly and at its upper end adjoins the straight portion lying in the same plane as the upper part of the vertical truss. This feature is not found in the Clark patent. There the inclined member is above the vertical member, and if a wagon body were put upon the frame the inclined member would be below the plane of the truss. Various other patents are cited in anticipation; but, as the elements are used in a different form or shape, they do not require special attention, in view of what has been said regarding the Windle, Wells, and Clark references.

In my estimation claims 1 and 2 are not devoid of invention. The patentee is not thought to have been a pioneer in the sense that he was the first to invent a light four-wheeled speed wagon without the necessity of a pole or reach; but by his adaptation he has improved wagons of this class by remedying certain indicated defects. It may be conceded that his improvement is not far removed from mechanical skill, yet it is believed that the conception was not so obvious as to remove any doubt which the court may entertain as to the necessity of exercising the inventive faculty in making the improvement. The claims should not be construed so narrowly as to deprive the patentee of the improvement he has concededly made in the speed wagon industry. The limitation of the claims in the patent office does not, in my estimation, operate to conclude the patentee from asserting that the details and mechanisms of construction of defendant's wagon and assembling of the parts was substantially such as pointed out in the specification in suit.

Infringement.

The defendant's speed wagon substantially embodies the elements of claims 1 and 2. Its truss frame does not extend perpendicularly to the wagon body, nor do its brace frames incline at an angle of 45 degrees thereto. But it is shown that the upward extension of the truss frame is about 76 degrees; that is, 14 degrees from the perpendicular. According to the complainant's expert witness Nathan, the angle between the truss frame and the arch brace in the defendant's structure is actually 52 degrees, and the expert witnesses for the defendant agree that an angle of 49 degrees practically covers the angle of complainant's structure. Upon this point I am satisfied that no new result or function is created by the difference in the angle of the truss frame. To strengthen this view it may be stated that the specification and claim 1 in suit refer to an inclination of the brace "of about forty-five degrees" and "substantially forty-five degrees." Nor does the adaptation by the defendant of a bar running from the slanting arched brace to join the inner side of the spindle secure a

different functional effect than that which is obtained by the arched brace of the patent in combination with the other elements of claim 1. The removal in defendant's structure of the thill connection further back from the point of connection of the thill with the clips of the Phillips patent does not avoid the claim covering the inventor's arrangement, nor do the words "above said spindles," contained in claim 4, call for a construction which would place the clip connection directly above the spindles. Claim 3, which apparently is broader than the others, is thought to be valid, as it includes the truss support carrying the wheel spindles and mentions the inclined brace engaging the ends of the spindles. Properly construed, this, of course, must be deemed to refer to "frames extending vertically upward" and connecting with the inclined frame substantially at the angle specified and as herein construed. The indicated difference in mounting the running gear in defendant's construction is inconsequential; and the round fifth wheel, while somewhat unlike that of complainant in form, appears to be supported across the frame and brace, to which it is firmly attached.

There is nothing novel in the employment of a fifth wheel in a speed wagon. In the Windle wagon the fifth wheel is not supported or braced by portions of the running gear. The essential feature of the claim in suit consists in mounting the fifth wheel in such manner as to support it across the arched frame and the inclined brace. I incline to the belief that by this method of construction rigidity is imparted to the running gear and that the manner of its construction and its functional effect was not obvious. The tenth and eleventh claims include the king-bolt located midway between the fifth wheel and its supporting brace. The king-bolt, of course, was familiar to the art; but, considered in the light of its use in combination with the rigid front frame and its inclined brace, it must be regarded as a detail of construction.

The various elements and features of construction of the Phillips invention, or their substantial equivalents, are used by the defendant in the construction of its speed wagon, and in consequence of such use and appropriation the functional characteristics of the patent in suit are secured thereby.

In my judgment complainant is entitled to a decree, with costs, for infringement of the involved claims, to wit, 1, 2, 3, 4, 7, 8, 10, and 11, and an accounting, as prayed for in the bill.

DONNER v. AMERICAN SHEET & TIN PLATE CO.

(Circuit Court, W. D. Pennsylvania. April 24, 1908.)

No. 22, May Term, 1908.

1. PATENTS—INTERFERING PATENTS—SUITS TO DECLARE VOID.

To make out a case under Rev. St. § 4918 (U. S. Comp. St. 1901, p. 3394), for adjudging a patent void for interference, there must be an actual conflict and not mere infringement, and in determining whether there is an interference the court cannot go beyond the claims as to which it is charged so as to consider the patent as a whole.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 146, 147.]

2. SAME—INFRINGEMENT—ROLLING BLACK PLATE.

The Donner patent, No. 620,541, for a method and mechanism for rolling black plate by means of a set or sets of rolls arranged in continuous train, to which the sheets are successively fed on a moving table or conveyor, the sheets being matched or made into packs in the course of the process, and reheated between the sets of rolls as required, while no one of the claims alone may express the full invention, as a whole was not anticipated, and discloses invention. Claim 5, for pinch rollers to hold the matched sheets in place and shape while being fed into the rolls, is void for anticipation, but claim 4, covering mechanism for matching the sheets without interrupting the continuity of the operation, discloses novelty and invention. Such claim also *held* infringed.

In Equity. Suit for infringement of letters patent, No. 620,541 for rolling black plate, granted to William H. Donner February 28, 1899. On final hearing.

James I. Kay, for complainant.

James K. Bakewell and Charles Neave, for defendants.

ARCHBALD, District Judge.¹ So far as the bill proceeds for the cancellation of the alleged interfering claims of the Bray patent, it is clear that it cannot be sustained. To make out a case under section 4918 of the Revised Statutes (U. S. Comp. St. 1901, p. 3394), where this is provided for, there must be actual conflict, and not mere infringement. *Gold Ore Separating Co. v. United States Disintegrating Co.*, 6 Blatchf. 307, Fed. Cas. No. 5,508; *Mfg. Co. v. Craig* (C. C.) 49 Fed. 370. Otherwise, whenever a defendant justified under a patent, and was found to infringe, a cancellation could be ordered, even though the infringing patent was for a valuable improvement, which, subject to the principal invention, the patentee had a perfect right to maintain. It has therefore been held that the interference, authorizing a cancellation, does not exist between a patent, having a dominant, broad, claim, and a later one, having a subordinate, specific claim. *Stonemetz Machinery Co. v. Brown Machine Co.* (C. C.) 57 Fed. 601; *Brown Co. v. Stonemetz Mach. Co.*, 58 Fed. 571, 7 C. C. A. 374. Nor, unless the claims in controversy cover the same mechanical construction or device. *Simplex Railway Appliance Co. v. Wands*, 115 Fed. 517, 53 C. C. A. 171. And in determining whether there is an interference, within the meaning of the statute, the court cannot go beyond the claims

¹Specially assigned.

as to which this is charged, so as to consider the patent as a whole. *Mfg. Co. v. Craig* (C. C.) 49 Fed. 370. *Stonemetz Machinery Co. v. Brown Machine Co.* (C. C.) 57 Fed. 601.

In the present instance, comparison is made between claim 4 of the Donner (complainant's) patent, and claims 6 and 10 of the Bray, both relating to a mill for the rolling of black plate; the former of which (claim 4) is, in terms, for "a continuous train in which two of the sets of rolls are sufficiently removed from each other to allow the bars or sheets to be matched between" the said rolls; while the latter (claim 6) is for "a combination with two pairs of reducing rolls arranged in tandem, of a matching device located between and in line with the rolls" the matcher being provided with suitable stop mechanism; and (claim 10) for "a continuous mill having a series of sets of rolls arranged in tandem and matching mechanism interposed between two of the sets." Conceding, of necessity, that these claims are much alike, dealing with the same general idea as they do, they nevertheless differ in the way of treating it, to such an extent that a cancellation of either of them is not warranted. Critically analyzed, Donner simply calls for a matching pass or space in which to match; while Bray declares, in the one claim, for a matcher or matching device with suitable stop mechanism, and in the other for matching mechanism or means to effect the matching, without more. However closely they may thus approach each other, patentably considered, they are not the same, the one being directed to a place where matching can be done, and the other to the means for bringing it about. It may be that, having regard to the scope of the invention as disclosed by the specifications, matching mechanism is to be read into the Donner claim, of which more anon. But taking it as it stands, as at present we must, while the fact of matching is no doubt involved in it, the same as in the claims of the Bray, each is concerned with a different phase, which, on an application to cancel, is to be regarded as distinct. Even if this were not so, and the Donner is to be taken as though matching mechanism were actually expressed, this necessarily would be of the same general character as that described in the specifications, and the same being true of that called for in the Bray, the simple stop fingers of the one are not to be identified with the highly organized arrangement provided for in the other, however they may both lead to the same result. The case is therefore to be disposed of, entirely aside from the question of interference, on the validity of the complainant's patent and the infringement charged.

As already stated, the patent in suit relates to the rolling of black plate, which is the basis of commercial tin, and is much thinner than ordinary sheet. According to the art previously practiced for nearly 200 years and which is still in extended use, the metal, in the form of heated bars, of about the width intended for the finished sheet is fed back and forth, two following each other at a time, between plain faced, adjustable rolls, arranged in single stands, two rolls high, and tended by three workmen, a feeder or rougher, and a catcher, to actually handle the metal, and a skilled roller or watcher, to oversee the whole. After

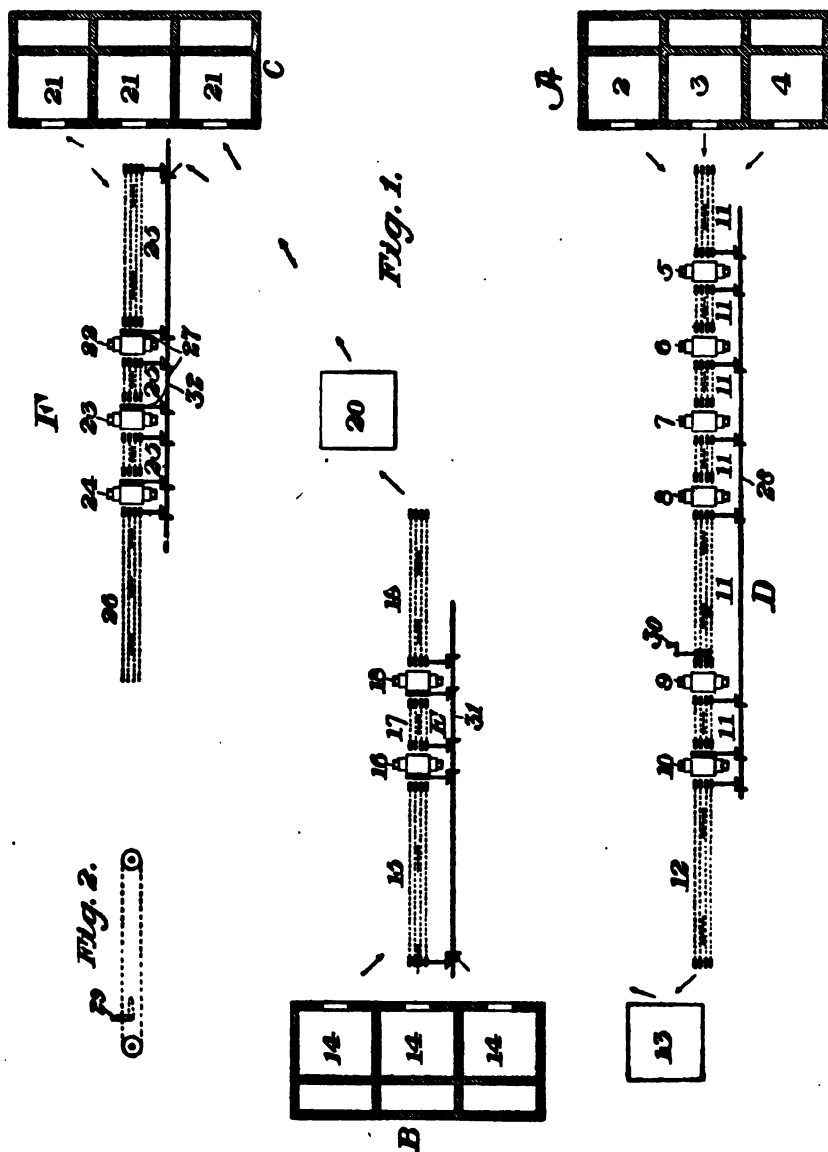
each passage of the metal through the rolls, the rolls are screwed closer together, until the sheet has been brought down to what is known as a matching thickness, which is usually after the fourth reduction, upon which two or more of the sheets are seized by the workmen with tongs and put together into a pack, and in this shape, with or without reheating, they are again rolled, on the same or another stand, the rolling in packs, by reason of the extra pressure so secured, having the effect of reducing the sheets in a way that nothing else will. If required to be reduced to a still lower gage; the sheets are pulled apart, so as to prevent their sticking or welding—a fruitful source of trouble—and after having been doubled over like a sheet of paper are again reheated and rolled, and for extreme reduction, they may be redoubled and rolled again. Finally, when all has been accomplished that is desired in this direction, the sheets are put singly through smoothing rolls to give them a superficial finish. Between each of the original reductions or passes, the rolls have to be carefully adjusted for the next turn, for which service a person with especial skill, to watch or “nurse” them, is required, the heat imparted by the metal being an element to be reckoned with, and often affecting the rolls unequally, spoiling the sheets. The packs also, on being put into the furnace with others which are hotter, tend to draw down the temperature of the latter and cool or harden them, which has likewise to be carefully considered and attended to. These are some, but by no means all, of the difficulties involved in the process, which in all its phases is a delicate one calling for the skill of trained and high-priced workmen. Preserving the essential steps of it, the complainant claims to have arranged for its successful performance on a series of rolls, set in tandem or continuous train, the heated metal, instead of being reduced on single stand rolls, which have to be adjusted after each reduction, being passed on from one pair of rolls to another, by means of a conveyor or moving table, each pair being set to do the particular work assigned to it, and being kept at the proper temperature or contour for doing so, by virtue of the uniform heat of the bars or sheets which are fed to it in a regular and continuous manner. Being the first to make use in this way of continuous rolling for the manufacture of sheet plate, contrary to the prevailing view as to its practicability, and claiming to have thereby made a radical departure in the plate rolling art, the complainant asks to be protected in the patent which he has obtained for it, against which it is charged that the defendants infringe.

The character of the invention, and the objects sought to be accomplished by it, will be best shown by reference to the specifications, where, after describing the hand method, with single stand rolls, previously pursued, and the disadvantages of it, it is said by the inventor:

“The object of my invention is to provide a plant and method of working the metal whereby the time and labor consumed in passing the metal back over the rolls is obviated and the iron reduced more rapidly and without changing the adjustments of the rolls. A further object is to provide a plant of this character wherein the metal after each set of reductions is reheated in a furnace-chamber at a point remote from the sets of packs which have been subjected to one less series of reductions and to obtain a continuous plant wherein the various sets of rolls are maintained at substantially the

same temperature by reason of the metal passing therethrough in a continuous or regular manner, thus giving more accurate sheets and reducing the liability of breaking the rolls."

Proceeding by reference to the accompanying drawings to particularly describe the apparatus designed to embody the invention, it is said:



"Figure 1 is a diagrammatic plan view, partly in section, showing a plant * * * constructed in accordance with my invention; and Fig. 2 is a detailed view of a stop mechanism.

"In the drawings, A represents a heating-furnace having chambers 2, 3, and 4, in which the bars are heated. This furnace may be provided with one or as many chambers as desired. When the bars are brought to the proper heat in this furnace, they are taken to a continuous mill, D, consisting of several sets of two-high rolls, of which I have shown six sets, arranged in tandem; * * * each set of rolls being provided with a feed-table or conveyor. * * * which is shown as consisting of a series of sprocket-chains passing over positively-driven sprocket-wheels at their ends, though other forms of positively-driven feed-tables may be employed, if desired. * * * The metal being placed upon the first feed-table passes through the set of rolls, 5, and being reduced therein emerges upon the second feed-table, which carries it to the rolls, 6, in which it receives a further reduction, and thence passes on in a similar manner through the sets of rolls, 7 and 8. The next set of rolls, 9, is spaced a sufficient distance from the set, 8, so that the plates may be matched at this point, if desired, the feed-table between rolls 8 and 9 being correspondingly lengthened for this purpose. To stop the plates upon the table between the rolls 8 and 9, I show tilting fingers, 29, arranged between the chains near the end of this table * * * to be swung into upper position to stop the metal or into lowered inoperative position by a lever, 30. From roll, 9, the metal passes through set, 10, and on emerging from this set of rolls the metal, which has now been reduced to a suitable gage for doubling, emerges upon a feed-table, 12, by which it is carried to a doubler, 13, upon which it is suitably doubled and taken to the furnace, B, having chambers, 14, in which the doubled pack is reheated. The pack being heated in one of the chambers of this furnace is drawn out and reduced in the continuous train, E, it being first placed upon a conveyor, 15, and carried to a set of rolls, 16, in which it is reduced and emerges upon a feed-table, 17, by which it is carried to another set of rolls, 18, in which it is further reduced and drops upon the feed-table, 19, by which it is taken to the doubler, 20. After being doubled therein the pack is then taken to a reheating-furnace, C, and being reheated in one of the chambers, 21, thereof is taken to a third continuous train, F, consisting of three sets of rolls * * * having feed-tables or conveyors * * * similar to those of the other trains. The metal passing through these three sets of rolls is reduced therein to the proper gage of sheets and emerges upon a conveyor, 26.

"In order to prevent twisting or spreading of the pack between the sets of rolls after it has been reduced in gage to a point where this may occur, I preferably provide in front of and closely adjacent to the reducing-rolls small rollers, 27, which act upon the packs passing through these rolls, guiding them and preventing twisting and spreading by their action upon the surface of the sheets in the same manner as a workman operating with tongs. I have shown these rollers as used upon the last six sets of the reducing rolls; but they may of course be placed wherever necessity demands between the rolls. The number of continuous trains or mills, as well as the number of sets of rolls in each train, may be varied as desired without departing from my invention, according to the number of reductions and the gage of sheet which are desired. The advantages of my invention will be apparent to those skilled in the art, since the labor and time of reducing the metal are greatly decreased, a greater number of reductions can be given before reheating the pack, and the number of workmen is materially reduced. Since I use one pair of rolls for each reduction instead of making several reductions on one mill, the reductions are more uniform and accurate than where the adjustments are being continually changed. The adjustments of the tension of the rolls which regulates these reductions are made easy for an unskilled workman, whereas the adjustment by the ordinary method heretofore used requires the close attention of a skilled roller. The packs being fed to the rolls in a continuous and regular manner, the rolls are kept at a substantially uniform temperature, and hence at about the same contour or shape, giving more accurate sheets than formerly and avoiding breakage of the rolls by reason of contracting and expanding thereof."

On this eight claims are formulated, the complainant relying however only on the fourth and fifth.

"1. In the manufacture of black plates or sheets, a heating-furnace, a continuous train made up of several sets of rolls arranged adjacent thereto in tandem, a doubler arranged to act upon the metal after passing through the continuous train, a heating-furnace to which the doubled pack is taken, and another continuous train to which the metal is taken from the latter furnace; substantially as described.

"2. The method of making black-sheets, which consists in heating a series of packs, rolling each pack successively by passing it through the several sets of rolls of a continuous mill, doubling each pack, reheating the doubled packs in series, rolling each pack successively by passing it through the several sets of rolls of a second continuous train, and continuously supplying the packs to the furnaces and to the continuous trains; substantially as described.

"3. The method of making black-sheets, which consists in heating a series of packs, rolling the packs successively by passing them through a continuous train made up of separate sets of rolls, doubling the rolled packs, placing the doubled packs in a series in a furnace-chamber at a point remote from those being rolled, rolling each pack successively by passing it through a second continuous train of rolls and supplying the packs in series to the furnaces and to the rolls, so as to keep the latter at a substantially uniform temperature; substantially as described.

"4. In a plant for rolling black-plate, a continuous train in which two of the sets of rolls are sufficiently removed from each other to allow the bars or sheets to be matched between said sets of rolls; substantially as described.

"5. In the manufacture of black plates or sheets, the combination of several sets of rolls arranged in tandem in a continuous manner, and driven rollers arranged between them, said rollers being arranged to prevent buckling; substantially as described.

"6. In the manufacture of black plates or sheets, the combination with a set of rolls, of driven chains arranged to carry the plates or sheets to said rolls, and rollers in front of the rolls and arranged to prevent twisting or spreading of the metal; substantially as described.

"7. In a plant for the manufacture of black-plate, the combination with several continuous trains, each made up of two or more sets of rolls arranged in tandem, of furnaces arranged between the trains and arranged to heat the metal coming from each train; substantially as described.

"8. In the manufacture of black plates or sheets, a heating-furnace, a continuous train made up of several sets of rolls arranged in tandem, a doubler arranged to act upon the metal after passing through the continuous train, a heating-furnace to which the doubled pack is taken, another continuous train to which the metal is taken from the latter furnace, and positively-driven feed mechanism between the sets of rolls of each continuous train, substantially as described."

It will be observed from this somewhat extended consideration of the terms of the patent, which is necessary, in my judgment, to a correct understanding of it, that it is combinedly for a method or process and an apparatus or mill on which to practice it, the claims being correspondingly given up, some to the one and some to the other. And, each being supposed to be devoted to different phases or features of the same general invention, all have therefore to be taken into consideration in determining its exact nature and scope. Thus—passing by the second and third claims which deal solely with the method or process—of the apparatus claims, the first is concerned with the first half of the operation, covering the initial heating furnace, the first set of reducing rolls, arranged tandem, in continuous train, the intermediate doubler and reheating furnace, to double and heat the pack which has been made up, and a second continuous train to which the sheets are taken

from the latter furnace; from which the eighth claim differs only in having the additional element of positively driven feed mechanism to act as a conveyor and pass the metal on continuously to the rolls; while the seventh merely declares generally for several continuous trains, without other specification than that each is to be made up of two or more sets of rolls, arranged in tandem, with furnaces in between the trains to reheat the metal coming severally from them. It is in this setting that we find the fourth and fifth claims which are in issue here; the one of which provides for two of the sets of rolls of a continuous train being removed a sufficient distance from each other to allow the bars or sheets to be matched between them; and the other, for driven rollers arranged between the rolls of a continuous train, to pinch and hold the matched sheets, so as to prevent buckling; the sixth claim—which although not involved completes the list—specifying, in addition to pinch rollers, the further feature of driven chains, as in the eighth claim, to carry the sheets to the rolls.

Without stopping at this point to determine the exact character of the general invention underlying these claims, there can be little doubt that, taking it as described in the specifications, an operative device is so shown, which is not anticipated by anything previously existing in the plate rolling art. It may be that the whole problem of rolling plate by continuous-train, instead of single-stand rolls, has not been thereby solved, nor that all claimed for it has been realized, more watching and nursing of the rolls being required than assumed, and too much scrap or defective sheets being produced. Also that a lower gage than 18 or 20 cannot be relied upon with any degree of confidence, so that single stand rolls have to be resorted to for any further commercial reduction. But with all that, it must be confessed that the way has undoubtedly been blazed by the complainant for the use of continuous rolling, with one or more sets of rolls arranged in tandem, the sheets being carried to and passed through each set in a continuous and regular manner, by means of a feed-table or conveyor, and the various operations of matching or packing, doubling, and reheating, being conducted expeditiously in between. This has been accomplished in the face of the prevailing opinion that the continuous rolling of black plate was impracticable; and it has resulted in a material increase of the output, with a saving at the same time of reheating and labor which goes far to establish its utility. There is evidence, also, that it furnished the impulse, if not the idea, of which the Bray patent, under which the defendants are operating, was the outcome, which followed after a communication to them of his invention by the complainant, and an unsuccessful attempt by them to buy his patent from him for \$1,000. Taking all things into consideration, as to the general apparatus and method described in the patent, an inventive advance would seem to have been thereby made in the art.

It is true that, prior to 1893, at Teplitz, Austria, there was a continuous mill with rolls in continuous train, a sheet from which was exhibited at the World's Fair in Chicago in that year; following which Mr. McMurtry, president of the Apollo Iron & Steel Company, went to Teplitz in 1894 and saw the mill in operation there, consisting of five

stands of rolls in which the sheets were reduced to about 12-gage. Returning home he discussed the subject with Mr. Norton, of Chicago, who was engaged in the tin can business, and had experimented in the rolling of thin sheets, who also visited Teplitz to see the mill. Mr. McMurtry also consulted with Mr. Julian Kennedy, of Pittsburg, one of the most eminent mechanical engineers of the country, as the result of which a mill was designed by him and put up at Vandegrift, Pa., for the production by continuous rolling of long bars to be made the basis from which sheets were subsequently to be rolled in the ordinary way. In the practice at Teplitz, however, there was no matching or making of packs, the metal being rolled in a long unbroken sheet, and the reduction stopping short of the production of commercial plate. And as to the mill at Vandegrift, while the rolling of thin narrow sheets, suitable for tin cans, may have been discussed, it was never actually used for any such purpose, and much less was there any matching or rolling of packs upon it, except recently to meet the exigencies of this case. Possibilities of that kind may perhaps have resided in it, but they are of no account in the present consideration, the arrangement of rolls in this comparison having to be taken for what was actually done on them, and not for what, with more insight, might have been.

Neither does the Howell publication stand much better. In this, two sets of rolls are shown, the first or blooming rolls taking the slab direct from the furnace and reducing it, after four passes back and forth, to about an eighth of an inch thick. It is then cut and packed and taken to the second set, arranged in continuous train, where it is rolled into long narrow strips, suitable for making tin cans, in which shape it is coiled up, instead of being boxed. Here no doubt, there is a combination of single stand and continuous or train rolling. But there is no connected feed mechanism, as in the device in suit, nor any matching up of sheets while in transit between rolls, the packs being formed by cutting up the sheets with shears on the way between the two sets of rolls and putting them together by hand, after which they are taken on buggies to the second or continuous set. The rolls of this set also, instead of being geared together, are detached and driven separately, so that each shall have a distinct and separate speed, the strips of metal being arranged to pass into one just as they are leaving the other, the distance between the several rolls being progressively spaced to conform to the increasing length of the sheets in order to bring this about. While then, to a certain extent, continuous rolling as well as a rolling in packs, is so shown, it is not at all of the character of that specified in the patent, the distinctive thing being that there is no matching pass between the continuous rolls, the attempt to overcome which, by the suggestion that the space between them is ample for it, if desired, again seeking to rely on what might be rather than what is.

The same is true of the Garrett mill, which is somewhat similarly arranged, the billet or slab being first reduced by repeated passes back and forth through a single stand of rolls, and then carried to a shears, where the sheet is cut and matched, and the matched packs then put through a succession of alternate rolls and heating furnaces, the rolls

at each stand being set side by side and the number successively increased in order to speed the process. But in all this there is nothing but hand rolling, the rolls at each set being simply the old single stand rolls, through which the metal is passed back and forth, each stand also being individual and distinct, there being no feeding of the metal to them on a connecting feed-table, in a continuous and regular manner as in the patent in suit.

The only other things to be reckoned with in this connection are: (1) A vague suggestion in the Jackson (1889) patent that the method of rolling sheet metal, there described, could be accomplished, if desired, in a continuous mill, instead of by the groove and plate rolls shown in the drawings; but without something very much more definite and specific, this clearly is entitled to no consideration, the problem of continuous rolling being altogether too complex to be disposed of in any such off-hand manner. (2) A set of continuous rolls shown in the Jones (1896) patent for rolling tin plate; but besides having no provision for matching the sheets, this is an utterly impracticable device, the inventor, although having only four sets of rolls, through which the metal is to pass but once, unmatched, apparently expecting to reduce a billet to a gage thin enough for tinning, which is impossible. (3) The showing made in various patents of train rolls, arranged either side by side or in tandem, for the rolling of rails, bars, rods, or other similar articles; but this amounts to no more than that train rolls are not unknown in the general rolling art, which, with all that is to be so implied, does not carry us far, shape rolling and plate rolling, while branches of the same art, requiring such separate and distinct treatment as to afford very little if any assistance to each other by way of suggestion or analogous use.

So far, the case has been discussed as though the invention in suit was for a continuous mill for the rolling of sheet plate, without regard to how it was to be made up, except that it should have a set or sets of rolls arranged in continuous train, to which the sheets should be regularly fed, on a moving table or conveyor, the sheets being matched or made into packs in the course of the process, whereby the necessary additional reduction would be secured, these being recognized as essential features of any such device; and it is as to an apparatus of this kind that the conclusion is reached that nothing to anticipate it is to be found in the prior art. If this broad view can be maintained, the defendants also undoubtedly infringe. Originally they had two mills, built on the continuous plan, one at their Monongahela plant in Pittsburgh, which has been given up, and the other at Sharon, Pa., which is still in use. In each of these, there was first a series of reducing rolls, arranged tandem in continuous train, through which the sheets were put singly, being fed thereto by conveying mechanism of one kind or another. There was then a matching of the singles by means of an incline or slide, down which they severally dropped to a second series of rolls, similarly arranged, on a lower level, the head sheet being stopped at the bottom, and the one following it made to overlay it, the two being squared up sidewise and endwise, as well as centered for the next pass. Pinch rollers then grasped the pack and held it, until it

was fed into the next train, through which it passed in that shape, and on emerging was taken to a mechanical doubler and then to a heating furnace, after which the final reduction and finishing were effected on the usual single stand rolls. But the difficulty is to identify this with the claims of the patent. Omitting the second and third which are process claims, it certainly does not comport with the first, nor the eighth, each of which—to say nothing of anything else—calls for another continuous train, besides the original one, after a second heating. Nor yet with the seventh, which has several continuous trains, with a heating furnace in between each. Nor with the sixth, which, in addition to being a mere variation of the fifth, to be considered later on, has driven chains to carry the sheets to the rolls, which chains the defendants do not use. The complainant is thus compelled to fall back on the fourth and fifth, on which, as already stated, he relies, the one apparently declaring, as a special feature, for a matching pass, and the other for pinch rollers, to prevent the sheets from buckling. The case turns therefore on the effect to be given to these claims.

There are several criticisms of the fourth claim, some of which however, manifestly, cannot be sustained. It draws upon the credulity, for instance, if indeed it does not reflect on the intelligence of the court, to argue that the Vandegrift mill shows a stop and a matching pass. This mill, as an alleged anticipation of the continuous rolling of black plate, has already been considered, but this is a different point. The stop, which is there employed, consists merely of a rough piece of angle iron, hung on a pivot, which is let down by hand, whenever for any reason it becomes necessary to stop the operation and prevent the bar from entering the next train of rolls, as for example, if it has a rough end, or the next train requires adjustment, or the finished bar at the delivery end is not yet out of the way. No doubt this effectively arrests the course of the metal, and the feed-table may be long enough to have one bar overlay or match the other if that was what was wanted. But to go out of the way, in this clumsy fashion, to have the machine do something, for the mere name of it, which it was never designed to do, and only by a strained use can be made to, merely serves to make plain the means to which the defendants are compelled to resort in order, perchance, to make out anticipation.

The same may be said also of the apparatus shown in the Howell publication, where the rolls of the continuous train, as it is urged, are sufficiently removed from each other to allow the sheets to be matched, if desired, before they enter the last four sets, thus fulfilling the terms of the patent. But the mere capacity for this, without any suggestion or arrangement for it, affords no argument against the novelty of the present device, particularly when it is remembered that the making up of the sheets into a pack in the Howell mill is expressly provided for after they have been taken to the shears to be cut, and before they go to the continuous train, thus absolutely negating any idea of their being matched up in any other way afterwards.

It is further suggested, however, that it is a common thing in the rolling art, to allow extra space between two successive sets of rolls, when some supplemental or special treatment of the metal is to be un-

dertaken, and that it involved no invention therefore in providing, in the same way, for a place to match. Thus, in the Jones patent, a rotary brush is introduced to remove scales or other foreign substances from the sheets. And in the Stephens & Cooper a device between two sets of rolls is shown, to automatically turn the rod which is being made, in order to successively present its various sides to the action of the rolls. But this, like the other things urged, is of no significance. A matching pass is something new in the art, as to which there was nothing to afford any analogy; and even if, in providing for it, advantage was taken of a not unusual expedient, it is the nature of the device, and the function it is to perform, and not the place, which serves to characterize it.

But the other infirmities of the claim are not so easily disposed of. All that is specified, as it will be noted, is a continuous train, in a plant for rolling black plate, in which two of the sets of rolls are sufficiently removed, to allow the bars or sheets to be matched between them. No doubt this assumes, as it in effect provides, that matching is to be done, notwithstanding that the specifications seem to speak doubtfully about it, saying, "if desired," as though it was intended to be left optional. It may be conceded also, that, as a necessary result, matching mechanism is implied, the same as housings for the journals, or other like essentials, and that the claim is to be read, as though this was in fact set forth in it, although it would be more satisfactory if it had actually been done. But the only thing, after all, which is declared for, as already said, is a continuous train, of a general and unspecified character, except that two of the sets of rolls are to be so removed from each other as to allow of matching. The whole efficiency and novelty of the device, as a machine for the rolling of black plate, is thus made to depend on the two characteristics, that the rolls shall be set in continuous train, and that two of them shall be sufficiently spaced at some point, to admit of the making up of a pack. No doubt the specifications may be resorted to, to help this out, but only incidentally, and to a limited extent. *Diamond Drill Co. v. Kelly* (C. C.) 120 Fed. 289. As for instance, to establish that the different rolls are to be so adjusted as to progressively reduce the sheets, and do not have to be changed for each pass; that the sheets are to be fed to the rolls in continuous and regular succession, in order to keep their contour substantially uniform; and that the matching is to be done, and the matching space introduced, somewhere about after the fourth reduction. But with all the assistance so derived, the question remains, as to just what is to be made out of the claim. Taking it, however, as covering a continuous train with a matching pass, it must be confessed, that an operative device, so far as it goes, is shown. That is to say, as the first step in the process, to bring the metal down by continuous rolling to a certain gage. But not, for the complete rolling of commercial plate. Else why the elaboration by the inventor of that which is made to follow, as shown by the specifications and drawings? Or why provide, as he does, for a doubling and reheating of the pack, and its reduction in a second set of rolls, with a redoubling, reheating, and further reduction in still a third? These being apparently made

essential steps in the method or process, found side by side in the patent with the apparatus designed by the inventor to practice it, it is manifest that the mere specification of a continuous train, with two sets of rolls sufficiently removed to allow of matching, which is only a part of it, cannot be made to stand for the whole, and that the claim, if sustained, must accordingly be accepted for considerably less. The full inventive conception, for which the complainant is entitled to credit, without reference to the terms of any particular claim, may be regarded as consisting in the successful transference of the essential steps of ordinary plate rolling to a mill with rolls set in continuous train. To this, a rolling in packs is necessary, after a certain reduction has been reached, and a place to match the packs without interrupting the continuity of the operation, must therefore be provided for. So far as the claim in controversy proceeds for that, it may be good. But it is to this, merely as a feature of the whole device that it must be limited, and by it also that it must be judged. The mistake is in not recognizing this, and in trying to have it stand broadly for the whole idea of making sheet plate on continuous rolls. It may be, as the result, that none of the claims is expressive of the full invention, and it no doubt would be difficult to say just what would adequately meet that requirement. But this is no reason for amplifying either of them, so as to have them stand for more than they consistently can.

But with all that has been so said, and limiting the claim in question to the single feature of a matching pass, why is not that, of itself, both novel and inventive, so as to sustain the infringement charged? That it was new, in a mill designed for the rolling of black plate, arranged in continuous train, to provide a place for matching the sheets, without interrupting the continuity of the operation, by an extra spacing of the rolls, is abundantly proved by what has been said above, a device of this character being absolutely unprovided for and unknown in the only instances which approach anywhere near to the use of a continuous mill. Was it inventive then to appreciate the necessity for this and arrange for it in the way that was done? That it was essential to the success of the operation is beyond question. It may not afford a complete solution of it, as the further steps provided in the patent show, but it is the key to the situation, the importance of which the defendants themselves have demonstrated, by adopting and elaborating upon it as they have. The simplicity of the means employed for effecting the matching is not necessarily against it. Nor that it takes the place of that which was already practiced in the hand rolling method. It is not as a step in the process, but as a means for effecting it, that the device is to be judged. It may be that the claim is meager, and that it would be strengthened if matching mechanism was actually specified. But something is to be conceded to the somewhat primary character of the general invention, of which it forms a part, means for stopping and matching the sheets being necessarily implied in providing a place where it is to be done which would otherwise be without purpose. It must be confessed that the stop fingers, described in the specifications, are rather primitive, and that the matching of the sheets is awkward, one or the other having to be raised by hand to permit them to overlap, without which, following end on end, they

are sure to get stalled. But passing this by as we may, the essentials of an operative device remain, which is novel in design, sufficiently effective in function, and highly important in results, which, in all the efforts towards the rolling of sheets in continuous train, no one else seems to have thought out. If the mechanism employed were all that was involved, it might perhaps be regarded as within the skill of the ordinary workman. But it is the idea which counts, which having escaped other inventors may well be accepted as satisfying the law. It may not be conclusive of the question, but it certainly is confirmatory of it, that in the Bray patent under which the defendants operate, noticed above, a matching device between rolls arranged in tandem, and suitable stop mechanism, were considered sufficiently distinct and inventive, to be made the subject, by themselves, of specific claims, and if so, they would seem to be the same here. While, then, the claim under consideration cannot be sustained to the extent of holding it comprehensively expressive of the full inventive idea with which the complainant is entitled to credit, by which rolls in continuous train were adapted and applied to the production of black plate, as covering an essential feature of it, whereby, without interrupting the continuity of the operation, a place to match the sheets is provided between rolls, I am of the opinion that it is good, being sufficiently distinct to stand as an independent invention, although involved in the other, against which, with all their elaboration upon it, the defendants clearly infringe.

The same favorable conclusion cannot be reached, however, with regard to the fifth claim. This, as it will be remembered, is for pinch rollers, to hold the matched sheets, in order to prevent the twisting, spreading, or buckling of the pack as it is fed into the next succeeding set of rolls. Without stopping to consider whether the defendants avoid infringement by the special arrangement of parts which they employ, it is sufficient to observe that feed rolls of the same general character, and performing exactly the same function, were to be found already in use in the plate rolling art, and could not therefore be monopolized by the complainant as attempted in this claim. Thus, in the Sheldon (1893) patent in order, as it is said, to prevent the metal sheets, when presented to the rolls for the final reduction, after the breaking up of the packs, from pinching or buckling in making the pass, an idle friction roller is arranged in front of the rolls, and in close proximity if not in actual contact with the upper one, the effect of which is to feed forward the sheets, in a uniform manner, presenting the front edge evenly to the rolls, without sagging or the consequent buckling or pinching. It is true, that the idle roller here is not positively driven, as called for in the claim, and that distinction is therefore able to be made against it. But with all that, there is such a close approximation in it to the device in hand, as goes a long way towards anticipating the claim. Even more to the point is the McFadden feed-table (1896), designed for automatically feeding the sheets in a continuous mill from one set of rolls to the next. To assist in the operation, rollers are arranged between the different stands, one of which is positively driven, and the other frictionally, which not only convey or feed the sheets from one set of rolls to the next, but, at the same time,

prevent them from bending or twisting, thus insuring their proper delivery. The only distinction which is attempted with regard to this is that it is designed to operate only upon single sheets, and not upon two or more made into a pack. But the use is clearly analogous and indeed could hardly be closer, being in the very same art in a case of continuous rolling. It certainly makes no difference in the character of the operation, whether it is employed to prevent one sheet from twisting or buckling or to prevent two, the mechanical means and the operative principle in each case being the same. The Bessimer (1879) British patent also presents a similar device in use in the same art; in a mill for the manufacture of black plate, positively driven feed rollers being set in front of the different stands or reducing rolls, which rollers are made to grasp the sheets or bars by means of hydraulic pressure and feed or force them forward into the reducing rolls through which they pass, the evident, if not the expressed, purpose of this being to control the feed. In view of these references, therefore, the fifth claim cannot be sustained.

The fourth claim of the patent, however, being good, a decree in favor of the complainant will be entered as to that in the usual form, with costs.

APPLEBY et al. v. CLUSS.

(Circuit Court, D. New Jersey. April 10, 1908.)

POST OFFICE—FRAUD ORDERS—SUIT TO ENJOIN ENFORCEMENT—SUFFICIENCY OF BILL.

A bill in equity cannot be maintained in a federal court to enjoin the enforcement of a fraud order made by the Postmaster General unless it makes a clear prima facie case that the facts adduced before him could not possibly support such order, or that complainant's legal or constitutional rights have been violated, and such a bill is insufficient where it shows a hearing upon due notice on charges of fraud clearly within the statute, but does not show what proofs were adduced.

[Ed. Note.—Nonmailable matter, see note to *Timmons v. United States*, 80 C. C. A. 86.]

In Equity. On demurrer to bill.

Peter and John Bentley, for complainants.

John B. Vreeland and H. P. Lindabury, for defendant.

LANNING, District Judge. By their bill the complainants pray for an injunction to restrain the defendant, who is the postmaster at Leonia, N. J., from obeying a fraud order, issued on December 5, 1906, by the Postmaster General. The order declares that it has "been made to appear to the Postmaster General upon evidence satisfactory to him" that J. Randolph Appleby, the Appleby & Wood Company, and the Asbury Company, "are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises." The bill shows that on October 20, 1906, the complainant Appleby was charged with having engaged, under his own name and the names of the companies above mentioned, in conducting a scheme to obtain money through the mails

fraudulently, by buying worthless land in New Jersey, dividing it into small tracts, advertising the tracts in newspapers, and inducing persons to buy the land and pay him money therefor by false and fraudulent representations regarding the character of the land. The bill also shows that Appleby and his companies were thereupon duly notified of the charge, and that they were cited to appear and answer the charge on November 1, 1906, and that appearance was made and an affidavit filed by Appleby. The objections to the Postmaster General's order are two: First, that the sections of the law under which the proceedings were had are unconstitutional; and, second, that the order was not supported by the law or the proofs adduced before the Postmaster General. The first ground of objection was abandoned, on the argument, in view of the opinion of the Supreme Court in *Public Clearing House v. Coyne*, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092. The second ground of objection is equally untenable. It is true that all facts well averred in the bill must, inasmuch as the present hearing is on a demurrer to the bill, be deemed true. But a federal court will not weigh the facts adduced before the Postmaster General in order to determine whether the court's judgment on the facts will accord with his. It will only look into those facts for the purpose of determining whether, in any aspect of the case, they are covered by any act of Congress or support a conclusion of fraud. The Postmaster General is the head of one of the executive departments of the government, and his acts will not be interfered with by the judicial department except upon proof of some legal error on his part.

In the present case, the bill of complaint fails utterly to show what facts were before the Postmaster General. There is an averment that the complainant Appleby submitted an affidavit, a copy of which is annexed to the bill, but there is no averment that other proofs were not before the Postmaster General, or that the complainants have no knowledge of the production of other proofs before him, or that, having no knowledge of what proofs were before him, they applied to him for a copy of or a statement concerning the nature of the proofs. The only averment in the bill bearing on any of these points is the following:

"And your orators further show that they were not acquainted with any facts concerning which complaint was made about them, but assumed that the complaint before the post office authorities was the same as that for which your orator J. Randolph Appleby was indicted by the September federal grand jury of the district of New Jersey concerning the transactions of the said Appleby at Beemerville, in the county of Sussex, and assuming that to be the complaint answered the same as fully as was within their power."

There are other averments as to what the complainants understand the complaint against them was, and concerning the nature of their business, and as to their conclusions or opinions concerning the legality of that business, but, as above stated, the bill fails to disclose the case on which the Postmaster General acted. A due regard for an order of an executive department of the government demands that the judicial department shall not require the head of that executive department, or any of his subordinate officials, to answer a bill in equity,

the purpose of which is to secure a decree which in effect annuls the order, unless the bill makes a clear prima facie case that the facts adduced before the executive department could not possibly support the order, or that the complainant's legal or constitutional rights have been violated. The present bill makes no such case. It was very different in the case of *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90. There, the demurrer to the bill admitted the truth of the allegations that the business of the complainants was founded "almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting, and remedying thereof, and that the human race does possess the innate power, through proper exercise of the faculty of the brain and mind, to largely control and remedy the ills that humanity is heir to, and complainants discard and eliminate from their treatment what is commonly known as divine healing and Christian science, and they are confined to practical scientific treatment emanating from the source aforesaid." These allegations, the court said, were not conclusions of law, but statements of fact upon which, as averred, the business of the complainants was based; and it was held that the statutes do not, as a matter of law, cover such facts, and that the Postmaster General's decision that the case stated in the bill was within the statute was a legal error not binding on the courts.

Here, the allegations of the bill show that the complainant was charged with obtaining money through the mails by fraudulently inducing persons to buy worthless lands. The bill itself shows that the nature of the business which it was charged the complainant was carrying on was clearly within sections 3929 and 4041 of the Revised Statutes (U. S. Comp. St. 1901, pp. 2686, 2749), as amended. It was incumbent upon the complainant, therefore, to set forth in his bill the case as it existed before the Postmaster General, or, if he could not do that, to show why he could not, and to aver, in addition, all the material facts concerning the nature of his business and his method of carrying it on. Failing to do this, the bill is demurrable for want of equity.

ADAMS v. CARRINGTON PUB. CO.

(Circuit Court, D. Connecticut. May 5, 1908.)

No. 619.

LIBEL AND SLANDER—ACTION FOR LIBEL—SUFFICIENCY OF COMPLAINT.

A complaint in an action for libel alleged that an association had been formed for the purpose of purchasing and preserving a building in Philadelphia as a memorial to Betsy Ross, the maker of the first American flag; that a plan for raising the money was devised by which Adams & Co., of which plaintiff was a member, was to issue and sell certificates of membership in the association, assuming all financial obligations and turning over to the association a fixed percentage of the profits; that about 1,000,000 certificates had been issued and sold, and plaintiff was prominently known throughout the country in connection with the plan and with Adams & Co., and his name appeared on the certificates. *Held*, that such allegations were sufficient, as against a demurrer, to show that

a statement, in an article published relating to the matter, that "\$70,000 of this amount has been used by the enterprising individuals who have been passing the hat or getting other people to pass it," referred to plaintiff or the partnership of which he was a member; also that it was libelous per se.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 80-90.]

At Law. On demurrer to complaint.

Hungerford, Hyde, Joslyn & Gilman, for plaintiff.

George D. Watrous and Henry H. Townshend, for defendant.

PLATT, District Judge. The demurrer attacks the complaint on several grounds, of which the important ones (stated in my own words) are as follows: (1) That the alleged libelous article cannot be said, from anything which appears in the complaint, to have been published of and concerning the plaintiff. (If it is narrower than that, and is confined to the article alone, without extrinsic facts set forth in the complaint, then there is no merit in the contention, because the admitted facts must be taken into account). (2) That the article is not libelous per se, and therefore an allegation setting forth special damages is necessary and absent. (3) That, looking at the complaint as a whole, it appears that the article contains a substantially true statement of actual facts, and that nothing worse can be said about it than that it carries on its face a taint of sneering, and is a proper matter to have been presented to the readers of the paper as a warning; in short, that it does not hold the plaintiff up to public contempt, ridicule, or reproach, even if it does call the reader's attention to him.

I am satisfied that, if it can be said to have applied to the plaintiff, it is without doubt libelous per se. If the intelligent reader, knowing the facts, would come to the conclusion that it applied to the plaintiff, or to the partnership which he dominated, he is entitled to general damages. Among others, the following facts are admitted by the demurrer: As a memorial to Betsy Ross, the maker of the first American flag, the original building in Philadelphia was to be purchased and preserved. For this purpose an association was formed and a plan devised by Adams & Co., consisting of the plaintiff and one Weisgerber. Souvenir certificates of membership in the association were to be issued at a cost of 10 cents each, and the names of the purchasers placed on a roll of honor. A painting showing the "Birth of our Nation's Flag" was to be prepared, and reproductions thereof were to be delivered to every one who should hand in a list of 30 subscribers, with the 10 cents given by each. From the amounts so collected the firm of Adams & Co. were to turn over to the association, as a donation, a certain fixed amount of the net profits. Adams & Co. had the sole charge of the plan, and no financial obligation rested upon the association. This plan had been put into operation, and about 1,000,000 certificates had been issued. Adams & Co. had collected the moneys, paid the bills, and turned over to the association, as a donation, certain moneys as agreed. The name of the plaintiff, John Quincy Adams, was prominently identified and well known throughout the country in connection with the plan, and it was also well known that Adams & Co.

had the sole charge of the receipts and collections of money for the certificates, and the plaintiff's name appeared on the certificates. It is fair to assume that, if 1,000,000 certificates had been issued in the country, a reasonable number had found their way into the neighborhood where the defendant's paper circulated. This being so, and the other facts stated being admitted, it is not for the court to say that none of the readers might have seen an allusion to Adams & Co. in the language, "\$70,000 of this amount has been used by the enterprising individuals who have been passing the hat, or getting other people to pass it." It was conceded on the argument that, if these words applied to the firm, the plaintiff as a member of the firm has a right of action, if one exists under the complaint.

The demurrer is overruled.

MIHALOVITCH, FLETCHER & CO. v. UNITED STATES.

(Circuit Court, S. D. Ohio. March 23, 1908.)

No. 5,915 (1,617).

1. CUSTOMS DUTIES—FRUITS IN SPIRITS—EXCESS OF ALCOHOL.

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1651), relating to fruits in spirits and imposing a duty "per proof gallon on the alcohol contained therein in excess of ten per centum," the duty is to be levied on all such excess, whether absorbed by the fruit or supernatant.

2. SAME—CLASSIFICATION—RECIPROCITY—ALCOHOL IN PRESERVED FRUIT.

The reciprocal commercial agreement with Germany (July 13, 1900, 31 Stat. 1978), negotiated under Tariff Act July 24, 1897, c. 11, § 3, 30 Stat. 203 (U. S. Comp. St. 1901, p. 1690), which allows a reduction of duty on "spirits," supersedes the provision of a different rate by Schedule G, § 1, par. 263, of said act (30 Stat. 171 [U. S. Comp. St. 1901, p. 1651]), on the alcohol in excess of 10 per cent. found in fruit preserved in spirits.

On Application for Review of a Decision by the Board of United States General Appraisers.

The following is the opinion of the board:

SOMERVILLE, General Appraiser. These protests cover the importation of cherries in spirits, assessed for duty at the rate provided for fruit in spirits in paragraph 263 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651]). The importers ask that they might be given the benefit of the German reciprocity agreement, and entry be allowed at \$1.75 per proof gallon. In our judgment there is no merit in this claim. In *re Rheinstrom*, G. A. 4,368 (T. D. 20,761), affirmed in *Rheinstrom v. United States* (C. C.) 118 Fed. 303.

The protests are overruled and the decision of the surveyor affirmed.

Curie, Smith & Maxwell, for importers.

Sherman T. McPherson, U. S. Atty.

THOMPSON, District Judge. The questions presented here were ruled upon by this court in *Rheinstrom et al. v. United States*. The ruling was inaccurately reported in 118 Fed. 303, and it is therefore repeated here in full as delivered, as follows:

"The taxable subject is fruit preserved in spirits; the fruit and the spirits together constitute the taxable subject. If the spirits contain but 10

per cent. or less of alcohol, the rates of duty to be levied on the fruit so preserved are 1 cent per pound and 35 per cent. of its market value 'in the principal markets of the country from whence imported.' But if the spirits contain over 10 per cent. of alcohol, the rates of duty to be levied on the fruit so preserved are 35 per cent. of its market value in said markets, and \$2.50 per proof gallon of alcohol in excess of 10 per cent., whether absorbed by the fruit or supernatant. In the first case the duties rest on the alcohol only in so far as it contributes to the weight and value of the fruit, but in the second case, in addition to the duty on the value of the fruit and spirits, including 10 per cent. of the alcohol, an additional specific duty is laid of \$2.50 per gallon on the excess of alcohol over the 10 per cent.; and there is no suggestion in the language of the statute that in determining the amount of the excess the alcohol absorbed by the cherries should be eliminated from the computation."

Since then the Circuit Court of Appeals of the Second Circuit, in *La Manna, etc., v. United States*, 144 Fed. 683, 75 C. C. A. 485, has held that under the reciprocal commercial agreements with other countries, contemplated by section 3 of the tariff act of July 24, 1897, c. 11, 30 Stat. 203 (U. S. Comp. St. 1901, p. 1690), alcohol in which cherries are imported is within the classification of said act which provides that "brandies or other spirits manufactured or distilled from grain or other materials" shall pay a duty of \$1.75 per proof gallon instead of \$2.50 per proof gallon, as provided in paragraph 263, c. 11, Schedule G, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1651); and the government having acquiesced in this holding this court will follow it as applicable under the treaty or agreement with Germany. July 13, 1900, 31 Stat. 1978.

The protests are affirmed, and the decisions of the Board of General Appraisers and the surveyor are overruled.

UNITED STATES v. LEWIS PUB. CO.

(Circuit Court, E. D. Missouri, E. D. April 30, 1908.)

No. 5,478.

INJUNCTION—WRONGFUL INJUNCTION—EXTENT OF LIABILITY.

Where, on the granting of a temporary restraining order by a federal court, a bond is required as authorized by Rev. St. § 718 (U. S. Comp. St. 1901, p. 580), the amount of such bond is the limit of complainant's liability for damages on the dissolution of such order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 404.]

At Law. On demurrer to petition.

Henry W. Blodgett, U. S. Atty., and Truman P. Young, Asst. U. S. Atty.

Barclay & Fountleroy, for defendant.

TRIEBER, District Judge. The government seeks in this action to recover damages alleged to have been sustained by reason of a temporary restraining order granted to the defendant in this case, and at a later date, upon a hearing for the temporary injunction, dissolved. The damages sued for in this cause are to cover alleged losses sustained in excess of the penalty of the bond executed when the tem-

porary restraining order was granted. Defendant demurs to the petition on the ground that in no event is a plaintiff in an injunction proceeding liable for any damages sustained by the defendant in that proceeding in excess of the penalty of the bond required to be given..

Section 718, Rev. St. (U. S. Comp. St. 1901, p. 580), authorizes the granting of a restraining order, with or without security, in the discretion of the court or judge, and it has been uniformly held that when no bond is required by the court granting the restraining order there is no liability for damages, or, if a bond is required to be given, its penal sum is the maximum risk assumed. *Meyers v. Block*, 120 U. S. 206, 7 Sup. Ct. 525, 30 L. Ed. 642; *Houghton v. Cortelyou*, 208 U. S. 149, 28 Sup. Ct. 234, 52 L. Ed. —; *Scheck v. Kelly* (C. C.) 95 Fed. 941; *In re Williams* (D. C.) 120 Fed. 34, 37; *Cimiotti Unhairing Co. v. American Fur Refining Co.* (C. C.) 158 Fed. 171. Of course, if there has been a malicious prosecution, an action may lie regardless of the bond; but nothing of this nature is involved in this proceeding.

The demurrer to the complaint will be sustained, with leave to the plaintiff to file an amended petition within 30 days, if desired; otherwise, a final judgment in favor of the defendant will be entered.

WOOD v. UNITED STATES.

(Circuit Court, D. Massachusetts. March 20, 1908.)

No. 165 (1,853).

CUSTOMS DUTIES—CLASSIFICATION—"COTTON WASTE" CONTAINING JUTE—COMMERCIAL DESIGNATION.

The provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 537, 30 Stat. 197 (U. S. Comp. St. 1901, p. 1683), for "cotton waste," includes a mixture of cotton waste and jute threads in about equal proportions, which is commercially known as "cotton waste."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, p. 1643.]

On Application for Review of Decisions by the Board of United States General Appraisers.

The two decisions below, which are reported as G. A. 6,394 (T. D. 27,457) and Abstract 12,233 (T. D. 27,493), affirmed the assessment of duty by the collector of customs at the port of Boston on imports of Charles H. Wood, which were found by the Board of General Appraisers to consist of cotton and jute threads mixed in about equal proportions.

Searle & Pillsbury, for importers.
Asa P. French, U. S. Atty.

COLT, Circuit Judge. The subject of this importation consisted of 59 bales of thread waste, which is composed of cotton waste and jute threads; and the article was classified by the collector at 10 per cent. ad valorem under paragraph 463 of the tariff act of July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 194 (U. S. Comp. St. 1901, p. 1679)

as "waste, not specially provided for," and is claimed by the importer to be free from duty under paragraph 537 of said act as "cotton waste."

The Board of Appraisers in its opinion, G. A. 6,394 (T. D. 27,457, June 28, 1906), said:

"The evidence fails to show that the article is commercially known as 'cotton waste.' We accordingly sustain the classification made by the collector."

Since this decision by the Board of Appraisers, additional testimony has been taken before a referee appointed by this court, and several witnesses were called in behalf of the importer. No evidence was offered by the government. This additional testimony established beyond any doubt that the article is commercially known as "cotton waste"; and the protest is accordingly sustained, and the decision of the Board of Appraisers reversed.

IN re WITTENBERG.

(District Court, E. D. Pennsylvania. March 27, 1908.)

No. 2,860.

BANKRUPTCY—OBJECTIONS TO DISCHARGE—SUFFICIENCY—AMENDMENT.

Exceptions to certain specifications of objection to the discharge of a bankrupt sustained on the ground that the averments therein were too vague and indefinite, but with leave to amend.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 714.]

In Bankruptcy. On exceptions to specifications of objection of bankrupt's discharge.

Harry Felix and Leo Bernheimer, for bankrupt.

Joseph H. Shoemaker and Frank G. Sayre, for objecting creditors.

J. B. McPHERSON, District Judge. The exceptions to the first, fourth, fifth, sixth, and seventh specifications of objection to the bankrupt's discharge are overruled. The exceptions to the second, third, eighth, and ninth specifications are sustained, on the ground that the averments contained therein are too vague and indefinite; but the objecting creditors, or either of them, are permitted to amend these specifications on or before April 1st. If such amendments are made, and no exceptions to the specifications as amended are filed on or before April 6th, the clerk will refer all the specifications to the referee for speedy action and report thereon. If no amendments are made, the clerk will make a similar order of reference concerning the first, fourth, fifth, sixth, and seventh specifications.

FORCE v. STANDARD SILK CO.

(Circuit Court, N. D. New York. April 17, 1908.)

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—CHILDREN.

The question of the contributory negligence of an infant is not to be determined by the same rules as in case of an adult, but his age, as well as his intelligence, experience, and knowledge, is to be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 87, Negligence, §§ 121-127.

Age as affecting contributory negligence, see note to *Atchison, T. & S. F. Ry. Co. v. Hardy*, 37 C. C. A. 362.]

2. SAME—NEGLIGENCE WITH RESPECT TO CHILDREN.

Children must be expected to act upon childish instincts and impulses, and others who are chargeable with a duty of care and caution towards them must calculate upon this and take precautions accordingly.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 9.]

3. COURTS—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

When a case involving negligence is removed from a state to a federal court, unless the action is founded on a state statute such question is one of general law on which the courts of the United States will exercise an independent judgment.

[Ed. Note.—Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

4. MASTER AND SERVANT—INJURY TO SERVANT—DUTY OF MASTER TO GIVE INSTRUCTIONS.

Where a master or his superintendent in charge hires servants, and turns them over to a foreman or another employé to be put to work, and he does so without instructions or warning, when instructions or warnings should have been given, the master cannot escape responsibility on the ground that the foreman or other employé was a fellow servant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 418, 419.]

5. SAME—INFANT EMPLOYÉ.

Plaintiff, when 14 years old, went to work in defendant's silk mill, being hired by the superintendent who took him to the reeling room, and turned him over to another employé, by whom he was set to work cleaning bobbins. At noon time, with defendant's knowledge, he usually remained alone in the room, in which there were several reeling machines operated by belts from a shaft. At the noon hour the belts were thrown off from the pulleys, and usually tied in a loop at the bottom and hitched to the machine so they would not drag, the shaft not being stopped. On some occasions plaintiff had been asked by some one to help in throwing off and tying the belts. The machines were such as were calculated to attract a boy of his age, and on two or three occasions he and a boy from another room had amused themselves at noon by putting on the belts. This was dangerous for inexperienced boys of their age, and was known to be so by the superintendent who had seen the other boy doing it in another room and warned him against it, but no warning or caution was given plaintiff. When he had been at work about three months he was caught in a belt while alone one noon time and his arm was torn off. He testified that the belt had become wound around the shafting and the end was striking the ceiling, and that he got a stepladder and was trying to unwind it when his arm was caught. Held that, even if so employed, he was not in the performance of any duty; but that under the facts shown the questions whether defendant was negligent in permitting him to remain alone in the room without warning or instructions not to meddle with the machines, and whether plaintiff was guilty of contributory neg-

ligence considering his age and inexperience, were for the jury, and that a finding in his favor on both issues warranted a recovery from defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1046-1048, 1068-1105.]

At Law. Motion by defendant for a new trial on minutes of the court, on grounds the verdict is contrary to the law and the evidence and unsupported thereby, and on exceptions to the charge and admission and rejection of evidence.

J. J. Bixby and John H. Grant, for plaintiff.

Edward J. Schoeck and Thomas S. Jones, for defendant

RAY, District Judge. This action was commenced in the state court and removed to the Circuit Court of the United States, plaintiff being a citizen and resident of the state of New York, and defendant being a foreign corporation, and the amount involved over \$2,000. The action was brought to recover damages alleged to have been sustained by reason of the negligence of the defendant.

Walter J. Force, the plaintiff, became 14 years of age October 1, 1906. He lived at Willowvale, about 1½ miles from defendant's silk mill at Washington Mills, Oneida county, N. Y. Soon after he became fourteen and in the fore part of October, 1906, he went to this mill; and saw Mr. Keeley, the superintendent of the mill, and applied to him for work. He was at once employed, told to report the next Monday, which he did. He found Mr. Keeley, the superintendent, who said, "Come down stairs, and I will let another little boy learn you." The superintendent took the plaintiff down to the reeling room and found one Eddie Cassart, who was about 15 years old, and left plaintiff with him. Cassart told plaintiff he should clean bobbins by sandpapering them, which he did. When cleaned they were put in a box which was wheeled by plaintiff to the elevator, taken therein to another room upstairs, and left. Cassart ran the elevator and showed plaintiff how to run it. Cassart showed plaintiff how to put the boxes on and off the elevator. At the end of a week and a half Cassart went upstairs to the spinning room and became a spinner, leaving plaintiff to do the work described. There was no one in that room who gave orders to plaintiff except Bert Ottoway, who came to that room some three weeks after plaintiff commenced work there, and told him what to do, sweep up, run off belts some 8 or 10 times, and tie up a belt, and one John Brown, who told him some things to do before that. One thing he was told to do, on three occasions, was to run off belts. Plaintiff worked in that room from 7 a. m. to 5 p. m. with one hour's nooning. At noon he remained in that room alone and took his dinner there. This was known to defendant's superintendent. In this room were located some 10 or 12 reeling machines, only 6 in commission, run by belts connecting with a long shaft overhead, which was run by a belt connecting with shafting in another room and thence with the engine. During this noon hour the belts to each machine were disconnected from the pulleys, but left hanging on the long overhead shaft; sometimes they dragged on the floor when thus disconnected, but usually were tied in a loop at the lower end and hitched to the

machine so they would not drag. These long shafts overhead in the same room during the noon hour were left revolving at a rapid rate. There was an abundance of evidence that belts thus hanging on a revolving shaft will sometimes "crawl," slowly at first, on the shaft and then wind up, in which event the ends will strike the ceiling very rapidly and make a noise. There was evidence that it was dangerous to take hold of those belts hanging on that revolving shaft as the moment there was friction, or the belts were caught in any way, they were liable to wind up quickly, and if the person having hold of them was caught thereby or entangled in any way he would be carried or hurled rapidly about the shaft. This was not an obvious danger to an inexperienced person, especially a youth. There was an abundance of room for plaintiff to do his work in cleaning bobbins without going close about the belts or machinery. He was in no danger from the belts if he attended strictly to his business of cleaning bobbins. This plaintiff had had no experience with machinery of this or any description; was unacquainted with it, and, as he claimed, had no knowledge, warnings, or instructions as to the dangers of being about or handling these belts or this machinery. He took to the superintendent a paper or papers showing his age, and his youth was obvious. That such machinery is attractive to boys of that age is a matter of common knowledge. It was described, and there was evidence given by the defendant that it did attract the plaintiff and another boy from the floor below on two or three occasions to intermeddle and experiment and play with it during the noon hour.

The claim of the plaintiff is that on the 29th day of January, 1907, he was left alone in this room in the condition described, and was about to eat his dinner when his attention was called to one of these belts at one of the machines not then in commission which he claims had wound up on the shaft, and that the loose end was striking the ceiling and making a loud noise; that he got a step ladder, put it near the flying belt and tried to catch it for the purpose of tying it up in the manner he had been told to do by Ottoway and Smith with hanging belts (not with those wound up or flying in any manner, as nothing of that kind had occurred there), when he was caught, carried about the shaft three or four times and his arm torn from his body near the shoulder joint. There was no eyewitness to this accident, but the theory of the defendant was that the belt did not wind up as described by the plaintiff but that he was intermeddling or playing or experimenting with it, as it says he had done before, and was caught and injured.

The theory upon which the complaint was framed was that, because Ottoway and Brown had told the plaintiff on the occasions mentioned to tie up the belt on its being disconnected from the pulley of the machine to stop work, it became incidentally a part of his duty to do so, and that, being allowed and permitted to be there, he, on seeing this flying belt at the noon hour, had a right to attempt to catch it and tie it up, and that, if he did so, he was acting in the line of his duty, and that being ignorant of the danger, and not having been warned or instructed by defendant or its representatives as to the danger of handling the belt, and not having gained any knowledge on the subject while there, the defendant was negligent, and that its negligence

was the proximate cause of the injury received by plaintiff, and that contributory negligence cannot be imputed to the plaintiff because of his youth, immaturity, inexperience, ignorance, and lack of instruction as to those latent dangers. The complaint was very full in charging negligence and contained the following:

"And this plaintiff was by said defendant, its officers, foremen and agents, carelessly, negligently, and wrongfully left alone, inexperienced child as he was, to work in a room of said factory where dangerous and rapidly moving machinery was in full motion, without the presence of a foreman or of any experienced or older person or of any other person; that on or about the 29th day of January, 1907, while said plaintiff was absolutely alone in a room in said factory, thus carelessly and negligently left by said defendant, its officers, foremen, and agents, where dangerous machinery was in rapid motion, and while he was with due care and caution proceeding about the duties which had been assigned him, he was caught in a belt, which had by the carelessness and negligence of the defendant, been allowed for many days to remain in a dangerous and unsafe condition, without proper guard or safety appliances, by his right arm, and carried many times around a rapidly moving shaft, his right arm torn completely off a few inches from the shoulder and his body hurled many feet to the floor, fracturing three of his ribs and causing great damage to other parts of his body, and plaintiff was caused great pain and suffering; that no one was present to give him assistance or extricate him from the belt, owing to the carelessness and negligence of defendant, and said calamity happened, and the plaintiff's right arm was thus torn off, and his ribs thus fractured, and plaintiff was caused and still experiences great pain and suffering, without any fault or negligence on his part, but solely through the carelessness and negligence of this defendant."

The complaint also charged that the place was dangerous: that plaintiff was inexperienced and ignorant of the danger, and that he was not properly instructed or informed of the dangers; and that his want of knowledge, etc., was known to defendant. At the close of the plaintiff's evidence the court allowed the following amendment so that the allegations should conform to the proofs and cover the real cause of action, viz.:

"The Court: The plaintiff in this case may amend his complaint if he so desires, so as to allege that the defendant neglected and failed to inform and instruct the plaintiff of the danger of the machinery, or of meddling with or having to do with the machinery in the room in which he was put to work and in which the accident occurred, and that such machinery was dangerous if meddled with by an inexperienced person, and that the machinery in motion was of a character if anything did occur or happen, or whether anything particular or peculiar occurred or not, to attract children and boys inexperienced, and to induce and tempt them to meddle with it or to use it, and that defendant knew this fact or facts, and that this plaintiff, in view of the duties that had been required of him and which he had been put to do in connection with it on the occasion in question, believed, or had reason to believe, in view of what had occurred and what had been required, that it was his duty to stop the flopping, flying revolution of the band, and that in so doing and in doing what he believed to be his duty in good faith, and because of the want of instructions, the negligence of the plaintiff in that regard, the failure to give proper warning and instructions, he was attracted to intermeddle with it, and received the injuries complained of."

There was no question but that plaintiff was injured there in that room by being caught in that belt hurled about the shaft and having his arm torn off as described, and that he intermeddled in some way or for some reason therewith, although that question was left to the jury to decide. The court said:

"You are to consider his station in life, his intelligence also. Of course you are to consider and determine how the accident occurred. If it occurred or happened to him in doing something he knew better than to do—something he knew was dangerous—then he cannot recover at all. You cannot, I think, but it is for you to say, doubt that he intermeddled with this belt and machinery either in play or experimenting or from a mistaken sense of duty to his employer if the flapping and flying belt is what attracted his attention and led him to intermeddle, and that he received his injuries in that way. He was not engaged in either event in performing any duty he owed to the defendant. He was not employed to run a machine or care for belts or correct anything out of place or out of order. He was not by any competent authority assigned to any such duty."

The stepladder was on the floor near by, thrown down, the belt was wound up, the loose end whipping the ceiling, and the plaintiff's arm, torn from his body, was on the floor. The contention of the defendant was that the plaintiff intermeddled with the belt for the purpose of putting it on the machine and seeing it run, or in some other way, and that in so doing he was caught by the belt and injured; that the belt was left tied up and looped to the machine when the employés left for dinner. The court expressly charged the jury that the plaintiff could not recover on any theory that the plaintiff was engaged in the performance of any duty he owed the defendant when he received his injury, or that it was a part of his duty to defendant to catch and tie up the flying belt, if it was flying; that whether he intermeddled with the belt under a mistaken sense of duty to his employer or to play or experiment with it or the machinery, he was not engaged in the performance of any duty to the company; that he could not recover on the theory he was put to work at the machine or with dangerous machinery, and not warned of the dangers.

The case was submitted to the jury on the following propositions and questions of fact, all questions of fact being left to the jury, viz.: (1) Was the plaintiff 14 years of age, immature, just out of school, and without previous knowledge of or experience with or about machinery? (2) Was he hired by the defendant's superintendent and put to work at cleaning bobbins in this room in which were this machinery, these machines, belts and revolving shafts, and left there alone during the noon hours? The jury in effect was told that this was his only duty. (3) Was it dangerous to boys of plaintiff's age, experience, and knowledge to intermeddle with or handle these belts, etc., and did defendant know such fact, or in the exercise of due care ought it to have known it? (4) Was the plaintiff given information or warning as to the danger, if any, of intermeddling with such belts or machinery? Was he warned or told to keep away from them; not to intermeddle therewith? (5) Did anything occur while he worked there to give him notice or information of the danger, if any, of playing, experimenting, or intermeddling with these belts? (6) Was it dangerous to such an inexperienced and uninstructed boy to intermeddle or play or experiment with those belts? Was the danger of so doing obvious to plaintiff? Could he only gain such knowledge by actual experience or by proper warnings or instructions? Had he gained such knowledge in any way? (7) Was this machinery and these belts on these revolving shafts of a nature or character calculated to attract

and induce boys and children of immature years, not experienced or informed of the danger of so doing, to intermeddle or play or experiment therewith? (8) If so, was this known to the defendant, to defendant's superintendent and foreman—those in charge—or in the exercise of due care ought they to have known to these facts? (9) Did they know, or, in the exercise of such care, ought they to have known, that this machinery and the belts were calculated to and would be liable to attract the plaintiff and children of his age to intermeddle or play or experiment therewith? (10) If dangerous and calculated to attract boys and children and defendant knew such facts, or ought to have known them, then it was its duty to either properly guard these belts when left hanging on these revolving shafts or the belts and the machinery, one or both, so the boys and children left there alone at noon could not get at them, or to warn or instruct them of the danger of intermeddling therewith, or to tell them to keep away from them. (11) That if these dangers did exist; if the belts were attractive and liable to attract children and boys; if the defendant did know all this, or in the exercise of ordinary care ought to have known it; if it did not warn plaintiff to keep away, or instruct him as to the danger of intermeddling therewith, or take any measures to prevent it; if plaintiff was ignorant of the danger and risk of intermeddling therewith—then defendant was guilty of negligence in not directing the plaintiff to keep away, or in not warning him of or instructing him as to the danger, or in not guarding the belts, etc., so they would not be intermeddled with, that is in some way intimating or indicating they were not to be intermeddled with. (12) That if under such circumstances the plaintiff was attracted to the belts when flying about the shaft and striking the ceiling, either under a mistaken sense of duty to the defendant or through curiosity to play and experiment with it, in ignorance of the danger, and induced to intermeddle with such machinery and belt or belts to play or experiment with them, in ignorance of the danger, and in so doing was injured, as described, then the jury was authorized to find negligence and that the negligence of defendant was the proximate cause of the injury and consequent damages. (13) That if the jury found the facts as above stated then the plaintiff could recover unless the plaintiff assumed the risks, or was guilty of contributory negligence on his part which in some degree contributed to the accident and injury. (14) That if he was guilty of such negligence he could not recover. (15) That in determining whether or not the plaintiff was guilty of contributory negligence the jury was to consider his youth, immaturity, inexperience, want of familiarity with such belts and machinery, want of knowledge of the dangers of going about them or handling them, and lack of instructions as to the dangers and to keep away from them; and that the same degree of care and caution is not expected or demanded of an immature and inexperienced and uninstructed youth as of an adult, etc.

There was evidence to sustain each and every proposition above stated (I am not referring to the complaint), and the questions of fact, so far as disputed, were left to the jury.

The jury was also charged, among other things:

"The plaintiff says that these belts and moving, revolving, overhead shaftings were attractive things and liable to attract young boys and children, especially to attract and lead or induce them to play or meddle with them—experiment with them—and they say that this fact is demonstrated by the evidence of the defendant itself, by one of its witnesses, who says that on more than one occasion he was in there and saw the defendant do that, putting on and off belts from one of these machines; that he himself, on one occasion, took a hand in doing it; and the plaintiff says that common knowledge and experience and the common sense of the owners and managers of the mill would teach any one of experience and maturity that those machines would attract boys—lead them to go and look at them. And the plaintiff says that the defendant's superintendent, foreman and managers in that mill had reason or cause to know this fact, and did know it, or in the exercise of due care they ought to have known it, and that you should find that that fact existed; that they knew children had those impulses; that they knew childish impulses and proclivities to play with, or experiment, or meddle with such things, especially when not acquainted with their real nature, and not accustomed to them. Plaintiff also says that it was a dangerous thing for young boys and children to meddle with those belts—those machines—running on this shaft, and that the defendant's managers knew this, or in the exercise of due care ought to have known it, in the exercise of good judgment and thought. * * * The plaintiff says that after that, on more than one occasion, he was told to tie up and did tie up some of these hanging belts, or was told to assist in it; that he was led to believe it was part of his duty to see they were properly tied up and in position; that he was never informed to the contrary, or fully and adequately informed or warned of the danger of handling them or of intermeddling with them in any way, and he says that he didn't know any such danger or appreciate it on account of his youth, his immaturity, his want of experience, and his want of information—want of instruction. He says the danger was not patent or obvious, at least not patent or obvious to him, to a child or boy of his years, however it might have been to a full grown, experienced man. The plaintiff was the only one who remained in that room during the noon hour, and of his remaining and being there, the man who had charge of that room and who hired this boy had knowledge. That man says that he saw the boy there about to eat his dinner. I think he said he never saw him actually eat, but saw him there with his box, and saw him on more than one occasion take his seat in the window or sill; just the place, I am not able to say. Other boys and girls did substantially the same thing on the floor above. * * * The plaintiff claims here, under the evidence—although the boy don't exactly say that—but the claim is, that you should find that he was led and impelled to do that by a sense or idea that it was his duty so to do in serving his employer; that because he had not been warned, or properly instructed, he didn't know it was dangerous, and didn't know or appreciate the danger of so doing; that it was negligence, the plaintiff says, not to inform and instruct him in that business and as to those dangers; and that therefore the defendant is liable in damages for the injuries which the boy then and there received. The plaintiff also says that even if you do find that he was playing or amusing himself, or experimenting with this belt for his own amusement, that he was attracted to it for the reason stated, was led to do so by reason of his inexperience, his youth, and want of instruction from the defendant when he was put to work there in that room, as to the dangers, and that even if he went there for that purpose, to play or experiment with it, that the defendant is liable because it was negligent in not informing him of the danger of so doing, negligent in not informing him of the latent hidden danger, the danger of trying to catch hold of and handle such a belt in such a shape, or in any shape, setting it in motion, not telling him to keep away, and that such negligence was the proximate cause of the injury. The plaintiff says that whether he meddled with the belt the one way or the other is immaterial, so long as he didn't know or appreciate the danger, and the defendant was negligent in not warning and instructing him; that in either case the proximate

cause of the injury was the negligence of the defendant, its negligence in allowing him to be there in that room at the noon hour without attention, with this attractive machinery in motion, and uninformed and uninstructed as to the dangerous character, or the danger of handling or interfering or meddling with these belts or machinery.

"Now, when I say the plaintiff claims this, the plaintiff is a minor, he is a boy, he is represented by his guardian who cares for his interests, and by his counsel, and in stating the claims of the plaintiff I am not stating what the boy states or claims, but what his guardian says; his guardian represents him legally and speaks for him, and it is his claim. * * * Now then, gentlemen, if this machinery—this revolving shaft and other machinery, with these hanging or depending belts—was dangerous to children, or boys of immature age, who should use, or attempt to use, or intermeddle with it, and who didn't know its dangerous character, and appreciate the danger of intermeddling with it, and it was liable and calculated to attract such children, and the defendant's superintendent, officers, and managers knew it, or had reason to believe, under the circumstances and conditions existing there, that the boys and young employees about there, and this plaintiff, would resort to it, or intermeddle with it, or might and probably would do so, and that if they did, they would or might be injured by it, then, if the defendant took no means or measures to keep children, or such boys of immature years or understanding, in its employ, away, and to keep the plaintiff away, and took no means or measures to prevent accidents and gave no instructions as to its dangerous nature and character, and no orders to them, or to the plaintiff to keep away, when in the exercise of due care it ought to have done so, then the defendant was guilty of negligence as a matter of law, if you find the facts so to be, and would be guilty of negligence. And if this plaintiff was induced and enticed by such machinery and its conditions to meddle with it, and was ignorant of its dangerous character, or having been caused to tie up the belt, if that was so, was led to think it was his duty to care for them, and undertook to do so, and was ignorant of the dangers through the fault of the defendant in not warning him and instructing him, and was injured in so doing, then the defendant would be liable for the damage caused by such injury, if such negligence was the proximate cause of the injury. This would be so even if it was not his duty, on seeing this belt in the condition he claims it was, flying about the shaft and striking the ceiling, if it was in such condition, to care for it and tie it up, in either event if those facts that I have recited existed, and you find them so to be, if you find that he was not warned, and not instructed as to the danger, and you find that such danger did exist, and that plaintiff did not know the danger, then the defendant would be liable in either event. * * * It was the duty of the defendant company to furnish this boy a safe place in which to work, and this includes not only the spot and space in which he did work, but the immediate surroundings in that room with which he was liable to come in contact, if the circumstances were such, and the surroundings were such, to the knowledge of this defendant company or its manager, that the plaintiff was liable to be, or would be, naturally enticed, induced, or attracted to them, and to intermeddle with them, and to intermeddle with them was known to the defendant company to be dangerous to an inexperienced and uninformed boy of plaintiff's age, or the defendant or its managers there, in the exercise of due care, ought to have known such facts. Did the defendant company or its managers—those in charge—have reasonable cause to apprehend such an accident, or such intermeddling from such a boy, if it did, and it was dangerous so to do, and defendant knew it, or ought to have known it in the exercise of due care, then it was its duty to provide against it by guards, by stopping the shafting, or by proper instructions and proper warnings, full and adequate, of the dangers."

And on the question of contributory negligence the court charged:

"If you find that the defendant was negligent and that its negligence was the proximate cause of the injury, then you will come to another question, was this plaintiff himself—this boy—guilty of any negligence which contribut-

ed to, or aided to produce, the injury? If so, he cannot recover. But in determining this question of contributory negligence, you are not controlled by the same rules you would be in the case of an adult who understands and appreciates the dangers of the situation, or the dangers of doing what he does do. This plaintiff was an infant—not of mature years—not experienced with such machinery, the evidence tends to show, and, he says, not informed of the dangerous character of this machinery, and he claims the dangers of intermeddling with it were not obvious to him even if they were to an experienced man for the reason stated, and that he didn't appreciate them. An infant, in order to avoid the implication of negligence, is bound to exercise only that degree of care which can reasonably be expected from one of his years; one of his years, in the first instance, and then comes in experience and knowledge gained in the work; hence you, gentlemen of the jury, must consider his age, his capacity, his intelligence, his experience, if any, in the business in which he was engaged; also what information he had received and gained, and what instructions he had received on the subject, if any.

"Now, gentlemen, in this court, the burden of making out the negligence of this defendant in the first instance is on the plaintiff—on this guardian of this boy—and he must have satisfied you by a fair preponderance of evidence, not beyond a reasonable doubt, as in a criminal case, but he must have satisfied you by a fair preponderance of evidence that the defendant was guilty of negligence, and in one of the respects or ways to which I have called your attention. If he has failed in doing that, then he has failed to make a case, and your verdict should be for the defendant. If, however, you find that the defendant was guilty of negligence in either of the respects or ways named, and that that negligence was the proximate cause of this injury, then you come to the question of contributory negligence, and here the burden of proof in this court shifts right around. In order to make out contributory negligence, the burden is on the defendant; it is an affirmative defense and it must be established, in case you find negligence on the part of the defendant in the first instance, and you come to the question of contributory negligence, then the burden is on the defendant of establishing, by a fair preponderance of evidence that this boy was guilty of negligence which contributed to his injury; and, as (I have stated, negligence cannot be imputed to a boy of this age, necessarily, as to an adult, but it depends upon his age, his knowledge and experience.) A boy twelve years of age or over is assumed to be *sui juris* in the first instance, so there must be evidence tending to show that he was not qualified to understand the danger and appreciate the necessity of observing the same caution required of an adult. Some evidence on that subject has been given. You have seen him here, you have heard his answers to the questions, and you have heard as to his schooling and his experience, and what instructions, if any, he received there, what knowledge he had gained there. But when such evidence is given, then, in getting at the responsibility of an infant, of a boy of this age, or of any age, and determining whether or not he was guilty of contributory negligence, his age, his capacity, his intelligence, his experience, and the information he had, general information on the subject, are all to be considered by the jury. And if there were hidden, concealed or latent dangers in the business, or in the room, and he was liable to be attracted to them, then the question whether he was properly and fully cautioned and instructed as to such dangers, his ability to appreciate by reason of his youth, his apparent capacity, and his intelligence, and all of that is to be considered on the question whether he was guilty of contributory negligence. Of course, if he had been previously instructed as to such dangers before he went there, or he knew them from experience, then no instructions there were necessary. If he had not, and there were such dangers, it was the duty of the defendant, as I have said before, to fully instruct him, and it was negligent not so to do. If he knew the dangers from experience then instructions would not be necessary and a finding of negligence cannot be predicated or based on a failure to give them."

The court also charged:

"Now, gentlemen, as matter of law, children, wherever they are, or wherever they go, must be expected to act upon childish impulses incident to their

years and understanding, and their employers are chargeable with a duty of care and caution towards them such as their years, want of knowledge, and understanding demand, such as their want of information, when it is the duty of the defendant to give that information, would imply or demand, and must calculate upon those, and take precautions accordingly."

This, excepted to by the defendant, was followed by this:

"When this boy went there to work in this room with those surroundings, if there were any latent dangers there, which is for you to say after hearing all this evidence and this description, it was incumbent upon the defendant to give proper instructions, suitable to the years of this boy, his previous experience, and suitable to the conditions and surroundings under which he was put to work. Now, gentlemen, this is the law where there are latent dangers and hazards, incident to the occupation, of which the master knows or ought to know; it is his duty to warn the servant of them fully, and, failing to do so, he is liable to him for any injury that he may sustain in consequence of such neglect; that is, in the absence of contributory negligence. And this rule applies even when the danger or hazard is patent, if, through youth, inexperience, or other cause, the servant is incompetent to fully understand and appreciate the nature and extent of the hazard. That is, if it is perfectly patent to the ordinary observer, the danger is, still, if through youth, inexperience, or other cause, a servant is incompetent to fully understand and appreciate the danger and extent of the hazard and the defendant—that is, the employer—had reason to know that, or it ought to know it in the exercise of due care, why, then, of course, it is his duty to give full instruction. If, however, the danger is obvious, and the servant (employee) is of sufficient discretion to see and avoid it, the master cannot be held responsible—the master would be the defendant here—for the injury resulting to the servant, although he did not warn him of the danger."

Among the requests to charge was one that the defendant was not responsible for the negligence of the foreman or assistant foreman, etc. The court was at the moment under the impression that it was the foreman who hired plaintiff and put him to work, but when the attention of the court was directed to the error it immediately corrected the statement, and said to the jury:

"Well, the superintendent, then. Then it was his duty, and if he turned him over [referring to the plaintiff] without instructions to the foreman of this room—I guess that is right—if he turned him over to the foreman without instructions when instructions were necessary, why, then, that would be negligence, then it would be the duty of those people, because the evidence is that he put him in charge of somebody, and told him that that person, in substance—I cannot repeat the words—but told him in substance that that person would give him instructions, and so left it with him. Then if he did not get instructions when it was the duty of defendant to give him such, then you are at liberty to find that there was negligence on the part of the defendant in that respect."

The court was also asked by defendant to charge and did charge that there was no evidence that Ottoway and Van Allen were other than fellow servants of plaintiff's. The evidence showed, and the court told, the jury that defendant had a superintendent and a foreman in the mill who were above the boy, managers of the mill, and that if they knew of the dangers this would be knowledge of the defendant corporation, and it would be their duty to inform the plaintiff of such dangers. The court also charged that Ottoway was not the alter ego of the defendant.

The court also charged the jury:

"Plaintiff assumed all the risks of his employment or those incident thereto, or which he knew or ought to have known, or which were obvious con-

sidering his years and understanding, but he did not assume the risks of the negligence of defendant."

Keeley, defendant's superintendent, who hired plaintiff and put him to work, and who was sworn as a witness, made no claim that he gave plaintiff any instructions or warnings when he hired him and turned him over to Cassart or Kasson. He says he took the plaintiff to the reeling room "and I approached a boy named Eddie Kasson and told him to show the Force boy how to clean the bobbins. Q. What machines were Walter [the plaintiff] working at? A. The reeling. Q. That is, he was taking the bobbins from the reel? A. Yes, sir." He also says that at noon the belts were thrown off by Ottoway assisted sometimes by Van Allen; that the speed of this overhead shaft left running on the day of the accident was 275 revolutions per minute. This superintendent also states that the hanging belts would wind about the shaft "when there was something interfered with the belt." Also, that right after the accident he went into the reeling room, and found the stepladder on the floor and plaintiff's arm also; "Q. That is, that part of the arm which had been severed by the accident? A. Yes, sir." Also that the belt was wound about the shaft "in a tangle." Also that he occasionally saw the plaintiff in that reeling room at noon and eating, the shafts running. Also that he had seen belts travel and crawl on a revolving shaft. Also that after the accident and the same day he saw blood on the floor and on the ceiling of the room.

Ottoway had various duties in the reeling room, and among others the putting on and off of belts, tying them, etc. He says, in substance, that this belt in question was in a different position, the day of the accident, after plaintiff was injured than it was before. Ottoway says he had charge of this reeling room under the superintendent; that it was not locked at noon; that plaintiff brought his dinners, and he saw him many times at noon take his seat in a window in the reeling room, and that he went away and left him there alone, and with four of the shafts in that room running; that when he got back soon after the accident this belt was wound up. Neither the superintendent nor Ottoway claimed they gave the plaintiff any instructions as to the danger of intermeddling with the belts or machinery.

As stated, the evidence was abundant to sustain a finding by the jury that the plaintiff was injured—lost his arm—by intermeddling with the belts while alone in the room at the noon hour where he was allowed to be and remain by the superintendent; that there was danger in so intermeddling therewith; and that he was uninstructed as to the danger of such intermeddling therewith, and ignorant of the danger of so doing. Also, that the defendant, its superintendent and foreman, above plaintiff, knew of this danger. The mere fact that he was injured was evidence on that subject. *Railroad Company v. Stout*, 17 Wall. (U. S.) 657, 661, 21 L. Ed. 745, approved and followed *Union Pacific R. Co. v. McDonald*, 152 U. S. 272-275, 14 Sup. Ct. 619, 38 L. Ed. 434. In *Railroad Co. v. Stout*, at page 661, 662, 17 Wall. (21 L. Ed. 745), the court said:

"That the turntable was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the

injury which actually occurred to the plaintiff. There was the same liability to injury to him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury, by his foot being caught between the fixed rail of the roadbed and the turning rail of the table they were justified in believing that there was a probability of the occurrence of such accidents. So, in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and that they had been at play upon the turntable on other occasions, and within the observation and to the knowledge of the employés of the defendant, the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case. As it was in fact, on this occasion, so it was to be expected that the amusement of the boys would have been found in turning this table while they were on it or about it."

There was also abundant evidence that this machinery and these revolving shafts in that room with the hanging belts were attractive to boys of his age and experience and knowledge, and liable to attract them to intermeddle therewith, and that defendant knew this, or in the exercise of due care ought to have known it.

Photographs of the machinery and hanging belts were put in evidence by the defendant. They were described by witnesses; also the mode and manner of putting the belts on and off. The witness for defendant, John Johnson, testified that he worked in the spinning room immediately above the reeling room, and that a few days before the accident he came down into this reeling room at the noon hour and found the plaintiff there. "Q. Now state what was done by Walter Force (the plaintiff) in your presence, and what was said by you and he at that time, if anything? * * * A. He had one of the belts off and was throwing it on." That it was a belt used in connection with a reeling machine. "Q. Just where did he have that belt when you first saw him at that time? A. He had it up, half way up over the top pulley. Q. On the overhead pulley? A. Yes, sir. Q. How did he get it up to that point? A. Stepladder. Q. He was standing upon a stepladder? A. Yes, sir." Also, that plaintiff threw the belt on the driving shaft overhead; that witness said "he better leave it alone or he would get hurt," and plaintiff said "never mind he knew what he was doing." Johnson testified that he himself stood on the ladder and threw the belt on the pulley. This witness also said that once in a while he went down to the reeling room at the noon hour to see the plaintiff; and "once in a while he was throwing on a belt"; that he saw him fooling with the belts on three or four occasions, and once before had helped him do it. "Q. What did you put the belt on for? A. Show him I could do it; he put the belt on, and then I did. Q. Did you go up on the stepladder? A. Yes, I did. Q. Anybody ever tell you not to do it? A. Yes, sir. Q. They have told you? A. Yes, sir. Q. Who told you? A. Mr. Keeley. Q. He told you not to do it? A. Yes, sir. Q. And that was up in the spinning room? A. Yes, sir. Q. Did you have shafts up there? A. Yes, sir. Q. And belts up there? A. Yes, sir. Q. How came he to tell you not to do it up there? A. He told me when I first went in there not to do it." This Johnson boy, now 17 years old, had been there some three years. So we have direct evidence that Keeley, the superintendent, had knowl-

edge that boys should not intermeddle with the belts; that they were liable to intermeddle with them, and that before the accident he had instructed one boy at least not to do it. But it was a fair question for the jury, in view of the novelty, etc., of this running machinery, these depending belts, the curiosity and inclinations and proclivities of boys of that age, etc., whether this machinery, etc., was calculated to attract children of plaintiff's age to play or intermeddle or experiment with it, and whether defendant's managers then knew the fact.

The case as finally presented and tried and submitted to the jury was squarely within the following cases decided by the Supreme Court of the United States, the Circuit Court of Appeals in this the Second Circuit, the Supreme Court of the states of Michigan and Minnesota, etc., viz., *Railroad Company v. Stout*, 17 Wall. (U. S.) 657, 661, 662, 21 L. Ed. 745; *Union Pacific R. Co. v. McDonald*, 152 U. S. 262, 273, 275, 14 Sup. Ct. 619, 38 L. Ed. 434; *Peirce v. Lyden* (C. C. A., Second Circuit) 157 Fed. 552 (decided November 7, 1907); *Keffe v. Milwaukee & St. Paul R. R. Co.*, 21 Minn. 207, 211, 18 Am. Rep. 393; *Powers v. Harlow*, 53 Mich. 507, 515, 19 N. W. 257, 51 Am. Rep. 154; *Iamurri v. Saginaw City Gas Co.*, 148 Mich. 27, 111 N. W. 884.

In *Railroad Co. v. Stout*, supra, children had played on a turntable on defendant's land which was not guarded or fastened, and which easily turned. The plaintiff, an infant, who had never been there before, went with two other boys, one of whom had been to the turntable to play before, to this turntable to play on it and while so doing was injured. They were not invited there or even knowingly permitted to be there. The case states, page 658 of 17 Wall. (21 L. Ed. 745):

"One witness, then a servant of the company, testified that he had previously seen boys playing at the turntable, and had forbidden them from playing there. But the witness had no charge of the table, and did not communicate the fact of having seen boys playing there to any of the officers or servants of the company having the table in charge."

The court (see page 659) submitted the question whether the turntable was dangerous and would be liable to cause injury to children who should resort to it; whether defendant was negligent in not anticipating that children would be liable to resort to it and be injured if they did. If not, then there was no negligence. There was no direct evidence that the turntable was dangerous to children who should resort to it, or that defendant's officers or managers knew they did resort to it, but the court held that from the very nature of it, and the fact that injury did occur, the jury was justified in finding those facts in language already quoted. This case has been criticised, and in some states—New York, New Jersey, and Massachusetts—the courts have refused to follow it (see *Turess v. Railroad Co.*, 61 N. J. Law, 314, 40 Atl. 614; *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *Daniels v. N. Y. & N. E. R. Co.*, 154 Mass. 349, 28 N. E. 283, 13 L. R. A. 248, 26 Am. St. Rep. 253), but the Supreme Court of the United States, which governs this court and all negligence cases tried therein not founded on and governed by some statute of the particular state, and which court ought to command respect everywhere, has reconsidered the doctrines of that case, and expressly reaffirmed them in

Union Pacific R. Co. v. McDonald, 152 U. S. 262, 272, 273, 274, 279, 14 Sup. Ct. 619, 38 L. Ed. 434, at which page, after citing and commenting on the various cases, the court says:

"We adhere to the principles announced in *Railroad Co. v. Stout*, supra."

This case was recently cited and followed by the Circuit Court of Appeals in the Second Circuit, opinion by Ward, C. J., in *Peirce v. Lyden* (decided November 7, 1907) 157 Fed. 552.

I can conceive of no more vicious doctrine than to hold that owners of mills in which are machinery and belts such as these were, dangerous to those who should intermeddle with them unless skilled in the business, may employ inexperienced boys and put them to work in the rooms with this machinery and leave them there alone at noon with parts of it in motion and the rest unguarded and easily accessible, without warning or instruction as to the danger of intermeddling with it, or without positive instructions to keep away from it and not intermeddle, without being liable to the imputation of negligence in so doing. A boy left and allowed to be in such a place under such circumstances is not a trespasser. He is rightfully there. He is there by invitation and permission. By reason of his youth and inexperience and want of instruction and knowledge he may reasonably be expected to follow childish curiosity and childish proclivities and impulses and so intermeddle with or experiment with such machinery and belting. It was for the jury to say whether or not, in view of the youth and inexperience and want of knowledge of this plaintiff, he had such impulses and followed them in intermeddling with this machinery.

In *Powers v. Harlow*, 53 Mich. 507, 515, 19 N. W. 257, 51 Am. Rep. 154, Cooley, C. J., said:

"Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take precautions accordingly."

This language was quoted and approved by the Supreme Court of the United States in *Union Pac. R. Co. v. McDonald*, 152 U. S., at page 277, 14 Sup. Ct. 619, 38 L. Ed. 434, and has always been approved. It was again quoted and approved by the Supreme Court of the United States in *McDermott v. Severe*, 202 U. S. 600, 609, 26 Sup. Ct. 709, 712, 50 L. Ed. 1162, where the court, on dissent, said:

"This court in *Union Pacific Railroad Co. v. McDonald*, 152 U. S. 262, 277, 14 Sup. Ct. 619, 38 L. Ed. 434, quoted approvingly from Judge Cooley in a Michigan case: 'Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them, must calculate upon this, and take precautions accordingly.' This view is supported by other well-considered cases. *Powers v. Harlow*, 53 Mich. 507, 514, 19 N. W. 257, 51 Am. Rep. 154; *Camden Interstate Railway Co. v. Broom*, 139 Fed. 595, 71 C. C. A. 641; *Forrestal v. Milwaukee Electric Railway Co.*, 119 Wis. 495, 97 N. W. 182; *Strutzel v. St. Paul City Railway Co.*, 47 Minn. 543, 50 N. W. 690; *Gray v. St. Paul City Railway Co.*, 87 Minn. 280, 91 N. W. 1106."

So the charge was correct wherein the jury was told that:

"In determining this question of contributory negligence you are not controlled by the same rules you would be in the case of an adult who under-

stands and appreciates the dangers of the situation, or the dangers of doing what he does do. * * * An infant, in order to avoid the implication of negligence, is bound to exercise only that degree of care which can reasonably be expected from one of his years; one of his years in the first instance, and then comes in experience and knowledge gained in the work. Hence you, gentlemen of the jury, must consider his age, his capacity, his intelligence, his experience, if any, in the business in which he was engaged; also what information he had received and gained, and what instructions he had received on the subject, if any. * * * Of course, if he had been previously instructed as to such dangers before he went there, or he knew them from experience, then no instructions there were necessary. If he had not, and there were such dangers, it was the duty of the defendant, as I have said before, to fully instruct him, and it was negligence not so to do. If he knew the dangers from experience, then instructions would not be necessary, and a finding of negligence cannot be predicated or based on a failure to give them."

The court was referring to latent dangers, those not patent to a youth of his apparent age and capacity.

The doctrine laid down by the court as to the rules for determining the negligence of a boy was expressly held and stated by the Supreme Court of the United States in *Railroad Company v. Stout*, supra, in the following language:

"While it is the general rule in regard to an adult that to entitle him to recover damages for an injury resulting from the fault or negligence of another he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case."

And, again, in *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 281, at page 281, 14 Sup. Ct. 619, 626, 38 L. Ed. 434, the court said:

"The question of negligence upon the part of an infant must be determined with reference to his age and to the situation in which, at the time of the injury, the circumstances placed him. The authorities cited—indeed, all the adjudged cases—agree, as declared by the Court of Appeals of New York, that in applying the rule that a person who seeks to recover for a personal injury sustained by another's negligence must not himself be guilty of negligence that substantially contributed to the result, the law discriminates between children and adults, the feeble and the strong, and only requires of each the exercise of that degree of care to be reasonably expected in view of his age and condition. *Reynolds v. N. Y. Central, etc., Railroad*, 58 N. Y. 248, 252."

And in *Serano v. N. Y. C. & H. R. R. Co.*, 188 N. Y. 156, 165, 80 N. E. 1025, 1027, 117 Am. St. Rep. 833, the Court of Appeals held:

"A child of tender years is not required to exercise the same degree of care and prudence in the presence of danger which is expected and required of an adult under like circumstances, but she is required to exercise such care and prudence as is commensurate with one of her age and intelligence."

The court cites:

"*Wendell v. N. Y. C. & H. R. R. Co.*, 91 N. Y. 420; *Zwack v. N. Y., L. E. & W. R. R. Co.*, 160 N. Y. 362, 54 N. E. 785; *Costello v. Third Ave. R. R. Co.*, 161 N. Y. 317, 55 N. E. 897; *Byrne v. N. Y. C. & H. R. R. Co.*, 83 N. Y. 620; *McGovern v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 421; *Thurber v. Harlem B., M. & F. R. Co.*, 60 N. Y. 326; *Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 289, 44 Am. Rep. 377."

The jury was carefully and repeatedly instructed on this point.

In *Peirce v. Lyden*, supra, recently decided by the Circuit Court of Appeals, Second Circuit, the defendant stored barrels of oil in a shed,

unlocked during the daytime, on his own lands, but near a school-house. These barrels had their heads knocked in so the oil could be dipped out. The school boys entered the sheds, dipped out the oil, and lighted a fire and threw the oil on it, and in so doing a boy was severely burned either by the bursting of a can of oil which they had obtained at the sheds or by running and jumping through the fire on which oil was thrown. There was no evidence that the defendant or his agents knew of this propensity of the school boys to meddle with the oil. His night watchman, however, did know of it, but his knowledge was not communicated to the defendant or his agents. Held, the injured boy could recover on the authority of *Railroad v. Stout*, *supra*.

In the case now before this court the evidence already quoted shows that defendant's superintendent knew that one of the boys employed in the factory had intermeddled with the machinery, and that he ordered him not to do it. Two boys had intermeddled with this machinery in this room at the noon hour on three occasions at least. These facts, with the attractiveness of such machinery and belts and the well-known propensities of such boys, were all sufficient to justify the jury in finding that defendant knew, or had reasonable cause to know, that such boys were liable to intermeddle with them. It was left to the jury to say whether the defendant and its managers knew this fact, if it was a fact, or had reasonable cause to know it, and were negligent in not giving instruction or warning, etc. Proof of positive knowledge on the part of defendant that boys had actually intermeddled was not necessary.

In *Railroad Co. v. Stout*, *supra*, the court said:

"So in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and that they had been at play upon the turntable on other occasions, and within the observation and to the knowledge of the employes of the defendant, the jury were justified in believing that children would probably resort to it, and that defendant should have anticipated that such would be the case."

So here, when the attractive nature and character of this machinery and of these belts were shown, and when it was shown that plaintiff and Johnson had intermeddled with them on at least three occasions, and that Johnson, when 14 years of age, had so intermeddled with the machinery in the room above to the knowledge of Keeley, defendant's superintendent, who had directed him not to do so, the jury was justified in finding that defendant should have anticipated that plaintiff would or might intermeddle with the machinery and belts in the reeling room.

In *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154, cited and approved by the Supreme Court of the United States in *Union P. R. Co. v. McDonald*, *supra*, the following from the syllabus sufficiently states the case:

"(7) Children must be expected to act upon childish instincts; and those who are answerable for their safety must take precautions accordingly, and must expect them to meddle with anything that is likely to tempt them if left exposed to their view and within their reach.

"(8) A small boy, finding a dynamite cartridge in a common packing box among the sawdust, proceeded to crack it on a stone, and maimed himself for life. The boy was rightfully on the premises, and his father was at work hard by. The packing box was on the ground under a rude shed, and was marked 'Powder,' but neither the boy nor his father could read. It had been left exposed by the agent of the landlord. Held, that an action would lie against the landlord for the injury, and that neither the child nor his father could be said to be guilty of contributory negligence."

In that case there was no evidence that boys or children had ever resorted to the shed where the dynamite cartridges were kept. The boy's father was not employed by defendant in or about the shed, and had no duties there, and the boy had no business there, or on the defendant's premises in the neighborhood, except as he accompanied his father, who was at work at agricultural pursuits on some of the adjacent land 10 rods distant from the shed, which he leased. The place where the father and son had the right to be was perfectly safe. The danger lay in the dynamite cartridges in the shed on other land, but in the immediate neighborhood. The boy in wandering about, impelled by curiosity and childish impulses, went into the shed and found and took one of the cartridges which were left exposed and used it as a plaything. While so doing it exploded and injured him. Judge Cooley, in giving the opinion of the court, said:

"We cannot under these circumstances say that the plaintiff's father was chargeable with fault in not suspecting danger and warning his children away from it [he did not know of the dynamite], or that the child himself was blameworthy in acting upon the childish instincts and propensities which combined with the negligence of defendant's servant to bring the danger upon him."

This is quoted and approved in *Union Pac. R. Co. v. McDonald*, supra, at page 277 of 152 U. S., at page 625 of 14 Sup. Ct. (38 L. Ed. 434). In that case Judge Cooley also said:

"The moving about of the children upon the lands where they were at liberty to go while they were not actually employed was as much an incident to their being there as is the loitering or playing by children outside the traveled part of the highway as they go upon it to school or upon errands."

So here the intermeddling of this boy with this machinery and these belts was, under the circumstances, as much an incident of his being there as was his eating his dinner or moving about for exercise.

In *Iamurri v. Saginaw City Gas Co.*, 148 Mich. 27, 111 N. W. 884, decided April 30, 1907, the defendant left a tank wagon containing "drips," explosives, to which was attached a horse, unattended in the public street. Children climbed on the wagon and were driven away, but not by defendant or any of its employes. Very soon thereafter other boys, the plaintiff being one, climbed on the wagon and one of them dropped a lighted match into the tank and it exploded. The court said:

"The children had a right to play on the highway, and this wagon was easily accessible and attractive to them as they were lawfully playing upon the highway. * * * It was negligence on the part of the defendant to leave this wagon in this manner in the public highway."

So in the case at bar this machinery and these belts whether loose, wound up and flapping, or otherwise, with the shafts in motion, were

attractive things as the jury found; and it was negligence to leave them and this boy in the same room alone, the boy, uninstructed and uninformed, if the dangers were not obvious or known to him, and defendant knew, or in the exercise of due care towards him ought to have known, such facts.

Again, it was the duty of the defendant to warn and instruct the plaintiff as to the dangers, if he needed instructions; and if the defendant's superintendent in charge did not give the necessary instructions and warnings, and he turned plaintiff over to the foreman of the room to be taught and instructed, then it was the foreman's duty to give such instructions, and, if he did not, the defendant cannot escape liability because of the negligence of the superintendent or foreman in failing to give necessary instructions or warnings.

In 4 Thompson's Commentaries on the Law of Negligence, § 4102, it is said:

"A foreman who knows an employé is unskilled in the work which he is directed to perform is bound to instruct him with reference to the danger incident thereto, unless the same is obvious to an unskilled person; and, if the servant is injured in consequence of a failure to give such instructions, the master must indemnify him."

In Wood on Master and Servant (2d Ed.) §§ 349-350, pp. 717-719, it is said among other things:

"Where there are latent defects or hazards incident to an occupation of which the master knows, or ought to know, it is his duty to warn the servant of them fully, and, failing to do so, he is liable to him for any injury that he may sustain in consequence of such neglect. * * * And this rule applies even when the danger or hazard is patent, if through youth, inexperience, or other cause the servant is incompetent to fully understand and appreciate the nature and extent of the hazard."

Where a duty to the servant rests upon the master, and he employs a superintendent or foreman to run and manage the business and hire the servants, and they do so, and put them to work without instructions or warnings when instructions or warnings are necessary, the master cannot escape liability even if that foreman and the servant were coemployés. "The mere fact of minority does not operate to abrogate the rule which puts upon the servant the assumption of the ordinary risks of the employment, unless the minor be of tender years and unable to judge intelligently for himself concerning the nature and extent of the risks." *Fisk v. Central, etc., R. Co.*, 72 Cal. 38, 13 Pac. 144, 1 Am. St. Rep. 22; *Curran v. Merchants' Mfg. Co.*, 130 Mass. 374, 39 Am. Rep. 457; 4 Thompson, Com. on L. of Neg., §§ 4866, 4867; *Hinckley v. Horazdowsky*, 133 Ill. 359, 24 N. E. 421, 8 L. R. A. 492, 23 Am. St. Rep. 618.

The principle is well illustrated in *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. Ed. 464, where plaintiff, a young man 24 years of age, was employed in and about defendant's mines chiefly in loading tram cars. He knew little about mining or the explosives used in the mine. Page 392 of 156 U. S., page 467 of 15 Sup. Ct. (39 L. Ed. 464). Powder and caps were stored in a house into which the plaintiff's duties occasionally called him, and he was not informed or instructed as to the perils and dangers of the place. Plaintiff had nothing what-

ever to do with using and handling the powder and caps. By the negligence of defendant's employes this powder was so heated and jarred that it exploded and the plaintiff was injured. Said Mr. Justice Field, in giving the opinion of the court:

"So, too, if persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will also be chargeable for the injuries sustained. Both of these positions should be borne constantly in mind by those who engage laborers or agents in dangerous occupations, and by the laborers themselves, as reminders of the duty owing to them. These two conditions of liability of parties employing laborers in hazardous occupations are of the highest importance, and should be in all cases strictly enforced."

The duties of the master to children and minors in his employ as to instructions, etc., are well stated in 4 Thompson's Commentaries on the Law of Negligence, §§ 4091 to 4108, inclusive. But in this case the duty to give information or instructions or warnings rested on the defendant, and the negligence of the superintendent and foreman intrusted with the hiring and direction of the plaintiff in and about his work to give such warnings, etc., was its negligence. They were vice principals. 4 Thompson's Com. on Law of Negligence, §§ 4861, 4862, 4878.

The jury was plainly told they must find that the defendant was negligent, that this negligence was the proximate cause of plaintiff's injury, and that the plaintiff must have been free from contributory negligence. The charge is to be taken as a whole, and altogether I find no error.

It is, of course, true that under the decisions of the Court of Appeals of the state of New York this plaintiff could not recover, as he was not put to work on or about the belts or machinery. *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *Walsh v. Fitchburg R. Co.*, 145 N. Y. 301, 307, 39 N. E. 1068, 27 L. R. A. 724, 45 Am. St. Rep. 615. However, those cases have no weight in this court where *Railroad Co. v. Stout*, supra, and the other cases cited, control. When a case involving negligence, or what constitutes a contract of carriage, etc., is removed from the state court to the Circuit Court of the United States, unless the action is founded on a statute of the state, it involves a matter of general law upon which the courts of the United States exercise their own judgment. *Railroad Co. v. Gladmon*, 15 Wall. (U. S.) 401, 21 L. Ed. 114; *I. & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898; *N. Pac. R. Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296; *Myrick v. Michigan Central R. R. Co.*, 107 U. S. 109, 1 Sup. Ct. 425, 27 L. Ed. 325; *Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. Ed. 61; *Hough v. Railroad Co.*, 100 U. S. 213, 25 L. Ed. 612.

In *Myrick v. Central R. Co.*, 107 U. S., at page 109, 1 Sup. Ct., at page 431 (27 L. Ed. 325), the court said, referring to the decisions of the Supreme Court of the state of Illinois:

"Assuming that such is the purport of the decisions, they are not binding upon us. What constitutes a contract of carriage is not a question of local law upon which the decision of the state court must control. It is a matter of general law, upon which this court will exercise its own judgment."

See, also, *Burgess v. Seligman*, 107 U. S. 20, 33, 2 Sup. Ct. 10, 27 L. Ed. 359; 2 *Foster's Fed. Practice* (3d Ed.) pp. 876, 877. See, also, *Venner v. Great Northern R. R. Co.* (C. C.) 153 Fed. 416, 417, 418, where cases are collected and commented on. This case was dismissed by the Circuit Court, and the dismissal was recently affirmed by the Supreme Court of the United States.

The defendant says:

"The plaintiff in this action was 14 years of age, and the question as to whether or not he was sui juris was one of law, to be passed upon by the court, and it was error to submit the same to the jury."

The jury was expressly told that as this boy was over 12 years of age he was "assumed to be sui juris in the first instance, so there must be evidence tending to show that he was not qualified to understand the danger and appreciate the necessity of observing the same caution required of an adult." The court then stated that some evidence on that subject had been given, and called attention to it in a general way, and said:

"But when such evidence is given, then, in getting at the responsibility of an infant, of a boy of this age, or of any age, and determining whether or not he was guilty of contributory negligence, his age, his capacity, his intelligence, his experience, and the information he had, general information, on the subject, are all to be considered by the jury."

When there is evidence tending to show that a boy of 14 years did not know or understand the latent or patent (patent to all of mature years) dangers incident to an employment in which he was engaged, it becomes a question of fact for the jury, and is not a question of law for the court, how far he understood and appreciated such dangers, whether or not his employer knew his youth and incapacity, etc., and whether or not instructions were necessary.

In *McGovern v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 421, *Andrews, C. J.*, said:

"The law is not so unreasonable as to expect or require the same degree of care or circumspection in a child of tender years as in an adult."

In *Costello v. Third Ave. R. Co.*, 161 N. Y. 317, at page 323, 55 N. E. 897, at page 899, the court, after quoting the above, said:

"The child in the case cited was a lad 8 years old. The rule as above stated has been repeatedly applied by this court to infants varying in age from 6 to 15 years"—citing many cases.

In *Tucker v. N. Y. C. & H. R. R. Co.*, 124 N. Y. 308, 318, 26 N. E. 916, 21 Am. St. Rep. 670, the Court of Appeals held that at 14 years of age an infant should be presumed in the first instance to be sui juris, and that:

"This presumption ought to stand until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of 14 years of age. * * * This presumption may, in a proper case, be so far overborne by evidence as to present a question for the jury, and then the age of the injured party may doubtless be considered by the jury in connection with the facts indicating a lack of comprehension of a dangerous situation."

In a later case, *Simkoff v. Lehigh Valley R. Co.*, 190 N. Y. 256, 83 N. E. 15, the same court held that after a child reaches the age of 7

years the burden of proof rests upon him to establish that he was non sui juris; but it was also held that a refusal so to charge was harmless, as the court did charge that whether sui juris or not he could not recover if he failed to exercise the care commensurate with his years and intelligence.

In the case now under consideration the court told the jury that the plaintiff was presumed to be sui juris; that there must be evidence to satisfy them that he did not know or appreciate the dangers of intermeddling with the machinery; that this fact must have been known to the defendant; that it, with such knowledge, must have failed to give proper warnings and instructions; that the belts and machinery must have been of a nature and character to attract boys of his age to intermeddle therewith, and defendant must have known this, or must have had reasonable cause to know it, and that such belts and machinery must have attracted the plaintiff to intermeddle, and that he must have been injured in so doing, and must have been free from contributory negligence; and also that defendant's negligence must have been the proximate cause of the injury. The court charged the jury:

"Now, also, it is the duty of the master employing such a boy as this not only to inform him that the service, that is, the work and immediate surroundings, is dangerous, that is, of the dangers surrounding him and of the perils of the particular place, but the perils of all the places where extraordinary risks are to be, or may be encountered in such service. That means, of course, encountered by him in connection with the ordinary discharge of his duty, if known to the master, or if he ought to have known them. In such case the servant, in this case the boy, should be warned of their character and extent so far as possible."

The defendant excepted to the first part of this part of this charge, but took no exception to it as qualified by the words:

"That means, of course, encountered by him in connection with the ordinary discharge of his duty, if known to the master, or if he ought to have known them. In such case the servant, in this case the boy, should be warned of their character and extent."

The court was referring to hidden latent dangers, extraordinary perils. And the court subsequently charged when attention was called to the subject:

"I have charged, and I charge again: That the jury must find these other facts which I have recited. That it was a dangerous place. That here were hidden dangers that he didn't understand. It was something calculated to attract the boy, or boys of his age. That it did attract him. That the defendant either knew or in the exercise of reasonable care ought to have known it, and plaintiff was not properly instructed, and that therefore it was negligence to leave him there in that way, and if they so find all these things that I have recited and which I have not now undertaken to go over again, if they find the facts which I have stated, why, then, they can find negligence."

The jury had been told that in speaking of "place" the court was referring to the surroundings in the room, these belts, etc., not to that space in the room in which the plaintiff was to clean the bobbins.

I think that the case was, under the amended complaint, one for the jury, and that it was properly submitted. The evidence was ample.

to sustain the finding of negligence and absence of contributory negligence, and the damages were moderate. I find no material or harmful error.

The motion to set aside the verdict and for a new trial is denied.

CHALMERS KNITTING CO. V. COLUMBIA MESH KNITTING CO.

(Circuit Court, S. D. New York. May 11, 1908.)

TRADE-MARKS AND TRADE-NAMES—INFRINGEMENT—"POROSKNIT" AS TRADE-MARK FOR UNDERWEAR.

The word "Porosknit," as a trade-mark for underwear, if valid, must be regarded as not descriptive, but as an arbitrary word, having no meaning as applied to such goods, and as such is not infringed by the words "Porous Underwear," stamped on underwear in letters of different style and color.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 71, 72.]

In Equity. On motion for preliminary injunction. Suit to restrain infringement of complainant's trade-mark, "Porosknit," for underwear, registered in the United States Patent Office January 2, 1906, numbered 48,473. Both complainant and defendant are corporations organized under the laws of the state of New York, and are citizens of said state.

Frank C. Curtis, for complainant.

Edmonds & Peck (Philip C. Peck, of counsel), for defendant.

HOUGH, District Judge. There is obviously no jurisdiction in this case (even upon complainant's contention), unless it be held that the trade-mark in question is valid and has been infringed. I do not mean to assent to the proposition that to a trade-mark case between citizens and residents of the same state a case of unfair competition can be annexed, but it is not necessary to decide that matter here.

Let it be assumed that the word "Porosknit," written in script and printed in black, is a valid trade-mark as applied to underwear of cotton, wool, silk, or linen. Having made this assumption, I do not think that the words "Porous Underwear," printed in red Roman letters upon undergarments, are a violation of that technical trade-mark. It is true that the words "Porosknit" and "Porous Underwear" are both applied to undergarments; but such garments are staple articles and may be manufactured by any one. It is also true that they are applied to undergarments composed of material woven or knit in a peculiar way. So far as the evidence in this case is concerned, any one is at liberty to manufacture such garments in this manner; and, indeed, it is matter of common knowledge that underwear containing very numerous regularly arranged holes for ventilating purposes has been offered for sale for many years past. It may be true that the particular method of producing interstices practiced by complainant is covered by a patent, but that fact is not pertinent to this litigation.

If the basis of complainant's contention (apart from unfair competition) be examined, it is plain that he conceives any use of the word "Porous" (whether correctly or incorrectly spelled), in connection with underwear, to be an infringement of his trade-mark. It may be true that he has so appropriated this word to his own use, so identified it with his own goods and given it by advertising such value, as to have acquired therein a property right that could be protected by law; but this is not the court which can grant him protection against a fellow citizen of New York. But as soon as complainant stands on the proposition that "Porous," as descriptive of underwear, is an infringement of "Porosknit" as a trade-mark for underwear, he has in my opinion come very near invalidating his own trade-mark; for "porous" is to be regarded either as a descriptive word (on which ground registration was refused to porous plasters—*Re Brandreth*, Seb. Dig. 626; cf. *Cellular Clothing Co. v. Maxton*, L. R. [1899] Appeal Cases, 326), or it is, as applied to the underwear of either complainant's or defendant's make, a false and untruthful word, for none of these undershirts produced contain pores—i. e., minute perforations, invisible to the naked eye, such as the pores of the skin.

It follows, therefore, that if the trade-mark "Porosknit" be regarded as a merely arbitrary or invented word, which has "either no meaning at all or no meaning in relation to the goods which it denotes" (*Cellular Clothing Co. v. Maxton*, L. R. [1899] Appeal Cases, 333), there is no infringement; while, if it be considered as denoting the style, kind, or quality of article manufactured, the registered trade-mark is invalid.

The motion for preliminary injunction is denied; but, unless complainant feels that all three questions argued at bar, viz., jurisdiction, validity, and infringement, are shown in this record as fully as he will be able to show them, I shall not dismiss the bill. In other words, if the complainant elects to take a speedy review of this decision on the record as it stands, he may do so; but defendant's motion to dismiss the bill is denied.

Ex parte WATCHORN, U. S. Com'r of Immigration.

(Circuit Court, S. D. New York. April 24, 1908.)

1. ALIENS—DEPORTATION OF IMMIGRANTS—CONCLUSIVENESS OF DECISION OF IMMIGRATION OFFICERS.

The determination of the immigration authorities on all questions of fact affecting the right of an alien to enter or remain in the United States is final, even if made on incompetent or inconclusive evidence, but, when the proceedings before them show indisputably that they are acting without jurisdiction, relief may be had by writ of habeas corpus.

2. SAME—RIGHT OF DEPORTATION—CONVICTION OF CRIME AFTER ADMISSION.

While the immigration acts of March 3, 1891, c. 551, 28 Stat. 1084 (U. S. Comp. St. 1901, p. 1294), and of March 3, 1903, c. 1012, 32 Stat. 1213, both excluded aliens who had been convicted of a felony or other crime or misdemeanor involving moral turpitude, and authorized the deportation of aliens who had obtained entry in violation of their provisions, within one year under the former and three years under the later act, there is

no jurisdiction in the immigration officers under either to deport an alien on account of his conviction of a crime in the country from which he came after his admission into the United States.

Petition for Writ of Habeas Corpus.

Giuseppe L. Maggio, for petitioner.

Henry L. Stimson, U. S. Dist. Atty.

WARD, Circuit Judge. This is an application under a writ of habeas corpus to discharge an alien now detained at Ellis Island and recommended for deportation by a board of special inquiry. No appeal has been taken to the Secretary of Commerce and Labor. The alien first came to the United States in 1902, returned temporarily to Italy in February, 1905, came back to this country October 12, 1905, was inspected and admitted by the immigration authorities, and in November, 1907, was married in this country. He was arrested at Rochester in this state, where he resides, under a warrant issued by Charles Earle, Acting Secretary of Commerce and Labor, dated March 17, 1908, charging him with entering the United States without inspection, and directing him to be brought before a board of special inquiry at Ellis Island to show cause why he should not be deported for that reason. Several hearings were had before the board, in the course of which it was proved without contradiction that he had been regularly inspected and admitted by the immigration authorities in October, 1905, and that he had then stated that he had originally come to this country in 1901 and had remained until 1904. April 17, 1908, the Acting Secretary amended his original warrant by a telegram to the Commissioner of Immigration at Ellis Island so as to charge the alien with having been convicted of a felony or other crime or misdemeanor involving moral turpitude. A certificate was produced under the seal of the Tribunal of Caltanissetta, Italy, signed by the clerk but not otherwise authenticated, dated January 16, 1908, professing to be a copy of a conviction in that tribunal March 16, 1906, in his absence, of one Tabone Calogero of the crime of rape committed in the month of July, 1905. There was evidence, though he stoutly denied it, that the alien had admitted to the officers who arrested him both his guilt and conviction of the crime charged, and in the presence of the board he was confronted with and identified by the person on whom it was alleged the crime was committed. When the alien came to this country in 1901 the act of March 3, 1891, c. 551, 26 Stat. 1084 (U. S. Comp. St. 1901, p. 1294), was in force which excluded aliens "who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude." The act of March 3, 1903, c. 1012, 32 Stat. 1213, which was in force when he returned to this country in 1905, provided for the exclusion of aliens "who have been convicted of a felony or other crime or misdemeanor involving moral turpitude." The alien in this case was not convicted of the crime charged, even if full force and credit be given to the Italian certificate, either when he originally came to this country or when he returned in 1905, because the trial took place March 14, 1906, in his absence and after his return.

Passing over various objections I come to the one on which the case turns, namely, that the alien could not be found to be in this country in violation of the law within three years of his entry in 1901, and was not convicted of a crime either before his original entry in 1901 or before his return after a temporary sojourn in Italy in 1905. Doubtless the determination of the immigration authorities upon all questions of fact, even if made upon legally incompetent or inconclusive evidence, is final, but when the proceedings before them show indisputably that they are acting without jurisdiction, relief may be had by writ of habeas corpus. *Gonzales v. Williams*, 192 U. S. 1, 24 Sup. Ct. 177, 48 L. Ed. 317, was such a case and in it, as in the case now under consideration, only a question of law was involved.

Under the act of 1891 aliens who had come to this country in violation of law could only be deported within one year after their arrival, and section 21 of the Act of 1903, only gave the Secretary of Commerce and Labor the right to deport an alien within three years after his entry in case he should be satisfied that the alien was "found in the United States in violation of this act." The violation of the act relied upon is a conviction, but it took place after the alien had come to this country whether it was in 1901 or in 1905. The alien is discharged, but in accordance with Supreme Court Rule 34 (6 Sup. Ct. iii), if the respondents wish to appeal, upon giving recognizance with surety in the sum of \$500, conditioned to appear and answer the judgment of the appellate court.

THE TREMONT.

(District Court, W. D. Washington, N. D. August 15, 1906. On Rehearing. January 8, 1907.)

No. 2,784.

COLLISION—STEAM VESSELS CROSSING—FOG.

A collision at night in a dense fog near Marrowstone Point between the large steel steamship Tremont starting on a voyage from Seattle to the Orient, and the steamship Ramona, on a crossing course, which struck the Tremont on the starboard side, *held* due to the fault of both vessels, the Tremont in going at a rate of speed which under the existing conditions, her size, the dense fog, and the number of other vessels in the vicinity was excessive, and in not stopping and waiting for the Ramona, whose fog signals were heard, to pass before changing her course to enter Pt. Townsend Harbor; the Ramona for not stopping and navigating carefully as required by article 16 of the Inland Rules (U. S. Comp. St. 1901, p. 2880) on hearing the fog signals of the Tremont forward of her beam instead of assuming, as her master did, that the Tremont was a meeting vessel on her port side, and keeping on at a speed of five or six knots per hour.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 170-175.]

Collision rules. Speed of steamers in fog, see notes to *The Niagara*, 28 C. C. A. 532.]

In Admiralty. Suit for collision.

The following is a map of the locality of the collision:

of her pilot, corroborated by her captain and other officers, she left her berth in Seattle harbor some time after 9 p. m., and was headed on her course out of the bay at 10:17 p. m. Running at her ordinary full speed she made Point-No-Point at 12:10, and at 12:15, on account of fog gathering and settling around her, her speed was reduced to half speed, and at 12:30 on account of density of the fog then prevailing, her speed was again reduced and she continued running slow. Her whistle was used, giving fog signals, regularly and continuously, from the time of getting into the fog near Point-No-Point, and when she rounded Marrowstone Point fog signals of other steamers were heard in Pt. Townsend bay, and in the direction of Pt. Wilson, and in the direction of Whidby Island. The fog signals of a steamer which the event proved to be the Ramona were heard from 5 to 10 minutes before the collision, and the Ramona's signal was repeated at short intervals alternating with the Tremont's signals continuously until the time of the collision. All of the Ramona's signals appeared to be about six points off the Tremont's starboard bow, indicating that she was coming toward the Tremont from the direction of Pt. Wilson. The Tremont passed Bush Point at 12:45, and made Marrowstone Point at 1:40, and the collision occurred at 2:05. At that time the Tremont was making no headway, and not under control of her helm, being held on her course by alternating movements of her starboard and port propellers. The fog was so dense that an approaching vessel could not be seen at a greater distance than 100 to 150 feet, and as soon as the Ramona came in view, the Tremont's engines were reversed and started working full speed astern. The Ramona came at right angles to the Tremont's keel, striking her starboard side about 60 feet abaft her stem. The estimated speed of the Tremont, with her engines working slow, is two or three knots per hour.

By reference to the map, it appears that the distance from Seattle to Point-No-Point is about 23 miles, and it is about 9 miles from Point-No-Point to Bush Point, and about 6 miles from Bush Point to Marrowstone Point. Therefore, the foregoing statement of the Tremont's pilot with reference to the speed and movements of the Tremont cannot be correct, for, by his statement going at full speed she was 1 hour and 53 minutes making the run of 23 miles from Seattle to Point-No-Point, then going five minutes at full speed, 15 minutes at half speed and 15 minutes slow, with speed estimated at from 2 to 3 knots per hour she made the run of 9 miles to Bush Point, and continuing slow she made the next run of 6 miles to Marrowstone Point in 55 minutes, arriving there as the pilot states at 1:40 a. m., and the ship thereafter made very little progress ahead until after the collision. It is to be noted that if the captain of the Tremont made any marine protest, that document was not offered in evidence, and the private memorandum of the pilot does not show that any order was given to stop, nor to reverse at any time before the collision happened, the last order noted being to "slow" given at 12:30. On the other hand, there is positive testimony of witnesses who were on board the "Ramona" that they could see by the wash of the water along her side that the Tremont was making way through the water when she was first seen,

and continued until she disappeared in the fog very quickly after the collision. For these reasons, I find that the Tremont did not stop at Marrowstone Point. To make the run from Point-No-Point to the place where the collision occurred, as she did, in 1 hour and 55 minutes, her average speed must have exceeded 6 miles per hour, and I find that she was going at approximately that rate of speed until her engines were reversed 1 minute before the collision. In computing time I am guided by the testimony which refers to the pilot house clock, which appears to have been faster than the clock in the engine room, and I assume that the Tremont did reach Point-No-Point at 12:10 and that the collision occurred at 2:05 a. m.

The engineer's log makes the case no better for the Tremont than the testimony of the pilot, for by that record the ship started at full speed, in Seattle harbor at 11 minutes after 10 p. m., by the engine room clock, and ran without reducing speed until 12:21, when the bell was rung for slow speed, and the subsequent notations in the log are as follows: At 12:22 port engine half speed, starboard engine two bells—12:29, port engine one bell, starboard engine one bell ahead—1:37 a. m., both engines stopped—1:42 starboard engine one bell ahead—1:43 starboard engine stopped—1:45 both engines one bell ahead—1:46 port engine stopped—1:47 port engine two bells ahead—1:49 port engine one bell—1:55 both engines stopped—1:58 both engines full speed astern—1:59 both engines stopped, that being the time of the collision by the engine room clock and by the Ramona's time. This record, like the pilot's testimony, is impeached by the physical conditions of time and distance, and the ship's capacity to make speed. Giving some consideration to the pilot's testimony, 30 geographical miles is a liberal allowance for the 2 hours and 10 minutes during which the Tremont was going full speed ahead from Seattle. That leaves her 1 hour and 38 minutes for running the remaining eight miles to the place of collision, and, if the engineer's log is true, during 10 minutes of that time both engines were stopped, 1 minute both engines were reversed, 2 minutes the port engine was working ahead full speed with the starboard engine working ahead under one bell, and 9 minutes the engines were alternately working ahead under a slow bell; leaving 1 hour and 16 minutes for the ship to have made the 8 miles under a slow bell. But the experiment made by Mr. Walker, the expert witness, proves that the ship's speed under a slow bell for 9 minutes, starting from standstill, was only 4.69 knots or within a fraction of $4\frac{7}{8}$ miles per hour, allowing for momentum at the start, her slow speed on this run would have been proximately 5 miles per hour, so that she could not possibly have reached the place of the collision at the time when it undoubtedly occurred if she had dallied for 22 minutes, as indicated by the engineer's log, for it would require 1 hour and 36 minutes continuous running at slow speed to get over the distance of 8 miles.

The Tremont did change her course by swinging around Marrowstone Point to enter Pt. Townsend Bay. Whether that change of course was made before the Ramona's signals were heard on board the Tremont is a matter of uncertainty in the light of the testimony, but

as the Tremont's signals were heard by those on board the Ramona, off the Ramona's port bow, it is reasonably certain that the Tremont did make her swing to the westward after her signals had been heard on board the Ramona, and after the Ramona's signals should have been heard, and noted, on board the Tremont, if her officers and watchmen were vigilant as they should have been, and the swinging did occur within a period of from 5 to 10 minutes previous to the collision.

I find from the evidence in the case that the Tremont was guilty of fault No. 1, in going at a rate of speed which under the existing conditions, considering the dense fog and the number of other vessels in the vicinity and her own immense size, was excessive; and, fault No. 2, in not stopping and waiting for the Ramona to pass before changing her course to enter Pt. Townsend Harbor; and that both of these faults were contributing causes of the collision.

I must also find that the evidence does not exculpate the Ramona. When her captain heard the Tremont's fog signals off the port bow of his vessel, he assumed that the signals were from a steamer going in the opposite direction, and nearly on the same track as his own vessel, and that she would pass, according to the rules of the road, on the port side. This was an error. A navigator has no right to assume anything in regard to the steering course of a steamer under way which he is unable to see by reason of the density of fog and whose fog signals are heard forward of the beam of his own vessel. Because of that error of judgment, the Ramona's captain failed to stop her until he realized that there was imminent danger of a collision, when it was too late to avoid it. The Ramona is a wood steamer 195 feet long, and going at full speed makes 10 or 11 knots per hour. On the night of the accident she was on her regular run from Vancouver to Seattle, and reached Pt. Wilson at about 1:32 a. m., by her own time, which appears to have been the same as the engine room time of the Tremont. At Pt. Wilson her speed was checked, and then at 1:35 she went ahead towards Marrowstone Point, and ran at full speed for 18 minutes, during which period she was in a dense fog, and sounding fog signals continuously. On hearing the Tremont's signals the Ramona's speed was reduced to about five or six knots per hour, and at that rate she continued on her course five minutes. Then realizing that there was danger of a collision, her captain ordered the engines reversed and to work astern at full speed, which order was promptly obeyed by the engineer, but without perceptible effect before the impact of the collision. I do not find the Ramona to have been in fault for going at an excessive rate of speed previous to the time of hearing and locating the Tremont's fog signal, but in view of all the circumstances, to have complied with the requirements of article 16 of the rules prescribed by Congress to avoid collisions in inland navigation, the order to reduce speed given at 1:53 a. m. should have been promptly followed by an order to stop, and by giving the inquiry signals prescribed by that article. U. S. Comp. St. 1901, p. 2880. I therefore find that the Ramona was in fault for nonobservance of article 16, and said fault was a contributing cause of the collision.

The result of the above conclusions must be a decree for a divi-

sion of damages. The evidence proves that the amount of the damages recoverable by the libellant for cost of repairs to the Ramona, and expenses during the time of her necessary detention amount to \$978.41. The answer calls for proof of the fifth paragraph of the libel, in which it is alleged that the reasonable value per day of the Ramona is \$400, and I do not find any evidence on this point. Therefore, there is no basis for estimating demurrage for her detention, other than the actual expenses during the time of the detention, which is included in the above sum. The cross-libellant's damages include the following items: The actual cost of temporary repairs \$820.93, trucking freight, \$197.34, water \$4.50, unloading and reloading \$193.36, extra pilotage \$150, 107 tons of coal, \$374.50, cost of permanent repairs, \$10,828, and demurrage for 18 days at \$213 per day, amounting to the total sum of \$16,402.63. I allow said amounts as the damages proved in the case, the aggregate of damages of both parties to be divided equally, and no interest to be allowed to either party.

The Circuit Court of Appeals for the Ninth Circuit in the case of *The Rickmers*, 142 Fed. 305, 73 C. C. A. 415, has established a rule for this circuit that the allowance of interest on the amount awarded as damages for injury to a vessel in a collision is within the discretion of the trial court. In the exercise of discretion, I do not allow interest in this case, for the reason that I consider the Tremont to have been most in fault, and as the amount of the damages recoverable for her injury is largely in excess of the damages recoverable by the libellant, it would be unjust to augment the difference by allowing interest. The costs will be equally divided.

On Rehearing.

To be consistent in adhering to the rules for estimating damages, established by precedents, the court will probably have to make an additional allowance to the owner of the Tremont to cover expenses of the ship during the time of her detention for repairs. Therefore the petition for rehearing must be granted.

I am disposed to allow the actual expenses of the ship for the 18 days of detention, not including insurance or office expenses. If the parties can agree on the amount, a decree can be submitted for signature, but if they are unable to agree I will make a computation.

MEMORANDUM DECISIONS.

CONNOLLY v. BOUCK et al. (Circuit Court of Appeals, Eighth Circuit. May 9, 1908.) No. 2,498. Appeal from the Circuit Court of the United States for the District of Colorado. Hugh Butler, for appellant. H. Riddell, for appellees. Before SANBORN and HOOK, Circuit Judges, and PHILIPS, District Judge.

PER CURIAM. The appeal in this case is dismissed, upon the ground that the decree which it challenges is an interlocutory and not a final decree, upon the authority of *Railway Company v. Simmons*, 123 U. S. 52, 8 Sup. Ct. 58, 31 L. Ed. 73, *Parsons v. Robinson*, 122 U. S. 112, 7 Sup. Ct. 1153, 30 L. Ed. 1122, *Chase v. Driver*, 92 Fed. 780, 783, 784, 34 C. C. A. 668, 671, 672, and the cases there cited.

MITCHELL v. MITCHELL. (Circuit Court of Appeals, Fourth Circuit. May 28, 1908.) No. 702. Appeal from the District Court of the United States for the Eastern District of North Carolina at Raleigh. James H. Pou and P. S. Winston (Pou & Fuller and Winston & Mathews, on the briefs), for appellant. Murray Allen (Day & Bell and J. B. Martin, on the briefs), for appellee. Before PRITCHARD, Circuit Judge, and WADDILL and McDOWELL, District Judges.

PER CURIAM. The learned judge of the lower court, in determining this case, filed a full and comprehensive opinion, which will be found in 147 Fed. 280. The conclusions reached in that opinion, after careful examination of the record by us, are approved, and the judgment of the court affirmed.

NUNGESSER ELECTRIC BATTERY CO. v. NATIONAL CARBON CO. (Circuit Court of Appeals, Sixth Circuit. May 29, 1908.) No. 1,768. Appeal from the Circuit Court of the United States for the Northern District of Ohio. For opinion below, see 159 Fed. 157. Charles B. Miller, for appellant. E. L. Thurston, for appellee. Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This is a suit which involves the alleged infringement of patent No. 641,546 for a battery filler. The defendant, who held patent No. 809,526, for a machine for filling dry batteries attacked the validity of the patent and denied any infringement. The court below reached the conclusion that the complainant's patent was not anticipated and was valid, and, after a careful opinion, in which the details of the two patents were compared, held there was infringement. It is unnecessary to recount the reasons given by the lower court. We content ourselves with affirming its decree on the authority of its opinion, which appears in the record.

SOUTHERN RY. CO. v. KEETER. (Circuit Court of Appeals, Fourth Circuit. May 6, 1908.) No. 728. In Error to the Circuit Court of the United States for the Western District of North Carolina, at Statesville. L. C. Caldwell, for plaintiff in error. L. H. Clement and E. J. Justice (Hayden Clement, on the briefs), for defendant in error. Before GOFF and PRITCHARD, Circuit Judges, and WADDILL, District Judge.

PER CURIAM. This is an action, brought by the defendant in error against the plaintiff in error, in which it is sought to recover damages for a personal injury to defendant in error, alleged to have been caused by the negligence of

the plaintiff in error. Matters relating to the facts raised by the pleadings were submitted to the jury, which found for the defendant in error. On the verdict of the jury a judgment in favor of the defendant in error was entered by the court below, and the writ of error we are now considering was sued out. The assignments of error relate to the charge of the trial judge to the jury and to his refusal to give certain instructions asked for by the plaintiff in error. The court's charge, taken in connection with the evidence before the jury, was entirely proper, and in our opinion free from error. The law applicable to the case, as the same was disclosed by the evidence, was fully, impartially, and carefully given and explained, and we think that the special instructions requested by the plaintiff in error were properly refused. We find no error. Affirmed.

TACOMA RY. & POWER CO. v. PACIFIC TRACTION CO. et al. (Circuit Court of Appeals, Ninth Circuit. April 6, 1908.) No. 1,547. Appeal from the Circuit Court of the United States for the Western District of Washington. B. S. Grosscup, A. G. Avery, and Charles O. Bates, for appellant.

PER CURIAM. Appeal dismissed, pursuant to terms of stipulation filed March 9, 1908. See 155 Fed. 259.

END OF CASES IN VOL. 160.

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